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[6] Appointed September 14, 1905.

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THE

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VIRGINIA-POCAHONTAS COAL CO. v. McDOWELL COUNTY COURT et al.

(Supreme Court of Appeals of West Virginia. May 27, 1905.)

PROHIBITION—COUNTY COURT—ISSUE OF LIQUOR LICENSE.

A writ of prohibition does not lie to prevent a county court from granting license to sell spirituous liquors. The matter being nonjudicial in nature, and of administrative or police regulation in nature, prohibition does not lie even where the county court acts beyond its power.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 74.]

(Syllabus by the Court.)

Petition by the Virginia-Pocahontas Coal Company for a writ of prohibition to the county court of McDowell county and others. Writ denied.

Rucker, Anderson & Hughes and M. P. Shawkey, for petitioner. Herndon & Smith and Strother, Taylor & Strother, for respondents.

BRANNON, P. George French Strother filed a petition before the county court of McDowell county for leave to obtain a license to sell spirituous liquors. A special term of the court was called for 8th May, 1905, to consider applications for leave to obtain liquor license, and the Virginia-Pocahontas Coal Company asks this court to award a writ of prohibition to prohibit the county court from acting on said petition.

The theory upon which the coal company would rest its call for the writ of prohibition is that chapter 36, p. 359, Acts 1905, in its amendment and re-enactment of chapter 32 of the Code of 1899, after making provisions for filing petitions to obtain license to sell liquor, makes section 13 of chapter 32 say that "the court shall hear the petitions at a regular or special term called for that purpose on the first Monday of April of each year," and the claim is that the county court can act only at a term held on the first Monday in April, and not at any other time, and, as the first Monday in April had passed, no action could be had on such petition on the 8th day of May, and thus the county court would have no jurisdiction to then consider such petition for license. We do not pass on this question, because we are without jurisdiction to do so, and any expression which we might make on the point would be mere obiter opinion, and this for the reason that prohibition does not lie to prohibit a county court from granting leave to obtain liquor license. Town of Hawk's Nest v. County Court, 55 W. Va. 689, 48 S. E. 205; Yeager, ex parte, 11 Grat. 655; French v. Noel, 22 Grat. 454. We think the matter is of administrative or police regulation, not judicial, and not the subject of prohibition, whether within or beyond the power conferred. City of Benwood v. Wheeling Co., 53 W. Va. 465, 44 S. E. 271.

We note that said new section 13 gives the county court pure discretion to "grant or refuse the licenses applied for." In view of the construction given by the cases cited of former statutes touching the power of the county court in such matters, which were held to vest absolute discretion in the county court, and of the words of the new section expressly giving such wide discretion, we do not think a prohibition lies for any cause to prevent its action. It must consider an application, but may grant or refuse it. Its pure discretion to grant or refuse license cannot be controlled by prohibition. Welch v. County Court, 29 W. Va. 63, 1 S. E. 337. Section 13 further provides: "The said county court shall hear any petition of residents of the county, in addition to that of the applicant, in favor of, and any remonstrance against, the application for such license, and in all cases shall refuse the same whenever in the opinion of said court (having due regard to the number and character of the petitioners for and against such application) such license is not necessary or that the applicant is not a fit person to whom such license should be granted." It may be, but we do not say, as the case does not involve the question, that some remedy might exist to protestants against such license where it appears that a county court has granted license in a case where it is "not necessary" or "the applicant is not a fit person," on the

theory that the section, after giving power to "grant or refuse," limits this discretion so far as that the section commands the court to make refusal in those two cases.

(58 W. Va. 88)

STAFFORD v. MINGO COUNTY COURT et al.

(Supreme Court of Appeals of West Virginia. May 27, 1905.)

1. ELECTIONS—CONTEST — NOTICE — TERM OF COURT.

The provision of section 3, c. 6, Code 1899, that notice of a contest of election to county office shall be presented to the "first term" of the county court after notice of contest is delivered to the contestee, means the first regular term, not a special term.

2. SAME.

The provision of section 1, c. 6, Code 1899, that notice of contest for a county office shall be given within 10 days after the result of an election has been declared, means the last legal binding declaration of result, where there have been two declarations, one irregular.

3. SAME—CONTINUANCE.

The provision of section 3, c. 6, Code 1899, that a pending contest for a county office shall not be continued more than three months after the election, applies only to a contest actually pending, and does not apply to or limit the time for giving or filing notice of contest.

4. SAME — COUNTY COURT COMMISSIONER — QUALIFICATION.

A commissioner of a county court is competent to act in a contest for a county office in that court, though there is pending between him and another person a contest for his office, involving the same matters of law or fact in such contest between others for another county office.

(Syllabus by the Court.)

Petition by John L. Stafford for a writ of mandamus to the county court of Mingo county and others. Peremptory writ awarded.

See 48 S. E. 835; 49 S. E. 364.

Stokes & Bronson and Brown & Campbell, for petitioner. Mollohan, McClintic & Mathews, S. U. G. Rhodes, and Sheppard & Goodykoontz, for respondents.

BRANNON, P. John L. Stafford and John A. Sheppard were candidates at the election 8th November, 1904, for the office of prosecuting attorney of Mingo county. A count by the canvassers of the returns of the election showed that Stafford had been elected, and he was so declared. A recount was demanded by Sheppard. Pending the recount, Stafford instituted a proceeding in the Supreme Court affecting such recount, and this court awarded a mandamus directing the board of canvassers as to the manner and procedure of such recount; commanding them to reconvene and recount the vote for said office under principles signified by this court in its opinion, as will appear from a report of the case of Stafford v. Board of Canvassers, 49 S. E. 641, 57 W. Va. ——. Pursuant to the mandate of the Supreme Court, the canvassers met and proceeded with the recount; and on the 2d day of February, 1905, the canvassers found and declared that Sheppard had been elected. On the 10th day of February, 1905, Stafford served a notice upon Sheppard that he would contest his election, and file the notice with the county court at its next term. On the 24th day of February the county court met in regular session, and Stafford presented to it the said notice of contest, and asked that it be filed and the proceedings docketed in said county court, but the court refused to entertain or docket the notice; and later Stafford asked this court to award a mandamus to compel the county court and its members to allow said notice of contest to be filed, and to docket the contest proceeding, and hear and determine the same.

One question in this case is this: After the notice of contest had been served a special term of the county court was held. Its call did not include this contested election case as a matter for its action, and the notice of contest was not presented at that special term, but it was presented at the next regular term. It is said that the county court was justified in refusing to docket the case on the ground that the notice was not presented to the county court at its first term after declaration of the result of the election, since Code 1899, c. 6, § 3, says: "Notice of contest shall be presented to the county court at its first term after the same is delivered to the person whose election is contested * * * and the same shall be docketed for trial at that court." This presents the question whether a special term of the court is the first term after service of notice of contest under this statute. We think it is not. "When a statute speaks of terms, the terms fixed by law are meant, not special terms appointed by the court." Tompkins v. Clackamas, 11 Or. 366; Smith v. Cutler, 10 Wend. 591, 25 Am. Dec. 580. We think that, as a general rule, when a statute requires a thing to be done at a term of court, it means a regular term. This is, and ought to be, the rule, unless something in the statute calls for another meaning. We should not incline to a construction which would defeat the contestant from having a hearing. But outside of that consideration, we say that the times of regular terms are known to the people, while special terms have no regularity; sitting only when called for particular business specified in the call. No other business than that specified in the call can be acted on at a special term. Hamilton v. County Court, 38 W. Va. 71, 18 S. E. 8. The notice of a special term is of limited publication—only posted at the courthouse door perhaps for the short term of only two days. Few persons know of such session, and it would be a harsh construction of the statute to say that "first term" means a special term not known to the community at large. Such a construction would be hurt-

ful, and often defeat just rights and work surprise and wrong.

In support of the claim that the notice was presented to the county court too late, it is further argued that Code 1899, c. 6, § 3, contains the language, "The hearing may be continued from time to time by the court, if it be shown that justice and right require it, but not beyond three months from the date of election." From this statute it is argued that more than three months had passed from the election to the day when the notice of contest was presented to the county court, and, as that statute contemplates that the contest must be ended within three months from the election, it follows that the notice commencing the contest cannot be filed in the court after three months from the election. To this we reply: (1) That language refers to a contest proceeding already docketed in the court. It presupposes that a notice of contest has been filed, and the proceeding on the court docket, and it is designed to forbid delay and procrastination in the hearing and decision of the case. It is not designed to fix a time for the commencement of the proceeding. That is done by those other provisions of the statute, fixing the time within which notice must be served by the contestant on the contestee, and fixing the time for the presentation of that notice to the county court. The provision just quoted has no relation to the commencement of the case—to the origination of the case—but only to its continuance as a pending case after it had been once brought into being. (2) Though it is not involved in this case, is not that provision forbidding a continuance beyond three months only directory? True, the language is prohibitory, in saying that the case shall not be continued beyond three months, but I doubt gravely whether noncompliance with it would work a discontinuance of the case. I should hesitate long before so holding.

Another question in the case is this: Two of the members of the county court were voted for at the same election, and their election was contested on the same grounds involved in the contest between Stafford and Sheppard. When Stafford presented his notice of contest, and asked that it be filed and docketed, Sheppard objected. It is urged, in justification of the refusal of the court to entertain the case, that two of the commissioners composing the court were interested. We cannot yield to the contention that they were so related to the case that they could not act. It is a fixed rule that an interested judge may pass any order necessary to bring the cause before the tribunal, where nothing is decided controlling the case—mere orders to advance the cause for final hearing. Findley v. Smith, 42 W. Va. 299, 26 S. E. 370. But it is said that these commissioners could not pass on the objection made to the filing of the notice and docketing the case, because that would involve questions going to the right to institute the case. Well, the statute above quoted is mandatory, in requiring the docketing of the case so as to bring it into being, and surely they could have done that. The notice could have been filed, objection to it stated on the record, and that objection stand for future decision. I do not see but that a circuit judge, though interested, could do that much. That would not decide on the objection to the proceeding. Surely the action of a circuit judge in simply filing a paper, or a motion, or to docket a case, would not render his action irregular or void, because it would leave the whole matter open for decision by a competent judge. Those commissioners were bound to docket that notice, so as to bring the contest proceeding into being, and state the objection made by the contestee, or enter a motion to quash or dismiss. They were bound to do this much. Certainly the accidental circumstance of two commissioners being interested would not deny Stafford the right to be heard. To deny his motion to docket would likely have defeated any chance for him to be heard. Again, the Code gives him a right to an appeal against a partial judgment, and that would be defeated. But in the second place, we hold that those two commissioners were bound to do not only so much as just indicated, but to decide that objection to the docketing of the notice, or any other matter, and the full merits of the case, from the necessity of the particular case. The Constitution (article 8, § 24) declares that the county court shall, in all cases of contest, judge of the election of all county officers. This makes the county court the sole judge of such contests. The Constitution (article 4, § 11) says that the Legislature shall prescribe the manner of determining contested elections; and in Code 1899, c. 6, the Legislature has given sole and exclusive jurisdiction to the county court to try contested elections for county offices, and it could not have committed it to other hands than the county court. The law makes no provision for substituting another commissioner in place of an interested one, or for the transfer of the case to another tribunal, or any other mode of hearing when a commissioner is interested. If those commissioners did not act, then the contestant was denied justice, and that high and commanding, and, I will add, sacred, provision of the Constitution (article 3, § 17), would be violated, reading: "The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." These commissioners had to act from the very necessity of the case. Nobody else could act. That necessity constitutes an exception to the general rule that a judge cannot act in his own case. 17 Am. & Eng. Enc. L. (2d Ed.) 744. Furthermore, those commissioners were not so interested in the case as to for-

bid their acting in it. They were interested no farther than that the same question of law was common to this contest and their own. That is not enough to disqualify them. Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238, which holds that, in order to disqualify, the interest of the judge must be in the subject-matter of the cause, and not merely in the legal question involved in it. The mere fact that the same facts or law arise in two cases will not, in law, prevent a judge from acting, because the decision in one case is not res judicata—either conclusive or even admissible in the other. The parties are not the same. Frequently a judge, in such a case, out of mere delicacy or feeling of propriety within his own breast, declines to act; but he can act—indeed, may be compelled to act by a suitor. But more clearly, still, where the law provides no one else to try the case, we cannot excuse these commissioners, and defeat a citizen's right to a hearing of his cause under the law of the land.

Another question in the case is this: The Code of 1899, c. 6, § 1, says that any one contesting an election of a county officer "shall, within ten days after the result of the election is declared, give notice in writing of such intention." It is said in this case that the first declaration of the election was made long before the notice was served—much more than 10 days; that the notice could have been given after the first declaration; that the notice which was presented to the court, having been served more than 10 days after the first declaration of result, was too late. When, under the mandate of this court, the county court reconvened and recounted the vote and declared the result, that last declaration was the effective one. It superseded the first. The first was then as if it never had been made. If we accord this last declaration any force at all—and we must—that force must be full force, and it nullifies the first declaration of result, and stands itself as the only valid declaration of the result; and notice of contest served within 10 days after that declaration is valid.

We therefore award a peremptory mandamus to the county court, requiring it to file the said notice of contest, and docket the proceeding, and proceed to hear and determine the same according to law.

It is hardly necessary to add that mandamus lies in such case. Richardson v. Farrar, 88 Va. 760, 15 S. E. 117; Morris, Ex parte, 11 Grat. 292; Roberts v. Paul, 50 W. Va. 528, 40 S. E. 470.

(58 W. Va. 44)

McKINLEY v. LYNCH.

(Supreme Court of Appeals of West Virginia. May 11, 1905.)

1. PARTNERSHIP—TRUSTS—BENEFICIARIES.
All the effects of a partnership are held in trust, and each partner is a trustee, and also a cestui que trust—a trustee so far as his own duties bind him, a cestui que trust so far as duties rest on his copartners.

2. SAME—PURCHASE OF PARTNER'S INTEREST.
Where, in a partnership for procuring options on coal and making sale thereof, the duties were divided between the partners, two of them to work in the field procuring options, and other two to negotiate for the sale of the coal, the partners having charge of the correspondence relating to negotiations for the sale thereof, intending to purchase the interests of one or both of the partners whose duties were to procure options, must make a full, clear, and frank disclosure of all correspondence and negotiations concerning such proposed sale; otherwise, the purchase of such partner's interest may be avoided by him.

3. SAME—DUTIES OF PARTNERS.
It is the duty of partners towards each other to refrain from all concealment in the transaction of the partnership business. If a partner be guilty of any such concealment and derive a benefit therefrom, he will be treated in equity as a trustee for the firm, and compelled to account to his copartner.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County.

Bill by George C. McKinley against Peter I. Lynch. Decree for defendant. Plaintiff appeals. Reversed.

E. G. Smith, Davis & Davis, Sperry & Sperry, and E. A. Brannon, for appellant. John Bassel and C. W. Lynch, for appellee.

McWHORTER, J. In January, 1900, George C. McKinley, James H. Moore, and C. D. Elliott entered into a verbal contract of partnership to option and sell a large body of coal in the counties of Lewis, Doddridge, and Harrison. Said McKinley and Moore were to get the options, and said Elliott to find a purchaser or purchasers of the coal so optioned; and afterwards Peter I. Lynch was taken into the partnership for the purpose of assisting in making a sale, and all negotiations in relation to the sale were committed to the said Lynch and Elliott, and placed in their control. On the 1st day of May, 1900, the said four partners entered into an agreement, in writing, wherein it was agreed that the said Moore and McKinley had secured and were to secure certain options on coal extending from near Jarvisville, in Harrison county, eastward and including Mineral Point, Goodhope, and other points towards West Milford, embracing about 7,000 acres of coal or coal lands, some of which options were taken in the name of Moore, some in the name of McKinley, and others in the name of Moore & Co., or McKinley & Co., or otherwise. It was set forth in the agreement that said Moore and McKinley were to bear the expenses incident to the taking of said options, and said Lynch and Elliott to bear all the expenses incident to securing buyers therefor, "All other expenses to be borne by the parties hereto, equally," and the surplus remaining after paying for said coal and deducting the expenses, which were to be borne equally as aforesaid, and the first cost of said coal as

agreed in said option, or the profits of said coal field, were to be shared equally by the parties to said agreement, and each was to have an equal one-fourth in such surplus or profits, whether said coal field should be sold under any option then existing thereon or that might thereafter exist thereon, or whether secured by the said Moore and McKinley, or said Lynch and Elliott, or either or any of them, or thereafter to be so secured. It was further agreed that no one or more of them should thereafter give an option on said coal or coal field without first having obtained the consent, by phone or otherwise, to the giving of such option, and the price and terms thereof, to the other parties to said agreement. On the 12th day of September, 1900, the said partners made a contract between themselves and J. C. Menoher & Co., of Pittsburg, whereby, for the sum of $750 cash, they assigned and set over to said Menoher the one-fifth interest in and to the coal optioned and located, and wherein it was agreed to make sale of all such coal at the rate of $22 per acre, and the parties to share in the net profits, each one equal one-fifth part, and that if such sale should not be effected before the expiration of any of such options the said Lynch, Elliott, McKinley, and Moore were to diligently endeavor to secure the extension thereof for as long a time as might be had, or on such of them as such extension might be obtained to such an extent as to command or control the said coal field the money necessary for that purpose was to be furnished by Menoher & Co.; and they attached to said contract a schedule of the options on the various properties. Correspondence by letter and telegraph was carried on between J. C. Menoher and Peter I. Lynch and C. D. Elliott in relation to the sale, Menoher being in Pittsburg and negotiating the sale of said coal. On the 12th day of December, 1900, late in the afternoon or at night of that day, Moore and McKinley, having been summoned in from the coal field to Clarksburg by Peter I. Lynch, by telephone, were in the store of T. J. Lynch & Co., the sons of Peter I. Lynch, when the question came up about the sale by McKinley of his interest in the partnership, when Peter I. Lynch purchased one-half of the interest of McKinley for the sum of $500, $100 paid in cash and the residue on time, with interest.

At the April rules, 1902, George C. McKinley filed his bill in the circuit court of Harrison county against Peter I. Lynch, alleging that the said Lynch had defrauded him in the purchase of the one-half of his said interest by fraudulently withholding and concealing from him information in regard to the sale of said coal, and the correspondence and contract between said Lynch and Elliott and J. C. Menoher, and had misrepresented to him the true condition of the negotiations for the sale of the said coal, with intent to deceive and mislead plaintiff, and to fraudulently procure from him the contract of sale of his interest at a price much below its true value; and prayed that defendant be required to answer, and to produce and file all the contracts and letters and correspondence touching or concerning the consummation of said sale of coal lands, or the negotiations leading thereto, and that the contract of plaintiff's sale to Lynch on December 12, 1900, be canceled, annulled, and set aside, and defendant be required to pay plaintiff the equal one-fifth part of all profits accrued or thereafter to accrue to said partnership; and offering to return to said Lynch the $500 paid by him to plaintiff for such interest.

The defendant, Lynch, filed his answer to said bill, denying all fraud and fraudulent misrepresentations, and the withholding or concealing of correspondence or information from plaintiff. Upon the filing of said answer the plaintiff filed an amended supplemental bill, exhibiting the correspondence brought out by the answer of the defendant, especially the telegrams between J. C. Menoher and Peter I. Lynch, dated December 10, 11, and 12, 1900, and numbered, respectively, 11, 12, 13, and 14.

Some 300 pages of depositions were taken and filed in the cause, and on the 29th day of January, 1904, the cause was heard upon the original bill and answer of defendants thereto, and general replication to such answer, on the amended bill and the answer of the defendant thereto, and general replication to such answer, on the depositions taken by both parties and filed in the cause. Upon such hearing, the court being of the opinion that the plaintiff was not entitled to the relief prayed for in his bills, the same were dismissed, and costs awarded the defendant, from which decree dismissing his bill the plaintiff appealed.

The partnership, consisting of the said McKinley, Elliott, Lynch, Moore, and Menoher & Co., had acquired options upon some 10,000 acres of coal at $15 per acre, and were negotiating sale of the same at the price of $22 per acre, making a profit to the partners of about $70,000. On the 12th day of December, 1900, it seems the negotiations were about being brought to a close and the sale consummated. Moore and McKinley were called in from the field, whether on that day, or on the 10th or 11th, the evidence is somewhat conflicting, but the decided preponderance of evidence is that they were called for over the telephone about noon of the 12th, and went to Clarksburg afternoon on that day. Both Moore and McKinley testify positively that it was on the 12th, and are fully corroborated by Mrs. Clara A. McKinley, wife of plaintiff, and by Owen Moore, son of J. H. Moore, who caught his father's horse for him in the afternoon for his father to ride to Clarksburg; that he returned home the next evening or night, having sold his interest in the options. And J. W. Coffman says McKinley and Moore came to his office

one evening or night between 8 and 9 o'clock, and he tried to secure an option on the Jarvisville coal field, which they represented; and the same evening Mrs. McKinley called him on the phone and said George had left home about 1 o'clock, and asked him if he had arrived, or whether he had seen him. It is not disputed that their interview with Coffman was on the same night of the contract between McKinley and Lynch. Thus McKinley and Moore are further corroborated by this circumstance, which places it beyond doubt that they were called in on December 12th, and not on the 10th or 11th. On the 10th day of December J. C. Menoher sent a telegram to Peter I. Lynch: "Coal field sold subject to examination before fifteenth. Answer. Collect." And on the 10th the following telegram: "Can my parties have coal at twenty-two? Answer immediately." To which Peter I. Lynch answered same day: "Will parties close deal to-day at the price you state? Answer." And on the 11th the following telegram was received by Lynch from Menoher: "Am closing at twenty-two. Can option be sent here upon notice?" To which Lynch answered: "Must know by noon to-morrow if deal is closed. Buyers here cannot send options." And on the 12th the following telegram was received by Peter I. Lynch from J. C. Menoher: "Am closing deal. Send one representative copy of option." These several telegrams indicate an immediate consummation of the sale, and defendant in his defense claims that McKinley and Moore were summoned in to consult about the telegrams and negotiations concerning the sale. It is alleged by plaintiff that these several telegrams were never shown him and Moore, and that at the time he made the contract with Peter I. Lynch for the sale of one-half his interest he did not know that the sale was being consummated—had never seen or heard of the said telegrams. The testimony of plaintiff is positive that the four several telegrams were never shown to him, nor was he informed of their existence. He testifies that on the 12th of December, 1900, he received a telephone message from defendant to bring James H. Moore and come to Clarksburg. That they arrived about dark, and went to T. J. Lynch & Co.'s store, and, after a short talk with Mr. Lynch and Mr. Elliott, inquired the business they were summoned in on. Mr. Lynch said they would have to look after some of the options that would soon expire, and wanted to know if they could be extended. "I asked him if there was any show to sell the field; if he had heard anything that had encouraged him; and he said he hadn't, but he thought maybe the coal would sell some time, he didn't know when; said there was one J. W. Coffman, who was taking options on some pieces of coal, claimed he had a man that would buy coal. * * * After Mr. Lynch told me that it was rather discouraging, I went out to John W. Coffman's office, and he said he would like to have an option on this coal." That he asked Lynch if he had any information to lead him to believe that the coal field would be sold, and he said: "You know as much as I do about that. I have no information whatever." That Lynch then said the only way they could make money out of this, he believed, was to trade among themselves; that he then proposed to buy the interest of plaintiff, who told him he would not sell all his interest, but would sell half of it; that he remarked to the defendant: "Mr. Lynch, I am not in a position to deal with you; you have been doing the correspondence with the coal buyers; I have not been doing any of this correspondence; this coal field might be sold or about to be sold and I have no knowledge of it, and you might have this knowledge." That Lynch then said he had no knowledge of the field being sold. That plaintiff then sold to him one-half interest at $500. Witness stated that as soon as he closed his contract and signed it up, it was proposed to buy out J. H. Moore, he thinks, by T. J. Lynch, and he thinks they had a trade that night. He said he asked the defendant where the contract was that they had made with J. C. Menoher; he said he didn't know; it was misplaced, and he couldn't find it; he supposed it was lost; that he asked for it before he made the sale of his interest. The next morning, when he went to the store about 9 o'clock, Elliott and the defendant were reading the contract which was claimed to be lost the night before, when Elliott said: "Boys, none of us had any sense; this coal has been sold ever since we made this contract." That he asked where they found the contract, and Elliott said it was out at his house. That he had laid it away and was not able to find it until that night, which explanation was made in the presence of the defendant. Witness was asked what other business in relation to the field did Lynch and Elliott have for him and Moore that evening after or before the sale of their respective interests had been made, and he stated that he had no recollection of any other business that they had with them. Witness was asked about the telegrams that are hereinbefore copied, and stated that he did not see them, nor was he informed that there were any such telegrams. When asked if these telegrams had been shown, or he had been advised of such negotiations, would he, or not, have sold his one-half interest to Lynch as he did on the 12th. "A. I would not. A man would certainly be a very poor business man to sell six or seven thousand dollars sure money for five hundred dollars." James H. Moore, one of the partners, and who operated in the field with plaintiff, McKinley, fully corroborates the testimony of McKinley in regard to the time of their being summoned to Clarksburg on the 12th day of December, 1900; that on their arrival in the evening of that day they put up their

horses, got their supper at a boarding house, and went from there to T. J. Lynch & Co.'s store, and remained there the most of the time till 11 o'clock, or a little after, that night; that McKinley, Peter I. Lynch, C. D. Elliott, Truman J. Lynch, and George Lynch were in the store; that they went there after dark. He stated that after they had been in the store a little while McKinley asked defendant, Lynch, something about the coal business—how he was getting along, and what he had called them down for. He said something about options that would expire in the next month, and he though they had better talk over the matter and see what arrangements they could make. That was about all the business he heard. McKinley asked Lynch if he thought there was a prospect to sell. He said he thought there would be; he thought the coal would sell, but didn't know when. Lynch told McKinley that he had worked a good while in the field and had been to a right smart of expense, and he would like for him to get some money out of it. That Lynch said about the only way he knew to get anything out of it was to be like the farmer's boys—would be to go to trading among themselves. "He said a farmer had some boys that would go to the barn on rainy days and would trade jackets among themselves and make two or three dollars apiece." That the next thing he heard, Mr. McKinley and Mr. Lynch were talking of buying one another out. "I heard Mr. Lynch offer Mr. McKinley $100 for his interest, and the next I remember hearing he was offering him $1,000 for his entire interest, less what he had received from Mr. Menoher. Mr. McKinley told him that he wouldn't sell his entire interest at all, but told Mr. Lynch that if he hadn't any more information of the prospect of a sale than he had that he would sell him one-half of his interest. Mr. Lynch told him that he had not, and told Mr. McKinley that he knew everything about a sale that he did. Mr. Elliott then said that was the thing to do: for McKinley to sell half of his interest, for he didn't want to see Mr. Lynch lose his money, and didn't want George to go clear out of the deal. Mr. McKinley sold Mr. Lynch one-half of his interest for $500, I think." Says he was present when the contract between McKinley and Lynch was drawn up and signed. He thinks it was close 11 o'clock. Before the contract was signed up between McKinley and Lynch, witness and McKinley asked Mr. Lynch to show them the contract between the partnership and J. C. Menoher. He said he could not do it; did not have it; that it had got misplaced some way, and he thought it was out at C. D. Elliott's house. Mr. Elliott said he did not think it was, but did not know where it was; that the next morning they went back to the store of T. J. Lynch & Co. together, and C. D. Elliott was sitting on the counter with the contract in his hand. "He said we was all fools; that the coal was sold when that contract was drawn up. He handed me the contract. I read the contract, and told him, 'Yes, I considered it sold when that contract was drawn up.' I told him I had forgotten exactly how that contract read; that if I had seen the contract before that, I would have knowed better how to have done business." Witness Moore was shown the telegrams, numbered 11, 12, 13, and 14, and asked to state when he first saw or heard of such telegrams. "A. The first I ever saw or heard of these telegrams was on the 27th day of November, 1902." That he, together with George C. McKinley, went to Mr. Sperry's office when Mr. Sperry handed him this paper, and asked whether he knew anything about these telegrams. "Q. Were these telegrams, or any of them, produced, mentioned, or referred to by Peter I. Lynch, or any one else, on the 12th day of December, 1900, when you and McKinley sold your interest? A. There positively was not."

No parties connected with this transaction have a better right to a positive opinion as to the date that McKinley and Moore were called from the field to Clarksburg than they. They had a ride through the cold rain on horseback about 18 miles, and, when they reported at the store to defendant, Lynch, and Elliott, and inquired the purpose of their being summoned in, they were told that it was in relation to some options that would run out in the next month that they thought ought to be looked after. There could have been but two objects on the part of Elliott and Lynch in calling these men to Clarksburg. One was, as they claimed, to consult with them about the telegrams and the closing up of the sale through Menoher; while the other purpose would be to buy the interests of McKinley and Moore before they would discover the fact that the sale was about to be consummated. If McKinley and Moore are to be believed, the latter purpose is the one that moved the defendant to summon them in. It is hard to conceive that with the knowledge of those telegrams any sane man would have disposed of his interest, the value of which was a mere calculation of the difference between fifteen and twenty-two dollars per acre on about 10,000 acres, for $500. There is an effort made to prove that they saw the telegrams; the first three, at least. The defendant, Peter I. Lynch, in his testimony, says: "I believe that Mr. McKinley seen all those telegrams that were received. He seen those that had come in before he come to town; and those that came in afterwards he likewise seen, or had an opportunity to see." He said his rule was, during this transaction, in all communications that he had with Mr. Menoher or any one else, that the very first opportunity when Mr. McKinley and Mr. Moore would come to town, or into the store where the correspondence and telegrams were kept, they would all be shown to them, and when he was there he generally showed them, and when

he was not his sons, T. J. and G. G. Lynch, and Mr. Elliott; that he always insisted on them, that they would keep them posted on everything that was done. "So I believe on this occasion that he seen all the telegrams that had come in there; as soon as opportunity offered, they could be shown to him." He was asked if he showed Moore and McKinley the telegrams numbered 11, 12, 13, and 14, in person. He replied, "I don't believe I did."

George G. Lynch was examined as a witness for the defendant, a partner in the firm of T. J. Lynch & Co.; was asked to state whether Mr. McKinley at any time saw the papers, or any of them, that witness then had in his hand, being the originals of the correspondence of J. C. Menoher and Peter I. Lynch, or Lynch and Elliott, and, if so, who showed them to him. "Yes, he has seen them. He was shown by different parties—T. J. Lynch and myself; that's all I know of." On the cross-examination: "You did not show to McKinley all of these letters and telegrams yourself, did you?" A. "I did not." Truman Lynch testifies: "Q. The plaintiff in his deposition in this case says: 'I did not see the telegrams 11, 12, 13, and 14, on the 12th day of December, 1900.' State what you know as to whether or not he did see them on that day? A. I handed Mr. McKinley, myself, at the desk in our store, telegrams 11, 12, and 13, and saw him read them. I am not sure who handed him number 14." Witness says: "I handed him on that day, when he first came in the store, numbers 11, 12, and 13, with possibly some other correspondence. This other telegram, 14, coming on the evening of the 12th, could not have been handed to him in the morning when he came in." The telegram, 14, is dated 12:14 p. m. The evidence is clear that McKinley and Moore did not reach Clarksburg until late in the evening, so that the first opportunity they could have had to have seen any of those telegrams must have been several hours after the receipt of the last, No. 14, and, if it is true that T. J. Lynch showed them the telegrams Nos. 11, 12, and 13, why was not 14 showed to them at the same time? It must be remembered that T. J. Lynch that same night purchased the interest of Moore at a heavy discount, and he was, of course, interested in concealing the facts from Moore and McKinley. C. D. Elliott, one of the partners, testified that Peter Lynch, George Lynch, Truman Lynch, and himself were in T. J. Lynch & Co.'s store when Moore and McKinley came in; they talked a while about the coal field, and he heard McKinley say to Lynch, "I have a chance to sell my interest." He gave Lynch to understand that he could get about $400 for his interest. Lynch says, "You ain't thinking about taking it, George?" He says, "That is in sight." Mr. Lynch says, "I don't want you to sell, George, but if you are going to sell I will give you more money." Then Lynch began to bid on the property, and offered McKinley $1,000 for his interest, minus what McKinley had received from Menoher. "Just then I told him to hold on, count me out, that I wouldn't be in that trade. I said, 'Mr. Lynch, you shan't buy all of George's share; and, George, you shan't sell all.' Said I, 'We need George in to help keep the field in shape.' Then some one said something about buying half of his interest, and I told him I didn't care; that was all right as far as I was concerned. Then I went over close to Mr. McKinley. He wanted to know what I thought about the trade. I told him to do as he pleased about it; that I had nothing to do with the trade. Then him and Mr. Lynch commenced talking again. He asked Mr. Lynch if he thought he could sell the whole field. He says, 'George, indeed I don't know.' Then George says, 'Maybe you know more about it than I do.' Mr. Lynch says, 'No, I told you all I know about it.' Then Mr. Lynch bought Mr. McKinley's half interest. I believe it was $500 that he paid." On cross-examination Mr. Elliott was asked: "On the 12th day of December, 1900, when Peter I. Lynch was trying to get an option or a contract for his son Tillman J. Lynch of this coal field, did he tell Mr. McKinley that Menoher already had the coal field sold, and was closing the contract for it? A. My recollection is that Truman Lynch is the one that was getting this contract signed for his brother Tillman. Mr. Peter Lynch didn't tell Mr. McKinley that in my presence." On cross-examination, Elliott was asked if McKinley did not ask for the contract with Menoher, and what Peter Lynch said about it. "A. He told him he did not know where it was; that it had gotten lost, or something had become of it; and that he did not know where it was, just as nigh as I remember." That Peter Lynch did not produce the contract or show it to McKinley on that day. He says he brought the Menoher contract from his residence to Clarksburg the first time he came in after the 12th of December.

This Menoher contract inquired for by McKinley and which could not be produced at the time he sold his one-half interest to P. I. Lynch, and which is a part of the record, but was found that night and seen by McKinley in the store the next morning, is the contract of September 12, 1900, before referred to, and which contains the following further provisions:

"In case such sale is made as herein provided the parties hereto are to have an equal one-fifth (⅕) of the net profits derived from such sale; and provided that in case such sale is not effected before the expiration of any such options said Lynch, Elliott, McKinley and Moore are to diligently endeavor to secure the extension thereof for as long a time as may be had or on such of them as such extension may be obtained to such an

extent as to command or control the said field. The money necessary for that purpose to be furnished or advanced by the said Menoher & Company, and with the further understanding and agreement that such sales shall be upon the terms and conditions and subject to the said reservations as are contained in the original options or leases.

"Such sale shall include all of the coal optioned for which good and sufficient title can be made, excepting such parts thereof as may be reserved under the original option, and shall also include any other adjacent or contiguous coal that may hereafter be optioned by the said first party at a price not in excess of Twenty Dollars ($20.00) per acre."

If the purpose of the defendant and Elliott was to withhold from McKinley and Moore the telegrams numbered 11, 12, 13, and 14, about the same reason existed for withholding this Menoher contract. It is somewhat significant that the contract could not be found before, but was produced immediately after, the sale of the McKinley and Moore interest. It appears from the record that Elliott and Lynch were partners in all transactions relating to dealings in coal and speculations. Mr. Elliott testifies, on cross-examination: "Something like two or three years before McKinley, Moore, P. I. Lynch, and myself entered into this coal deal, Peter I. Lynch and I entered into a contract as partners. This contract stated, as I remember, that what moneys necessary to carry on any business we might be into, any profits arising from any trade we might have, was to be divided equal, and on this night this trade was had between Peter I. Lynch and George C. McKinley this was one of the reasons why I objected to Mr. Lynch buying Mr. McKinley's interest, knowing if I didn't object at that time, if Mr. Lynch went on and made the trade without my objections, that I would be equal partner. At that time I didn't have the money myself to pay my part; didn't want to go in debt for it, but, knowing if Mr. Lynch did buy it and I did not object, that he would have to furnish the money, and that time I did not feel interested. At that time I told Mr. Lynch to count me out. I told Mr. McKinley that I had nothing to do with the deal. He asked what I thought about the deal and I told him to do as he pleased; that I was not in it; nor haven't been since." He further states that the contract was in writing, that they had never destroyed it, and that they were still partners in coal business and in a farm and some oil; and stated that he considered himself a partner in the deal with McKinley up to the time he told him to count him out. Peter I. Lynch and his brother-in-law, C. D. Elliott, were the partners who had charge of the correspondence in the negotiations for the sale of the property. This gave them an advantage over McKinley and Moore in the fact that they had the correspondence and negotiations in their own hands, and had a better opportunity of knowing the value of the interests of the several partners than McKinley or Moore. There had been some correspondence between Menoher and Peter I. Lynch with reference to the purchasing of the interests of some of the partners. Lynch and Elliott were in a position where the temptation would be strong to suppress communications for the purpose of making an advantageous deal for the interests of members who were not so fortunate in being possessed of the knowledge of the then rapidly closing or consummation of the sale of the property optioned, which was finally consummated on February 6, 1901, except as to the details of preparing the papers, etc.

In 1 Bigelow on Frauds, p. 262, it is said: "It is difficult to define the term 'fiduciary relation'; but it will probably be safe, without excluding other possible cases, to say that such a relation arises wherever a trust, continuous or temporary, is specially reposed in the skill or integrity of another, or the property or pecuniary interest, in the whole or in part, or the bodily custody, of one person, is placed in the charge of another. For the protection of the former, the law raises the suspicion or presumption that the transaction between the parties has been effected through undue and illegal means by the latter; that the party in the superior position has used that position to the injury of the party in the inferior situation; and this suspicion or presumption must be overcome, if the transaction be impeached, before the superior party in the situation can retain the benefit received."

In Kerr on Fraud and Mistake, p. 182: "The principles which cover the cases of dealings of persons standing in a fiduciary relation apply as between partners, between principal and surety, and, generally, to the case of persons who clothe themselves with the character which brings them within the range of principal. * * * The principle on which a court of equity acts in relieving against transactions on the ground of inequality of footing between parties is not confined to cases where a fiduciary relation can be shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one man over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed." And cases there cited.

In Goldsmith v. Eichold, 94 Ala. 116, at page 119, 10 South. 80, at page 81, 33 Am. St. Rep. 97, the court says: "These properties of partnership render it eminently a relation of trust. All its effects are held in trust, and each partner is, in one sense, a trustee; a trustee for the newly created entity—the partnership—and for each member of the firm, who thus becomes a beneficiary under the trust. He is more: he is a trustee and cestui que trust—a trusteo so far as his own duties bind him, a cestui que trust so

far as duties rest on his copartners. And it is sometimes said that each partner is both a principal and an agent—a principal to the extent he represents his own interest, but an agent only so far as he represents his copartners."

In Bigelow on Frauds, at page 311: "Where a partner intending to purchase the interest of his copartner has had the special management of the business or the keeping of the accounts, * * * the intending purchaser must make a full disclosure of the extent and situation of the business, otherwise, the purchase will be liable to be avoided by the copartner." And on page 312: "It is certainly the duty of partners towards each other to refrain from all concealment in the transaction of the partnership business. If a partner be guilty of any such concealment and derive a benefit therefrom, he will be treated in equity as a trustee for the firm, and compelled to account to his copartner. * * * The burden is upon him to justify the transaction; otherwise he is a trustee." And cases there cited.

In Wright v. Duke, 91 Hun, 409, 36 N. Y. Supp. 853, it is held: "The relation of partners to each other is one of trust and confidence, and if some of the partners propose to buy the share of another partner in the business, the intending partners having general charge of the operations of the firm, of its office, and of its books, they owe their fellow the duty of fully disclosing the extent and condition of the business and the existence of all valuable assets." This proposition is well discussed by the court in that case at pages 417, 418, of 91 Hun, page 859, of 36 N. Y. Supp.; where, after citing many authorities, including some that I have just cited, the court says: "There would be no advantage in multiplying authorities upon this subject, all tending to support the proposition that in their dealings, as between each other, partners must act with the utmost candor and good faith. This duty or obligation was not lessened in the case at bar by the fact that during the negotiations the relations between the partners became straightened, and until the relation was terminated the obligation remained."

The questions involved in this case are thoroughly discussed in the case of Newcomb v. Brooks, 16 W. Va. 32, where it is held (Syl., points 1 and 2): "A person who occupies any fiduciary relation to another is bound not to exercise for his own benefit, and to the prejudice of the party to whom he stands in such relation, any of the powers or rights, or any knowledge or advantage of any description, which he derives from such confidential relation." "(2) A purchase by a fiduciary, while actually holding a fiduciary relation, of the trust property, either of himself or of the party to whom he holds such fiduciary relation, is voidable at the option of the party to whom he stands in such a relation, although the fiduciary may have given an adequate price for the property and gained no advantage whatever." It is contended by counsel for appellee that this case is not applicable to the case at bar. I fail to see wherein it is not applicable, in view of the authorities before cited, and the uniform line of decisions which treat such business relations as those of partnership as trusts and as fiduciary relations. Counsel for appellee admit that partners must deal fairly with each other, that they are agents for the partnership and for each other, but say that "it clearly appears that if Lynch had not purchased half of McKinley's interest McKinley would have sold it to some one else for less than Lynch paid him for half, and that therefore he is in better situation, or in no worse situation, at least, and should be held just as firmly by his contract in selling to Lynch as selling to any one outside of the firm." This is, indeed, a most specious argument. While McKinley was entirely free to trade with outside parties as he chose, and could have been held to his contract made with any one who was not in possession of all the facts, yet he was entitled to all the information and knowledge that any of the partners had in relation to the negotiations for the sale of the coal, and Lynch had no right to purchase without disclosing to McKinley all the information he possessed, nor had he a right to allow him to sell to another without giving him such information as he possessed. Lynch was by no means justified in purchasing the interest of McKinley, in view of the circumstances under which the sale was made. If McKinley had been in possession of the information that Lynch had, it is not probable that he would have sold at the price he did, either to Lynch or to any outside party.

Counsel for appellee, in their oral argument, cite in support of their contention Geddes' Appeal, 80 Pa. 442, a case in which a partner sold his interest in the firm to his copartners, and then, proceeding about six years afterwards to rescind the sale, alleged that his interest had been reported by one of them as being of less value than it was. "Held, that as partner he had a right to examine the books, etc., and, not having availed himself of the means of information, he had no ground for relief." And: "Partners bought the interest of a fellow through a third person, concealing that the purchase was for them. Held, that was not per se fraud." That was a case in which the partner sold his interest in a furnace which was doing an active business, and the value of his interest was easily arrived at simply by an examination of the books of the concern, to which plaintiff had the right of access; a case very different from the one at bar, where the information was wholly under the control of the defendant, and he had it in his power to withhold or produce it. It is insisted by appellant that, by reason of the gross inadequacy of price, fraud in the

contract complained of is presumed, and cite, among other cases, Lowe v. Trundle, 78 Va. 65, where it is said: "Now, how was this accomplished? How did he succeed in getting these judgments worth over $1,450 for the grossly inadequate sum of $200? It is true that mere inadequacy of consideration will not of itself be a sufficient cause for the rescission of a contract by a court of equity, where the circumstances of the case indicate that no unfair advantage has been taken by the purchaser. 2 Story on Contracts (5th Ed.) § 550. It is also true, however, that where, as in this case, the inadequacy of consideration is so gross as to shock the conscience and astound the judgment of a man of common sense, that it alone will create a presumption of fraud. 3 Minor's Inst. p. 120. Starting, therefore, with this circumstance, which creates of itself a presumption of fraud, we are prepared to give full credence to the testimony of Jenkins, which shows that the appellant represented, in substance, to him that the judgments were worthless, that the plaintiff's attorneys had given up all hope of collecting them, that all the proceeds derived from the sale of the property had been paid out in satisfaction of other debts, and that there were six or seven thousand dollars of debts yet to be paid before these judgments would get anything." Inadequacy of price is much more gross in the case at bar than in the Virginia case. In 3 Min. Inst. p. 222, in speaking of inadequacy of consideration, the author says: "Thus, when an inadequate consideration, accompanied by even slight circumstances besides, showing concealment, misrepresentation, undue influence, and the like on the purchaser's part, * * * it is potent, and for the most part irresistible, evidence of fraud, and is usually fatal to the contract." In Marlatt v. Warwick, 18 N. J. Eq. 108, it is held: "Inadequacy of price at a judicial sale is not of itself sufficient cause to avoid the sale, unless so gross as to be proof of fraud, or to shock the judgment and conscience." Wilson v. Jordan, 3 Woods, 642, Fed. Cas. No. 17,814; Insurance Company v. Hamilton, 3 Cooper's Chy. 228 (on page 231 the court discusses the question, and cites many pertinent cases); Bradford v. McConihay, 15 W. Va. 732; Conaway v. Sweeney, 24 W. Va. 643; Lallance v. Fisher, 29 W. Va. 512, 2 S. E. 775; Wood v. Harmison, 41 W. Va. 376, 23 S. E. 560.

Counsel for appellee rely principally upon the conflict of testimony, and upon that principle established in Smith v. Yoke, 27 W. Va. 639 (Syl., point 1), where it is held: "Where the decree sought to be reversed is based upon depositions which are so conflicting and of such doubtful and unsatisfactory character that different minds and different judges might reasonably disagree as to the facts proved by them or the proper conclusion to be deduced therefrom, the appellate court will decline to reverse the finding or decree of the chancellor, although the testimony may be such that the appellate court might have pronounced a different decree if it had acted upon the cause in the first instance." Chrislip v. Teter, 43 W. Va. 356, 27 S. E. 288. And in Weaver v. Akin, 48 W. Va. 456, 37 S. E. 600 (Syl., point 1): "The finding of the court as to facts in issue, unless against the plain preponderance of the evidence, is conclusive upon this court." Wolfe v. Bank, 54 W. Va. 689, 47 S. E. 243; Poling v. Condon, 55 W. Va. 529, 47 S. E. 279. While we by no means repudiate the rulings of this court in the cases cited, and other cases holding likewise, the court will not hesitate to reverse a decree where it is plainly wrong or against a clear preponderance of the evidence.

We think the plaintiff has clearly shown himself entitled to the relief prayed for in his bills; therefore the decree is reversed, and the cause remanded for further proceedings to be had therein according to the rules and principles governing courts of equity, and in accord with the principles herein set forth.

(123 Ga. 17)

HUBBARD v. STATE.

(Supreme Court of Georgia. May 13, 1905.)

1. GAMING—INDICTMENT.

Where the statute makes it penal for any person to play and bet for money or other thing of value "at a game played with cards, dice or balls," an indictment was not demurrable because it alleged that the defendant played and bet for money and other things of value at a game played with "cards, dice and balls."

2. SAME—EVIDENCE.

Under an indictment charging that the defendant played and bet money and other things of value at a game played with cards, dice, and balls, it is sufficient to support a conviction if the evidence shows that he played and bet money at a game played with cards alone.

3. SAME.

Under the ruling in Pullen v. State, 42 S. E. 774, 116 Ga. 555, where several persons were jointly indicted by name for the offense of gaming, and it was not alleged that others or unknown persons participated in the game, a conviction of one of the named persons was not authorized by evidence which did not disclose that any of those jointly indicted with him were connected with the transaction.

Fish, P. J., dissenting in part.

(Syllabus by the Court.)

Error from Superior Court, Walker County; W. M. Henry, Judge.

George Hubbard was convicted of gaming, and brings error. Reversed.

Bale & Shaw, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

LUMPKIN, J. Hubbard was indicted for gaming; it being charged that he "did unlawfully play and bet for money and other things of value at a game played with cards, dice and balls." A demurrer to the indictment was overruled. After conviction he moved for a new trial, and, upon a refusal

thereof, excepted. On the trial only one witness was introduced, who testified that he went on a raid after gamblers, and, on entering a room about 10 o'clock at night, saw some negroes sitting around an old canvas cot, on which were lying some cards and a few nickels and dimes; that he made a grab for the money, and the negroes did likewise; and that the defendant was one of the party. He said, "I did not see any dice or balls." The witness did not identify any of the parties present, except the defendant.

1, 2. An indictment under section 401 of the Penal Code of 1895 may charge in one count conjunctively that the defendant played and bet at a game played with cards, dice, and balls, without being subject to demurrer. At the trial the offense could be established by proof of playing and betting at a game played with either cards, dice, or balls. Wingard v. State, 13 Ga. 396; Eaves v. State, 113 Ga. 749 (5), 39 S. E. 318; Cody v. State, 118 Ga. 784, 45 S. E. 622; Brand v. State, 112 Ga. 26, 37 S. E. 174; 1 Bish. New Cr. Pro. § 436; Bish. Stat. Cr. (3d Ed.) § 244. Had the indictment charged the offense as having been committed in one of several ways, in the alternative, it would have been more open to objection. Grantham v. State, 89 Ga. 121, 14 S. E. 892; Eaves v. State, supra; Henderson v. State, 113 Ga. 1148, 39 S. E. 446. This ruling in no way conflicts with the decisions in Langston v. State, 109 Ga. 153, 35 S. E. 166, 779, and Long v. State, 12 Ga. 293. In so far as the remark in Woody v. State, 113 Ga. 927, 928, 39 S. E. 297, may appear to conflict with the decisions herein cited, it is not authority.

3. It has been held that it is not now necessary in this state to allege with whom the gaming took place. Hinton v. State, 68 Ga. 322; Brand v. State, 112 Ga. 25, 37 S. E. 100. But if an indictment jointly charges the defendant and other named persons with the offense of gaming, without charging that others participated in the act specified, the conviction is not sustained by evidence which merely indicates that the defendant participated in a game with certain persons, but fails to show that any of the other joint defendants were engaged in it. Pullen v. State, 116 Ga. 555, 42 S. E. 774; Woody v. State, 113 Ga. 927, 39 S. E. 297; Grant v. State, 89 Ga. 393 (4), 15 S. E. 488. Under these rulings, the judgment is not supported by the evidence.

Judgment reversed. All the Justices concur, except CANDLER, J., absent.

FISH, P. J. (dissenting). While I concur in the judgment rendered, I cannot agree to the proposition stated in the second headnote, and announced in the opinion—that where an indictment for the offense of gaming charged the accused with playing "at a game played with cards, dice and balls," evidence that he played a game with cards only authorized a conviction. The charge was that the offense was committed in a particular way; that is, "at a game played with cards, dice and balls." The descriptive averments of the manner in which the game was played were essential elements of the particular offense charged, and, according to the well-settled rule of pleading, should have been proved as laid. In Woody v. State, 113 Ga. 927, 39 S. E. 297, the exact point here involved was distinctly ruled. In that case the indictment was for gaming, and charged the accused with playing and betting at divers games "played with cards and dice." It was held that a conviction was not warranted when there was no evidence that the accused played and bet at a game played with both cards and dice. It is true that it was held that the verdict was not warranted for another reason, but the decision was distinctly put on both grounds. In my opinion, the ruling in that case was not at all in conflict with any of the previous rulings of this court, nor with the principle stated by Bishop, cited in the opinion of the majority in the present case. Of the cases decided by this court cited to support the decision now rendered, Wingard v. State, 13 Ga. 396, and Eaves v. State, 113 Ga. 749, 39 S. E. 318, seem more nearly in point than the others. In Wingard's Case the indictment charged that the accused played and bet with cards for money, "at a game of poker, whist, faro, seven-up, three-up, and other games played with cards." The words "poker, whist, faro," etc., were each descriptive of a separate and particular game, and especially so when used in connection with the expression "and other games played with cards." That each of these words was descriptive of a distinct and separate game was shown by the statute itself under which the accused was indicted, which enacted that "if any person shall play and bet for money, or other things of value, at any game of faro, loo, brag," etc., "or any other game or games played with cards," he shall, on conviction, be fined, etc. In the Eaves Case it was held that where an indictment charged the accused with unlawfully selling "spirituous, vinous and malt liquors," proof that he unlawfully sold any one of such liquors would support a conviction. If the indictment in that case had charged the unlawful sale of a given quantity of spirituous, vinous, and malt liquor, and the proof had shown the unlawful sale of a given quantity of malt liquor alone, I apprehend that a conviction would not have been sustained, yet such a case would have been more like the one in hand than the real case there made. As I understand the ruling in that case, it was that the indictment charged the accused with unlawfully selling spirituous liquor, vinous liquor, and malt liquor—that is, that he was charged with unlawfully selling all three kinds of liquor—and therefore proof that he unlawfully sold any one of them was sufficient to sustain a conviction. If a merchant were to advertise to sell woolen, linen,

and cotton goods, I think it would be generally understood that he offered to sell three kinds of goods, to wit, woolen goods, linen goods, and cotton goods. But if he were to advertise to sell cloth made of or "with" wool, flax, and cotton, I think it would be well understood that he proposed to sell a particular kind of cloth, composed of all three of these materials. If the indictment in the present case had charged that the accused played and bet at a game played with cards, a game played with dice, and a game played with balls, proof that he played at a game in which cards alone, or dice alone, or balls only, were used, would sustain a conviction; but "a game played with cards, dice and balls" is a different thing from a game played with cards only, dice only, or balls alone. The Eaves Case was decided July 18, 1901, and the Woody Case on July 20, 1901. It would be rather singular if only two days after the ruling was made in the Eaves Case this court had, in the Woody Case, rendered a decision in conflict therewith. But as said above, I do not think there is any conflict between the two.

(123 Ga. 35)

CROWN COTTON MILLS v. McNALLY.

(Supreme Court of Georgia. May 13, 1905.)

1. INJURY TO EMPLOYÉ—DEFECTIVE MACHINERY—NOTICE.

If there are latent defects in machinery, or dangers incident to an employment, unknown to a servant, of which the master knows or ought to know, he is bound to give the servant warning in respect thereto.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 299, 310, 316½.]

2. SAME—EVIDENCE.

In a suit by a servant against a master, alleging failure of duty on the part of the latter in not giving to the servant warning of a danger incident to his employment, it must appear that the master knew, or ought to have known, of the danger, and that the servant injured did not know, and had not equal means with the master of knowing, such fact, and by the exercise of ordinary care could not have known it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 299, 308, 309.]

3. SAME—FAILURE TO WARN.

If the danger is obvious, and as easily known to the servant as to the master, the latter will not be liable for failing to give warning of it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 310, 316½.]

4. SAME.

A master is bound to exercise ordinary care in the selection of servants, and not to retain them after knowledge of incompetency. If he discharges his duty in these particulars, he is not required to anticipate that they may be negligent, and to warn one of them of dangers which may arise from the possible negligence of others.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 307.]

5. SAME—INSTRUCTIONS.

Where an employé injured by a machine in a cotton factory contended that the danger was not obvious because a portion of the machine was covered with cotton, which obscured the view, and prevented the employé from seeing an open door in the machine; and where defendant sought to show that, had the plaintiff performed his duty, the cotton would not have fallen down so as to obscure the view and prevent the open door from being readily seen—it was error for the presiding judge to charge that it was immaterial whether the cotton fell down so as to obscure the view or not.

6. SAME—MEASURE OF DAMAGES.

The charge in respect to the measure of damages was somewhat general, but, the evidence not disclosing elements of special damage of a kind to require more detailed instructions on the subject, and there being no request to charge, the judgment would not be reversed on this ground.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by William McNally, by his next friend, against the Crown Cotton Mills. Judgment for plaintiff, and defendant brings error. Reversed.

McNally brought suit against the Crown Cotton Mills, a corporation, seeking to recover damages for a personal injury. He alleged that he was an employé of the defendant, and was working on a certain machine; that it had rollers, teeth, and saws, which were protected by an apron or door, which, for the safety of the employé, should be, and usually was, kept closed, and, so far as plaintiff knew, had always been so kept while the machine was running; that to have left the door down or open, so as to expose the cylinders and saws, was dangerous to the person operating the machine; that the plaintiff was young (being 16 years old) and inexperienced, especially in regard to this machine, and had not been warned of its dangers, or of the danger incident to leaving the door open or down, or to the absence of the stripper stick; that he was put to work upon the machine, and it was his duty to clean off the stripper stick; that he was proceeding to find it for that purpose; that the defendant had negligently left the machine in a dangerous condition; that the stick was not present, and the door was negligently left down, and the machinery was open, so as to catch the hand of a person working there; that he was not aware of this, nor, in the exercise of ordinary care, could he have discovered it, because the whole top and breast of the machine was filled with cotton and covered completely, and it was not possible to tell whether the door was closed, or whether the stick was present, or what condition the machine was in; that the foreman was present, and knew of this, but did not notify him of the danger; and that while hunting for the stick his hand was injured. Negligence was charged in not furnishing him a safe place to work, and in not warning him of the danger, and there were other allegations not material to mention. The defendant denied negligence or liability on its part. After a verdict for the plaintiff, the

defendant moved for a new trial on several grounds. The following charges, among others, were alleged as error: "If the injury occurred on account of the negligence of the defendant company in not notifying the plaintiff, as he insists, and he did not know of the dangerous condition of the door when down, or could not have known it by the exercise of ordinary care and diligence, then he could recover." "The real question for you to determine first, I will say, is whether or not defendant, in the exercise of ordinary care, should have notified the plaintiff of the dangerous condition of the machinery when in motion and the door down." "There is some contention as to whether the cotton did or did not fall down over the open door so as to obscure the vision and prevent the plaintiff from seeing whether or not it was dangerous; but as the court understands the law, and gives you in charge, it is immaterial whether it so fell down or not. The question is, in this case, did the plaintiff know of the danger incident to operating the machinery when the door was open? If he did, or ought to have known it by the exercise of ordinary care and diligence, then he cannot recover. If he did not or could not, then he can recover." Error was further assigned on the charge as to the measure of damages on the ground that it was too vague and indefinite, and laid down no rule for the jury in arriving at the amount of the verdict, but allowed them to give an amount that, in their judgment, would compensate the plaintiff for the loss of his arm. It is unnecessary to set out the evidence further than to state that the plaintiff sought to sustain his allegations, while the defendant sought to show that it was not negligent, but that the injury to the plaintiff resulted from his own negligence, or that of his co-employés. He was 16 years of age, and had worked at the mill several years, and at this machine about three weeks. The doors were opened and the cards cleaned several times a day. The motion was overruled, and the defendant excepted.

R. J. & J. McCamy, for plaintiff in error. Arnold & Arnold, Harvey Hill, and Geo. T. Glenn, for defendant in error.

LUMPKIN, J. (after stating the facts). 1–3. If there are latent defects in machinery, or dangers incident to an employment unknown to a servant, of which the master knows, or ought to know, he is bound to give the servant warning in respect thereto. But a servant assumes the ordinary risk of his employment, and is bound to exercise his own skill and diligence to protect himself. In a suit seeking to recover of a master, where it is claimed that there was a failure of duty on his part in not giving to the servant notice or warning of a danger incident to his employment in connection with a machine, it must appear that the master knew, or ought to have known, of the danger in the machinery, and that the servant injured did not know, and had not equal means with the master of knowing, such fact, and by the exercise of ordinary care could not have known of it. Civ. Code 1895, §§ 2611, 2612. If the danger is obvious, and as easily known to the servant as to the master, the latter will not be liable for failing to warn him of it. Ludd v. Wilkins, 118 Ga. 525, 45 S. E. 429; Hamby v. Union Paper-Mills Co., 110 Ga. 1, 35 S. E. 297; Stubbs v. Atlanta Cotton-Seed Oil Mills, 92 Ga. 495, 17 S. E. 746; Cartledge v. Pierpont Mfg. Co., 120 Ga. 221, 47 S. E. 586; Hoyle v. Excelsior Steam Laundry Co., 95 Ga. 34, 21 S. E. 1001; White v. Kennon & Co., 83 Ga. 343, 9 S. E. 1082.

4. As to fellow servants, the duty of the master is to exercise ordinary care in the selection of them, and not to retain them after knowledge of incompetency. If he discharges his duty in this regard (except in cases of railroads, or of children of tender years), he is not liable to one servant for injuries arising from the negligence of fellow servants. One of the risks which a servant assumes is negligence or misconduct of a fellow servant about the same business. Civ. Code 1895, § 2610; Evans v. Josephine Mills, 119 Ga. 448, 46 S. E. 674; Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698. If the master has used ordinary care in the selection of servants, and has not retained them after knowledge of incompetency, he is not required to anticipate that they may be negligent, and to warn one of them of dangers which may arise from the possible negligence of others. While the presiding judge charged that if the injury occurred on account of the negligence of fellow servants, "nothing else appearing," the plaintiff could not recover, he immediately followed this charge with the first and second charges complained of as set out in the statement of facts. As he did not inform them that the master was not bound to anticipate negligence of a co-employé and give warning against it, and as one contention in the case was whether the danger was such as to impose on the master the duty to give warning in regard to it, or was a danger arising solely from negligence of a co-employé, these charges, standing alone, did not fully submit to the jury how far the duty of the master in this respect extended. As no request to charge was made, perhaps a new trial might not result on this ground alone.

5. The plaintiff alleged and sought to prove that the danger was not obvious, because the top and breast of the machine was covered up with cotton, and it was not possible to tell whether the door was closed or open. The defendant sought to show that it was the duty of the plaintiff to look after what was called the "stripper stick," on which the cotton was wound, and to clean it off and put it back; that, if this had been properly done, the cotton would not have fallen down and obscured a complete view

of the open door; that, instead of doing this himself, he asked another employé to do it on the occasion in question; and that, if it were not done, and the cotton fell so as to wholly or partially conceal the open door, it resulted from the plaintiff's own fault or that of his co-employé, and not from any latent danger in the machine itself, whether the doors were open or shut. It will thus be seen that the question of whether the danger was obvious and patent, or, if not, whether it was prevented from being so by reason of the defendant's own conduct or that of a fellow servant, was an important one. It was accordingly error for the court to inform the jury that, in the view which he entertained of the law, it was immaterial whether the cotton fell down so as to obscure the vision or not. Counsel for the plaintiff contends that the charge which the court gave on this subject was more injurious to him than to the defendant. But it was erroneous, and may have shut out from the jury a material contention forming part of the defense.

6. The charge in respect to the measure of damages was somewhat general, informing the jury that they should only compensate the plaintiff, if they found for him, for the loss of his arm and for pain and suffering, and that they should determine how much would be a fair and just compensation. There was, however, no evidence showing diminished earnings. Neither were the mortality tables introduced. The data on which to base the charge on this subject being not very exactly proved, it was natural that the charge on it should be general. No more specific charge was requested.

Judgment reversed. All the Justices concur, except CANDLER, J., absent.

(122 Ga. 679)

GEORGIA, F. & A. RY. CO. v. LASSETER.

(Supreme Court of Georgia. May 10, 1905.)

1. APPEAL — JURISDICTION — RECORD — IMPEACHMENT.

The Supreme Court has no jurisdiction to hear contradictory evidence impeaching the verity of a record from the trial court. In the absence of any statutory provision, this court has no authority to try a traverse to a return of service of a bill of exceptions, or to refer to the trial court the issue of fact as to the truth or falsity of such return. The bill of exceptions and entries thereon showing jurisdiction of the Supreme Court, the writ of error will not be dismissed.

2. TRIAL—INSTRUCTIONS.

In stating the contentions upon which a plaintiff relies for a recovery, it is proper for the trial judge to confine his statement thereof to those matters which it is necessary that the plaintiff should establish by proof; and, if the defendant desires any instructions given the jury touching admissions made in the plaintiff's pleadings, an appropriate request to charge in regard thereto should be presented. In the present case the court did not, in summing up the contentions of the defendant, express an opinion as to any question of fact at issue.

3. INJURY TO EMPLOYÉ—ISSUES.

The right of the plaintiff to recover did not depend upon his showing that the employé of the defendant railway company of whose negligence he complained was not a fellow servant, but a vice principal; and this being so, whether this employé was or was not the company's foreman was not, under the evidence submitted, a substantial issue of fact which the court should have directed the jury to consider and determine.

4. TRIAL—INSTRUCTIONS.

The court charged the statutory rules applicable to cases of this character with sufficient particularity, and was not bound, in the absence of a timely written request, to specifically apply these rules to the peculiar facts of the case on trial.

5. INJURY TO EMPLOYÉ.

The defendant was not entitled to have the jury instructed upon the theory that the injury to the plaintiff was the result of an unavoidable accident, and cannot justly complain that the court incorrectly charged the law relating thereto.

6. TRIAL—EXCEPTIONS TO INSTRUCTIONS.

A general exception to a charge on the ground that the law was not thereby correctly presented is not well taken unless the charge contains a single proposition which is objectionable for that reason, or, if it contains several distinct propositions, none of them present a correct abstract statement of law; and such an assignment of error does not raise any question as to whether the charge was as full and as explicit as the excepting party had a right to expect. Nor is a new trial demanded where the court omits to charge the law as to the preponderance of evidence, not being requested to do so.

7. INJURY TO EMPLOYÉ—EVIDENCE.

A finding in favor of the plaintiff was warranted by the evidence, and the damages awarded him were not excessive, viewed in the light of the character of his injury, the fact that it was permanent, and that he suffered severe physical pain for a considerable period.

(Syllabus by the Court.)

Error from City Court of Bainbridge; B. B. Bower, Judge.

Action by W. L. Lasseter, by next friend, against the Georgia, Florida & Alabama Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Donalson & Donalson, B. B. Bower, and A. G. Powell, for plaintiff in error. Albert H. Russell, for defendant in error.

EVANS, J. The plaintiff below, by his next friend, brought a suit for damages against the defendant railway company for personal injuries alleged to have been received while in its employ. The case made by the plaintiff's petition was substantially as follows: Plaintiff was employed to work in the company's machine shops. On the day of his injury he found it necessary, in order to properly perform the duties assigned to him, to have a chisel, he not having been supplied with one. For the purpose of obtaining information as to where he could get a chisel, he approached one Wheeler, who was acting as foreman of the company's shop, and who was the proper person to whom to apply. Wheeler was at work in the shop chipping brass, and fragments of

the metal were flying in front of and to the right and left of him, though not towards him. In order to avoid being hit by the fragments of metal, plaintiff approached Wheeler from behind, and inquired where to find the chisel needed. Wheeler stopped chipping the brass, and plaintiff then advanced to his side and received instructions as to where to get a chisel; but before plaintiff could retire to a place of safety, Wheeler began again to chip the brass, and caused a fragment of the metal to strike plaintiff's right eye. The injury thus inflicted produced total blindness in that eye. The plaintiff was entirely free from fault. He was at the time but 16 years of age. Had he not been injured as alleged, he could have earned $100 per month by the time he reached his majority, but because of his injury his earning capacity will be decreased one-half. He suffered intense physical pain for a period of four months after the injury, and will continue to experience great pain and suffering, not only in the eye of which he has lost the sight, but in his left eye also. The defendant filed an answer, in which it alleged that on the day of the injury the plaintiff was assigned work on the outside of the shop, and was under the direction of a special boss, from whom he could have obtained a chisel, if needed, but he did not in fact need one to do the work; that Wheeler was not acting as foreman of the shop, and had no authority over the plaintiff, but was at the time in the building performing special work; that there was no occasion for the plaintiff to go in the shop, but he did so, and approached Wheeler as an idler and a loafer, in violation of his duty as an employé, for the purpose of killing time, as it was just before the noon hour, when the work at the shop ceased; that plaintiff was out of his place, Wheeler not being a foreman or an employé upon whom the plaintiff could properly call for the desired tool, and the injury was the result of plaintiff's own carelessness and willful conduct in going where he had no right to go, and interfering with an employé of the defendant. The trial of the case resulted in a verdict for $5,000 in favor of the plaintiff. A motion for a new trial was made by the defendant, but the same was overruled, and the defendant sued out a bill of exceptions, in which complaint is made of the court's refusal to grant a new trial, for the reasons assigned in the motion therefor.

1. The bill of exceptions contained a sworn entry by W. V. Wardell that he had previously served a true and exact copy of the original bill of exceptions on the defendant in error. Before the call of the case in this court, the defendant in error presented a written motion, alleging that he was not served with a copy of the original bill of exceptions; that the paper served on him did not appear to have been certified by the trial judge, the certificate was not dated, and there was nothing thereon to indicate it had ever been presented to the judge. The prayer of the motion was for a rule nisi requiring the plaintiff in error to show cause, at such time as this court might direct, why that part of the affidavit of service by W. V. Wardell reciting that he had served a copy of the original bill of exceptions on the defendant in error should not be stricken and expunged from the record as false, and that, if the answer to the motion should present an issue of fact, this court would refer such issue to the trial court for determination. The plaintiff in error filed both a demurrer and an answer to the motion. The answer denied the allegations of the motion respecting the service of the defendant in error with a copy of the original bill of exceptions, and the demurrer challenged the power and authority of this court to submit the issue of fact to the trial court. Afterwards, this court passed an order directing the original bill of exceptions, the motion to strike the evidence of service, the answer and demurrer to the motion to be returned to the city court of Bainbridge, with instructions that the judge of that court submit to a jury, to be impaneled under the law for the impaneling of juries in civil cases in that court, the following question: "Did W. V. Wardell, on or before the 10th day of August, 1904, serve a true and exact copy of the original bill of exceptions in the above-stated case upon E. Lasseter, as next friend of Walter L. Lasseter?" The order provided for the certification of the verdict and the return of the papers to this court. This order was passed without prejudice to the right of the plaintiff in error to question the jurisdiction of this court to pass such order, or to insist that the service as admitted to have been made was sufficient in law. Pursuant to the order of reference, the issue of fact was tried by a jury in the city court of Bainbridge, and the verdict was in favor of the defendant in error—that he had not been served with a copy of the original bill of exceptions. Whereupon a motion for a new trial was made by the railway company, which was overruled, and it sued out and had certified a bill of exceptions, assigning error upon the judgment overruling its motion for a new trial. When the main case was called for argument here, counsel for the defendant in error moved to dismiss the original bill of exceptions because the defendant in error had not been served with a copy of the same. Counsel for the plaintiff in error insisted that, as the record showed service, the main case should be heard on its merits, and that all of the proceedings relating to the reference of the issue of fact as to service were nugatory and void, because this court was without jurisdiction in the premises.

The Supreme Court is a constitutional court of limited jurisdiction. It has no original jurisdiction, but is a court alone for the trial and correction of errors from the su-

perior court and certain city courts. Civ. Code 1895, § 5836. Unless the return of service of the bill of exceptions is traversible, the course pursued by this court in submitting the issue as to service to the city court is indefensible; for it will be apparent that, unless this court has the power to hear evidence upon the traverse of a return of service, it is without power to delegate to the court from which the writ of error issued, or to any other tribunal, authority to determine that issue of fact. In other words, if the power does not exist in this court, it cannot be delegated to any other tribunal whose jurisdiction depends upon the order of reference. At common law an entry of service was not traversible. The reason of the rule rested upon the sanctity of the official return. The entry of service was made by an officer under oath, and such entry was entitled to great sanctity. It was the prescribed method whereby the court was informed that its process had been served, and it acted upon such information. If the return was false, the remedy of the injured party was an action against the officer for a false return. This was the rule which originally obtained in this state, and the return of a sheriff could not be assailed until the General Assembly authorized its traverse. Higgs v. Huson, 8 Ga. 317, 321; Dozier v. Lamb, 59 Ga. 461. The General Assembly also authorized the practice of serving writs in certain cases by a person other than an officer, but an entry of service by one who is not an official must be verified by the affidavit of the person making the return. When so verified, it is the equivalent of a return by a sworn official whose duty it was to serve the writ.

While the Supreme Court is a constitutional court, and its jurisdiction is defined by the Constitution, yet the Legislature may prescribe the manner of bringing cases to this court, and the practice so prescribed is exclusive, and, unless it is complied with, the writ of error must be dismissed. Hardee v. Lovett, 85 Ga. 620, 11 S. E. 1021. The prescribed mode of bringing a case to this court is by a bill of exceptions, and the certificate of the judge thereto is the writ of error. When the bill of exceptions is certified by the trial judge, the case is no longer pending in his court, and he is wholly without authority to pass any order or to do any act with reference to the same. State v. Powers, 14 Ga. 388. While the signing of the bill of exceptions deprives the trial court of jurisdiction of the case, the jurisdiction of the Supreme Court only becomes complete upon the filing of the bill of exceptions in the office of the clerk of the trial court. Armstrong v. Hand, 36 Ga. 270. The statute requires the bill of exceptions to be served upon the opposite party. The service may be made by the sheriff, the plaintiff in error, his counsel, or any other person. Walter v. Kierstead, 74 Ga. 18. The return of service must be entered upon the original bill of exceptions. If entered upon any other paper, even one purporting to be a true copy of the bill of exceptions, the return cannot be considered. Arnett v. Gurley, 59 Ga. 666. The original bill of exceptions, with the entry of service thereon, is certified to this court by the clerk of the trial court as the true bill of exceptions. The jurisdiction of this court then arises upon a record consisting of an original bill of exceptions, with a return of service duly entered thereon, and a certified transcript of the record in the trial court. Such a record imports absolute verity, and cannot be contradicted by allunde proof. In Jones v. Rountree, 96 Ga. 230, 23 S. E. 311, a motion was made by counsel for the defendant in error to be permitted to traverse a return made by a deputy sheriff that he had served a copy of the bill of exceptions upon the movant, and this court held it was without jurisdiction to hear evidence upon such traverse, and refused to dismiss the writ of error. Being informed in the manner prescribed by the General Assembly that it has acquired jurisdiction of a case, this court will not entertain extraneous proof offered to impeach the record and to show want of jurisdiction. So strictly has this rule been enforced that this court has declined to look outside of the record before it or to allow a return of service to be entered on the bill of exceptions after it has been transmitted to this court, even though service was in fact made but by inadvertence no entry thereof was made on the bill of exceptions. Hightower v. Hightower, 13 Ga. 204. In the case of Turner v. Collins, 8 Ga. 252, counsel for the plaintiff in error proposed to supply the omission by an entry nunc pro tunc; opposite counsel resisted the motion for leave to do so, and submitted a counter affidavit in which the fact of service was denied; and this court refused to allow the entry to be made, holding that it was without jurisdiction to try the issue of fact, and that the entry, if made, would be conclusive evidence of service, and could not be controverted by the defendant in error. Again, in Coleman v. Ransom, 45 Ga. 316, where a motion was made to dismiss the writ of error because there was no entry of service upon the bill of exceptions, plaintiff's counsel stated that, "if time was given, he could prove that a copy of the bill of exceptions was served upon" the opposite party; but the "court replied that time could not be given; that service must appear on the bill of exceptions by an acknowledgment, or by a return of an officer or affidavit of the party perfecting it." It appears that in Meador v. Dent, 48 Ga. 126, counsel for the plaintiff in error secured a written waiver of service from the opposite side, but as the record did not disclose that service had been perfected, the writ of error was dismissed, the court holding it was without jurisdiction, and that the parties could not by consent confer jurisdiction upon

it. And it was not until later, when the Legislature expressly authorized such a waiver of service to be made (Civ. Code 1895, § 5547), that this court could entertain jurisdiction of a case where the record failed to disclose the jurisdictional fact of service upon the defendant in error.

It may be suggested that the statute allowing a traverse to a false entry of service is broad enough to include and apply to a return of service of a bill of exceptions sued out to this court. Civ. Code 1895, § 4988, provides that "the entry of the sheriff, or any officer of the court, or his deputy, may be traversed by the defendant at the first term after notice of such entry is had by him, and before pleading to the merits." This language indicates that the General Assembly had in mind service of a process returnable to a trial court, and that there was no intention to change the long-established rule which applied in this court because it was without jurisdiction to try such an issue of fact. Indeed, in Turner v. Collins, 8 Ga. 253, this court held that an entry of service upon a bill of exceptions, "if made as directed, is conclusive; it cannot be controverted here, as the return of ministerial officers can be in the other courts of this state." We therefore conclude that the motion to be allowed to traverse the entry of service and have the issue thus raised determined by this court, or referred for determination to the trial court, is unauthorized by law, and that the proceedings based upon this motion are to be regarded as a nullity, as this court was without jurisdiction to submit any such issue to the trial court for adjudication. As the record of the case shows on its face that this court has jurisdiction, the bill of exceptions will not be dismissed.

The case of Cooper v. Nisbet, 118 Ga. 872, 45 S. E. 692, does not afford a precedent for pursuing any other course. In that case the plaintiff in error applied for a mandamus to compel the clerk of the trial court to duly enter upon the bill of exceptions the date of its filing in his office. In reply to the writ, the clerk denied the bill of exceptions was deposited in his office within the time prescribed by law, and the plaintiff in error then asked to be allowed to file a traverse to the answer of the clerk. As, under Civ. Code 1895, § 5555, the trial court had concurrent jurisdiction to compel the clerk, by mandamus, to perfect the bill of exceptions, and as this court was without jurisdiction to try the issue of fact presented by the traverse, the bill of exceptions was returned to the trial court in order that appropriate proceedings to cure the alleged defect might be taken in that court. This was in accord with express statutory provision that no writ of error shall be dismissed because of any defect which may be cured during the term of this court to which a case is returnable, and the jurisdiction of the trial court did not in any way depend upon the order of reference, but upon the section of the Civil Code above cited.

Upon the merits of the case, we have reached the conclusion that the judgment of the court below should be affirmed. In the event of a reversal, however, the defendant in error would not have been without remedy. Equity will enjoin a judgment fraudulently obtained, and perhaps the plaintiff in error, by knowingly taking advantage of a false entry of service, would be liable in action on the case for the amount of the verdict returned in favor of the prevailing party in the trial court.

2. The court instructed the jury as to the contentions of the plaintiff with reference to the circumstances under which he received his injury, following closely the allegations relied on in his petition. Complaint is made, however, that the court did not in this connection direct the attention of the jury to the fact that these allegations disclosed that the plaintiff knew, when he approached Wheeler, that the latter was engaged in an occupation which rendered an approach to him dangerous, on account of the flying fragments of metal, unless he was approached from behind. Counsel for the plaintiff in error insist that the court should have done so, as what the plaintiff below alleged in his petition amounted to an admission that "he knew Wheeler was doing dangerous work," and he would be liable to injury from the fragments of flying metal if he approached Wheeler from the front or from either side. The court, in stating the contentions upon which the plaintiff relied for a recovery, properly confined its instructions to those matters which it was necessary that the plaintiff should establish by evidence. If the defendant wanted the court to charge as to the effect of any admissions against interest set forth in the plaintiff's pleadings, a timely written request to so charge should have been presented. Wrightsville, etc., R. Co. v. Lattimore, 118 Ga. 581, 45 S. E. 453 (7).

Further complaint is made that the court, while stating to the jury the contentions of the defendant company, intimated an opinion as to a vital issue in the case, having instructed them that it contended that "before the foreman was acquainted with his presence" the plaintiff put himself in a situation of peril, and received the injury wholly because of his own fault. This inadvertence in referring to Wheeler as "the foreman" was not calculated to impress the jury with the belief, as counsel insist, that the court intended to be understood as saying that the company "contended and admitted that Wheeler was a foreman over the plaintiff on that occasion." The court, in the same connection, stated to the jury that the defendant contended that the plaintiff needed no tool, and had no right to go into the shop for one if it was needed, but "ought to have gone to Anderson" (the company's master

mechanic); that "Mr. Wheeler was not at fault, that he was doing his work, that he had not called upon this party to come there, * * * did not know he was there," and that plaintiff had no business going there to get a chisel at all, having been set to work on a locomotive. Furthermore, the court immediately followed the instructions given as to what the defendant contended with the statement that he did so merely in order to direct their attention to the issues in the case, that they were to determine these contentions, and that the court could not intimate any opinion as to the truth of the same.

3. Whether Wheeler was, in point of fact, the company's foreman, was not the vital and controlling issue in the case. The case was not one to which the common-law doctrine that a master is not liable for an injury to one servant caused by the negligence of a fellow servant was applicable, for in this state an exception to the common-law rule is made where the employer is a railway company. Civ. Code 1895, § 2610. If the plaintiff's injury was caused by the negligence of another employé in the service of the company, and the plaintiff was himself without fault, the fact that they were fellow servants would be no bar to his recovery. Civ. Code 1895, § 2323. In the motion for a new trial error is assigned on the failure of the court to charge "as to whether Wheeler was a foreman or co-servant of plaintiff," and to explain to the jury what effect the determination of this question would have on the plaintiff's case. In the absence of a special written request, the court's omission to so charge was not a matter of which the company can justly complain. The company's master mechanic, Anderson, testified that he was in charge of its shops, and exercised control and supervision over all of its employés, including Wheeler, who was merely a machinist working in the shops; that the company had no foreman of its shops, and, if the plaintiff "wanted a chisel, he should have told" him, the witness. But he did not undertake to swear that any rule on the subject had been promulgated, or that the plaintiff had ever been instructed to apply to him when he needed tools not furnished him; nor did this witness deny the statement of Wheeler that he had been instructed by him "to see that these boys worked around there," and, acting upon this authority, had told "them to do little things around the shop." The plaintiff testified that, on previous occasions when he had need of a chisel to do the work assigned to him, he had gone to Wheeler to get one. This statement was not contradicted. The plaintiff evidently regarded Wheeler as a foreman, for he testified he was the foreman of the machine shop, and the proper person to whom to apply for the chisel desired. In view of this evidence, it was really immaterial whether Wheeler was, as matter of law or in point of fact, technically the company's foreman. If the plaintiff needed the chisel, as he testified was true, and had not been instructed by the master mechanic to apply to him for tools, certainly the plaintiff was at liberty to go to Wheeler, as he had previously done, even though Wheeler was no more than a fellow workman. The court, under the undisputed evidence, could not properly have charged otherwise, and it is obvious that any authorized instructions on the subject would not have inured to the benefit of the defendant company.

4. The only defense of the railroad company which the testimony introduced in its behalf tended to establish was that the plaintiff's errand was a mere pretense, and that he approached Wheeler without his knowledge, and was injured before he knew of his presence or had warning to desist from his work. Upon this branch of the case the court explicitly charged the jury that, before they could find the defendant liable for damages, "they must be satisfied from the evidence that the plaintiff was without fault on his part, without negligence on his part, and that there was no fault or negligence on his part that contributed to the injury"; for if they found that the plaintiff "was at fault in such a manner as to bring about the injury, or contributed to the injury, then he [could] not recover anything out of the defendant." In its motion for a new trial, the company nevertheless insists that the court erred in failing to charge that "the plaintiff was bound to exercise ordinary care and diligence in approaching Wheeler, who was engaged in dangerous work, and ordinary care and diligence in placing himself where the brass chips were not likely to fly," and in avoiding the flying chips, etc.; that Wheeler was only bound to exercise ordinary care in chipping the brass, etc.; and that, if both the plaintiff and Wheeler were negligent at the time of the injury, there could be no recovery against the company. The company further insists that the court should, of its own motion, have given in charge the provision of Civ. Code 1895, § 2612, to the effect that a servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. The charge given was as full and explicit as was necessary, the court having previously stated the various contentions of the parties. L. & N. R. Co. v. Thompson, 113 Ga. 983, 39 S. E. 483 (2). If the defendant wished the law specifically applied to the facts, an appropriate request to charge should have been made.

5. In response to a verbal request made by counsel for the company to charge on the subject of unavoidable accident, the court instructed the jury that should they believe the injury to the plaintiff was the result of "pure accident," yet if they believed "the accident occurred by reason of the negligence of the company or its employés, and that the

plaintiff was without negligence himself," then they "would hold the company liable"; but should they "believe that it was a pure accident, or that the plaintiff was at fault or negligent to such an extent as to contribute to the accident, even if the company was at fault itself, the company would not be liable." As the plaintiff in error correctly asserts, this charge was "not the law as to an accident," for the injury could not be attributed to accidental cause unless neither the plaintiff nor the defendant was at fault. However, a careful reading of the evidence discloses that the company was not entitled to any charge based on the theory of an accidental injury, the evidence relied on by the plaintiff showing that Wheeler was negligent in the manner charged, while the evidence introduced by the company was to the effect that the plaintiff was culpably negligent in placing himself in a situation of peril before giving Wheeler notice of his presence. As applied to the facts of this particular case, the charge given amounted to an instruction that if the injury was brought about by the negligence of the company, and the plaintiff was himself free from fault, the company would be liable notwithstanding the injury was wholly unexpected and unintentional; but if it was purely accidental, not being attributable to any negligence on the part of the company, or if the plaintiff contributed to any negligence chargeable to the company, it would not be liable. Though incorrect as an abstract proposition of law, the charge was not prejudicial to the defendant, but really hurtful to the plaintiff.

6. The instructions given to the jury as to the rules for determining, in civil cases, where lies the preponderance of evidence, are excepted to upon the general ground that the court incorrectly stated the law upon this subject. The charge excepted to seems unobjectionable. Certainly a number of the instructions given were in accord with the familiar rules usually to be applied. This being so, the exception to the charge is not well taken, no specific objection to any portion of it being pointed out. Anderson v. Railway Co., 107 Ga. 501, 33 S. E. 644; Owens v. State, 120 Ga. 209, 47 S. E. 545. In the brief of counsel for the company, the criticism is made that the charge only "halfway defines" what constitutes a preponderance of evidence. If so, the fact that the court ought to have given a fuller charge could not be taken advantage of by excepting to the giving of instructions which were correct and pertinent, so far as they went. Roberts v. State, 114 Ga. 450, 40 S. E. 297. No request to charge on this subject was made, and, had the court wholly failed to charge thereon, the omission to do so would not require the grant of a new trial. Small v. Williams, 87 Ga. 682, 13 S. E. 589 (6).

7. A finding in favor of the plaintiff was warranted by the evidence. The verdict returned was not, we think, excessive. Aside from the fact that the injury produced total blindness in one eye, of the use of which he has been forever deprived, his other eye was affected, he suffered much physical pain, and the injury has brought about a permanent disfigurement which must prove a source of regret and distress throughout the remainder of his life, upon which he has just entered. Five thousand dollars may, or may not, compensate him. This amount does not indicate bias or prejudice on the part of the jurors, or suggest that their verdict was emotional, rather than compensatory for the injury sustained.

Judgment affirmed. All the Justices concur, except CANDLER J., absent, and LUMPKIN, J., not participating.

(123 Ga. 77)

WESTERN & A. R. CO. v. BRYANT.

(Supreme Court of Georgia. May 15, 1905.)

INJURY TO EMPLOYÉ — DECLARATION—NEGLIGENCE—PROXIMATE CAUSE.

The allegations of fact upon which the plaintiff relied as showing that the defendant railroad company was liable to him in damages because of personal injuries sustained by him while in its employ and in the discharge of his duties disclosed that the negligent acts of which he complained were the proximate cause of his injury, and that he did not voluntarily expose himself to a known and obvious danger which was impending, and which he should have taken immediate steps to avoid, instead of obeying the orders of the company's foreman, to whose directions he was subject.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by J. T. Bryant against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The question presented for determination in this case is whether or not the court below erred in overruling a demurrer interposed by the defendant railroad company to the plaintiff's petition as amended. The facts alleged, which the demurrer admitted to be true, were substantially as follows: On February 15, 1904, the plaintiff, J. T. Bryant, was employed by the company to work under one of its foremen, McFarland, on push and lever cars, and to do track work about two miles south of Dalton, the plaintiff being one of a crew working under McFarland on a section which extended from Dalton to a point some six miles below that place. On the date named the plaintiff was working with a squad of hands between Loughridge and Dalton, and was making use of the push and lever cars. Before these cars were started from Loughridge Crossing, the foreman had sent one of the crew towards Dalton for the purpose of flagging any train of the defendant company which might be approaching from Dalton. This member of the crew flagged a freight train at Dalton, and notified the engineer to look out for McFarland's push and lever cars,

informing the engineer that these cars were moving towards Dalton, and stating about where they would be found. The servants of the company in charge of the train nevertheless ran the freight train at a rapid rate of speed toward the point where the push and lever cars were being used. The foreman, hearing the train approaching, directed the plaintiff and the other members of the crew to reverse the direction of the push and lever cars, and to push them in the opposite direction. Plaintiff obeyed this order, and undertook, with the other hands, to push the cars southward, and was in the act of doing so, when the foreman, finding that the freight train continued to approach at a rapid rate of speed, warned the crew to leave the push and lever cars and get out of the way of the rapidly approaching train. A track of the Southern Railroad Company ran alongside of the track of the defendant only a few feet distant. The plaintiff, "in the exercise of all care, when warned by his foreman to leave said push and lever cars, sought to escape from the approaching collision between said push and lever cars and said approaching freight engine and endeavored to get away. * * * The collision between the approaching freight train and said push and lever cars was calculated to throw said cars or fragments of the same some distance from the track, and for [plaintiff] to reach a point of safety it was necessary for him to cross the track of the Southern Railway Company. * * * The negligence of the agents of the defendant in disregarding the flag and bringing their freight train at a rapid rate of speed toward said push and lever cars placed the property of the defendant company and the lives of its employés in great danger, and [plaintiff] was discharging his duty in obedience to the orders of his foreman when he sought, with the balance of the crew, to push said push and lever cars away from said approaching freight train, so as to give an additional opportunity for the same to be checked before it struck said cars. * * * When engaged in this work [plaintiff's] entire attention was absorbed in said work, and he was compelled to occupy a bent position, so that he had no view of the track in front of him, and his back was towards the freight train approaching on the line of the defendant. * * * When [he] and the other employés upon said push and lever cars received their notice warning them to get out of the way of the approaching freight train, in the exercise of all care he endeavored to escape from the emergency brought upon him by the negligent conduct of the employés of the defendant." He at the time had no knowledge of "the approach of the train upon the Southern Railroad, and no time for stopping or looking when he was warned to escape from the approaching freight train"; and he "used all care in his efforts to escape, but was struck by an engine on the Southern Railway, which had approached at a rate of speed of not less than sixty miles an hour." Plaintiff had no warning of the approach of this train, and the noise of the freight train prevented him from hearing its approach. He was free from fault. The defendant was negligent in that said freight train ran down at a rapid rate of speed upon the push and lever cars with which he was at work; and the defendant was also negligent in that the foreman, under whose orders he undertook, with the other members of the crew, to push the cars away from the approaching freight train, did not at an earlier time warn him of the close approach of the freight train, and in that the foreman did not also warn him of the approach of the train on the Southern Railroad—all of which negligence contributed to and caused the injuries sustained by him. He was knocked down, his left arm was broken and had to be amputated an inch below the elbow joint, three ribs were also broken, his right lung was punctured, and he received other bodily injuries. He was twenty-four years old, was earning $1 per day, and at the time he was injured was in the discharge of his duties under his employment by the defendant company. The freight train struck the push and lever cars, knocking them about 60 feet, the collision taking place a few moments after plaintiff was struck by the Southern Railway engine. "It was the duty of defendant's foreman to watch over and supervise plaintiff and other employés working under the said foreman, and to warn them of the approach of said freight train in time for them to reach a place of safety in case said freight train did not stop. It was also the duty of said foreman to warn those under him who were moving said push and lever cars under his direction of any other danger which surrounded them. Defendant's foreman was aware of the position which plaintiff necessarily occupied while performing the duties required of him, and was aware of the fact that plaintiff could not see the freight train of defendant approaching him from behind or the train of the Southern Railway Company approaching him from the front. The duty was upon defendant's foreman to notify plaintiff to leave the push and lever cars under circumstances and at a place where it was reasonably safe for him to do so." "The defendant was negligent in that its foreman for the first time notified plaintiff to leave the push and lever cars at a place and under circumstances that were dangerous, and which caused the plaintiff's injuries, without negligence on the part of plaintiff contributing thereto."

Besides demurring to the petition generally, the railroad company specially demurred thereto on the following grounds: "(1) It is therein shown that the plaintiff, after being apprised of danger in which he was placed by the alleged negligence of the defendant's servants, and after having sufficient time and opportunity to free himself

therefrom and place himself in a safe place, continued in a dangerous position, brought about by the alleged negligence of defendant's servant, and declined to escape therefrom. (2) It is shown by plaintiff's petition that his injury was not the proximate result of defendant's alleged negligence, but was caused by an independent third party, to wit, the engine controlled and operated on the tracks of the Southern Railway Company by the employés of said Southern Railway Company, and not controlled or operated, directly or indirectly, by this defendant, or any of its employés, and was not caused by any act of any servant of this defendant; nor was any act of this defendant or any of its employés the proximate cause of plaintiff's injuries."

Payne & Tye and R. J. & J. McCamy, for plaintiff in error. Hoke Smith, H. C. Peeples, W. C. Martin, and Marion Smith, for defendant in error.

EVANS, J. (after stating the facts). That the employés of the defendant railroad company were guilty of acts of negligence is not controverted. It is insisted that such acts were not the proximate cause of the injury. What are the facts alleged bearing on this question? Assuming, for the present, that the plaintiff was not guilty of contributory negligence, it appears: (1) That the negligence of the defendant's train crew in approaching at a rapid rate the cars being operated by the section gang, notwithstanding notice of its whereabouts had previously been given to the engineer, brought about the necessity of reversing these cars and pushing them southward in order to endeavor to prevent a collision. (2) The continuing negligence of the train crew in not checking the speed of the train rendered this precautionary measure of no avail. (3) The section foreman, instead of warning his crew that the train continued to approach rapidly, and giving his men an opportunity to reach a place of safety, hazarded their lives by persisting in his effort to prevent the impending collision. (4) He knew of the position occupied by the plaintiff, and that the plaintiff could not observe for himself the increasing danger in his rear, or observe the new danger in front presented by the approach of a train on the Southern Railway track; yet the foreman gave to the plaintiff no hint of this new danger, nor warned him in time to leave his post of duty after the danger from behind had become imminent. (5) When the foreman did give his tardy warning, the only avenue of escape from the immediate and pressing danger in the rear which was open to the plaintiff lay across the track of the Southern Railway Company. (6) Knowing only of the impending collision, and having been unable to either see or hear the train of the Southern Railway Company, the plaintiff undertook to save himself by availing himself of his only apparent avenue of escape, which was immediately cut off by the rapidly moving train approaching on the track of that company. To place one in a situation where he will be instantly killed if he remains where he is, and to thus force him to throw himself into the very teeth of an unknown peril in a futile effort to escape injury, is a very practical way of furnishing the efficient and proximate cause of his being physically injured by the physical operation of the unknown peril into which he is driven. Not only does the plaintiff allege that he was negligently placed in such a situation, but he goes further, and asserts that his lack of knowledge of the unknown peril to which he was exposed was due to the negligent omission of the foreman to give him notice thereof before he was actually entrapped between a known and an unknown peril, both of which threatened his life.

As was pertinently remarked by Lord Ellenborough in Jones v. Boyce, 1 Stark. 493, one who places a man "in such a situation that he must adopt a perilous alternative is responsible for all the consequences." Since the decision in that case, which has been approved and universally followed in this country, the defense that one negligently placed in such a situation was actually hurt, not by the person who placed him in peril, but by his own act in endeavoring to escape therefrom, whereby he came into contact with another independent and overwhelming agency, of which he was unable to gain the mastery, has lost all novelty. See cases cited in note to Gilson v. Delaware Canal Co., 36 Am. St. Rep. 847, 848. "It is well settled that the mere fact that there have been intervening causes between the defendant's negligence and the plaintiff's injuries is not sufficient in law to relieve the former from liability; that is to say, the plaintiff's injuries may yet be the natural and proximate in law, although between the defendant's negligence and the injuries other causes, conditions, or agencies have operated." 21 Am. & Eng. Enc. L. 490. The "causal connection must be actually broken, the sequence interrupted, in order to relieve the defendant from responsibility. The mere fact that another person concurs or co-operates in producing the injury, or contributes thereto in any degree, whether large or small, is of no importance." 1 Shear. & Redf. Negl. § 31. See, also, Missouri Ry. Co. v. Rogers (Tex. Sup.) 40 S. W. 956; Lundeen v. Electric Light Co. (Mont.) 41 Pac. 995. "If one person wrongfully places another in a position of peril, whereby the latter makes a natural and reasonable effort to escape the threatened danger, the former is responsible for the consequences of such effort, precisely as if he had immediately caused them." Watson, Dam. Per. Inj. § 66. This doctrine was applied by this court in Simmons v. Railway Co., 92 Ga. 658, 18 S. E 999. The plaintiff, a brakeman employed by the defendant company, was put in imminent

peril by the negligence of its engineer in not stopping at a switch in order that a train coming from the opposite direction might pass. A collision between the two trains was momentarily expected. The plaintiff and the conductor vainly endeavored to signal the engineer with their lanterns, but the lights went out, and the conductor ordered the plaintiff to run forward and tell the engineer to stop his train. In attempting to execute this order, the plaintiff, while passing over a coal car, lost his footing and fell, sustaining injuries. The defense of the defendant company was that the negligence of its engineer was not the proximate cause of these injuries, which resulted from a large lump of coal over which the plaintiff fell; but our present chief justice effectively disposed of this contention by saying that the company wrongfully placed the plaintiff in a situation of peril, giving him no alternative save to jump from the moving train, or endeavor, as he did, to stop it in time to avoid the expected collision. Had he jumped and struck the lump of coal or any other object on the ground, any injury so sustained would result from the act of negligence charged; and the fact that he was injured while jumping from one part of the train to another in an effort to effect his escape from the danger by procuring the engineer to stop the train did not make such negligence any the less the proximate cause of his injury. A wrongdoer cannot avail himself of the plea that he only produced the fright which caused another to injure himself in an attempt to guard himself from the threatened danger. Ellick v. Wilson (Neb.) 79 N. W. 152; San Antonio Ry. Co. v. Peterson (Tex. Civ. App.) 49 S. W. 924. It may, in the present case, be conceded that the foreman of the defendant company was not negligent in not anticipating that a train of the Southern Railway Company might come along and cut off the plaintiff's only avenue of escape from the impending danger in his rear. Still, as the foreman failed to give warning till immediate flight therefrom was rendered imperative and the plaintiff was thus put in peril of his life, the company would be liable if there had been no approaching train on the parallel railroad track, and the plaintiff had been injured by falling in his precipitate haste in endeavoring to cross the track and reach a point of safety. The foreman might well have foreseen that, if the plaintiff was forced to make undue haste in an effort to get out of his perilous situation, he might be injured in various ways. "Negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result." Atchison Ry. Co. v. Parry (Kan.) 73 Pac. 105; Mayor of Macon v. Dykes, 103 Ga. 848, 31 S. E. 443. Any injury which ordinary prudence would suggest as likely to result from the act of negligence committed would be the proximate result of such negligence. Township v. Graver, 125 Pa. 24, 17 Atl. 249, 11 Am. St. Rep. 867; Johnson v. Tel. Exchange Co., 48 Minn. 433, 51 N. W. 225. The test is not whether the foreman could reasonably have anticipated that the plaintiff would be run over by a train on the parallel track, but whether the foreman should have foreseen that, if timely warning was not given to the plaintiff to leave his post of duty, he might be subjected to injury, not only from the obvious danger of the impending collision, but from other wholly independent, but existing, sources of danger. 1 Shear. & Redf. Negl. § 29. Thus, in W. & A. R. Co. v. Bailey, 105 Ga. 100, 31 S. E. 549, while it could not reasonably be expected of the company's engineer to anticipate that, if he recklessly ran over a trespasser on the track, the trespasser's body would be hurled against another employé of the company, who was at his post of duty, the company was held liable for injuries in this manner sustained by such employé. We are by no means prepared to say, however, that the precise injury sustained by the plaintiff in the present case was not one which might have been anticipated. The parallel track of the Southern Railway Company represented something more than a feature of the landscape at the point where the plaintiff was run over. The company was engaged in the serious business of transporting freight and passengers, and employed the customary means used in conducting such a business. Trains ran, and were to be expected to run, on that railroad. Long since, this court called attention to the fact that the employés of a company so engaged were in a position to realize that trains might be run along the track at any and at all times; and in Southern Ry. Co. v. Webb, 116 Ga. 152, 157, 42 S. E. 395, 397, 59 L. R. A. 109, Mr. Justice Cobb said: "If a railway company is bound to anticipate and apprehend that one left in a helpless condition in a perilous place upon its tracks through its negligence may be injured by one of its own engines or trains running thereon, is it not equally bound to so anticipate and apprehend any injury which might result to such person from an engine of another company which the first company knew had a right to and did actually use the tracks from time to time? It would, indeed, bring about a curious result if the defendant would be liable in such a case only when the second engine or train was owned by it." The result reached in that case was that the negligence of the defendant, which caused the plaintiff's son to be thrown off a train onto its track, where he lay insensible till a train of another company came along and ran over him, was the proximate cause of his death, the crew of that train being blameless. Had the plaintiff in this case been hurt by a train northward bound on the defendant company's track, the approach of which the fore-

man failed to observe, though he kept his men pushing the cars towards it, the company would surely not be in a position to say that common foresight could not have suggested the possibility of their being such a train, and therefore its foreman was under no duty to maintain a lookout in the direction from which it came. And it seems none the less reasonable to conclude that the probability of the Southern Railway Company using its parallel track for the purpose of conducting its business in usual course and with customary means was a probability which human foresight might have suggested to a man of ordinary care and prudence.

The allegations of the petition do not show that the plaintiff voluntarily exposed himself to a known and obvious danger which was impending at the time he obeyed the order of the foreman to reverse the push and lever cars and propel them in the opposite direction from that in which they had been moving. The fair inference from the facts recited is that the foreman and the men working under his direction pursued a safe course in so doing, acting upon the reasonable assumption that the crew of the freight train would take all necessary steps to reduce the speed of the train. According to the allegations of the petition, the plaintiff would have committed a breach of his duty had he refused to obey this order of the foreman, and it was not until afterwards, when it became apparent that the trainmen were not checking the speed of the approaching train, that it was proper and necessary that the men in charge of the push and lever cars should abandon them to their fate, and seek a place of safety for themselves. Nor, under the facts alleged, was the plaintiff chargeable with fault because he did not forsake his post of duty at the appropriate moment, but relied on the foreman to give him timely warning.

Judgment affirmed. All the Justices concur, except CANDLER, J., absent.

(123 Ga. 62)

LOUISVILLE & N. R. CO. v. WILSON.

(Supreme Court of Georgia. May 15, 1905.)

1. DEAD BODIES—INTEREST OF WIDOW.

A widow has an interest in the unburied body of her deceased husband which the courts will recognize.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dead Bodies, §§ 1, 2.]

2. CARRIERS — NEGLIGENCE — PROTECTION OF DEAD BODY.

Where a declaration alleged that a widow desired to have her husband's body carried by a railroad from the place of death to the place of intended burial; that the route was over the railroad to a junction, and thence by a branch of the same road to the destination; that the agent of the company at the initial point would only sell her transportation for the body to the junction, but told her that the company would carry the body to the place of burial, and that at the point of junction she could obtain transportation to the destination; that she paid for such transportation to the junction, and delivered the body, with its accompanying shroud and coffin, to the company; that on arrival at the junction the company's agent had the coffin and body placed on an open platform in the rain, and allowed it to remain there for several hours while waiting for the second train to arrive, and refused, on request of the wife, to have it placed where it would be protected from the weather; and that the coffin and shroud were damaged to the extent of $75, and the body was "soaked and otherwise mutilated"—*held*, that the declaration set out a cause of action.

(Syllabus by the Court.)

Error from Superior Court, Warren County; P. E. Seabrook, Judge.

Action by P. Wilson against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Penina Wilson brought suit in the superior court of Warren county against the Louisville & Nashville Railroad Company, a foreign corporation, as the lessee of the Georgia Railroad & Banking Company, a corporation under the laws of Georgia. She alleged that the defendant company had damaged her in the sum of $2,000 for the following reasons: On or about the 12th day of March, 1903, her husband, Hamp Wilson, died in Atlanta, Ga. After his death she delivered his body to the defendant company, to be carried from Atlanta to Warrenton, Ga., where it was to be buried. Defendant has a railroad and operates trains between said places. She notified the defendant that she was going to carry her husband's body to Warrenton, and offered to pay for the transportation thereof. The agent at Atlanta refused to sell her transportation further than to Camak, a junction point on the defendant company's road. Petitioner paid defendant for the transportation to Camak, and informed it that she was going to carry the body of her husband on to Warrenton. The said agent informed petitioner that the body of her husband would be carried by the defendant company, and that she could buy transportation from Camak to Warrenton. Defendant agreed to transport the said body of petitioner's husband from Atlanta to Warrenton, and accepted pay therefor. When the train bearing the body of her husband arrived at Camak, in the county of Warren, the coffin containing it was taken from the train by the defendant company and placed on an open platform, and there allowed to remain several hours until defendant's train going to Warrenton arrived. When the body was taken from the train it was night and raining. Petitioner and others requested the agent of the defendant company at Camak to have said body placed where it would be protected from the rain and weather, but he refused to do so. Petitioner shows that as a result the body of her husband, the shroud, and coffin were "soaked and otherwise mutilated." By reason of the facts

above set forth, said coffin and shroud were damaged to the amount of $75, and she was subjected to great humiliation and shame and mental suffering. Defendant was a common carrier. She charged that it was wanting in ordinary care and in fact was grossly negligent. She also alleged a property right in the coffin and shroud. The defendant company demurred generally to the petition. The court overruled the demurrer, and to this ruling the defendant excepted.

Jos. B. & Bryan Cumming, for plaintiff in error. L. D. McGregor, Burton Smith, and J. A. Branch, for defendant in error.

LUMPKIN, J. (after stating the facts). Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber and pig iron. And yet the body must be buried or disposed of. If buried, it must be carried to the place of burial. And the law, in its all-sufficiency, must furnish some rule, by legislative enactment or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead and rights surrounding their bodies. In doing this the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes. It is said that burial in churchyards was introduced into England by Cuthbert, archbishop of Canterbury, in the year 750 A. D. At an early date the church began to take jurisdiction in regard to places of burial and the sepulture of the dead. This jurisdiction gradually became more enlarged and more firmly fixed, until the ecclesiastical courts left little for the common-law courts to decide upon these subjects. Thus it was that Lord Coke said that the burial of a corpse belonged to ecclesiastical cognizance, but the heirs had an action for defacing the monument (1 Inst. 4, 18 B; 3 Inst. 203); and so it was that Blackstone made use of the much quoted expression: "But, though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if any one, in taking up a dead body, steals the shroud or other apparel, it will be felony, for the property thereof remains in the executor, or whoever was at the charge of the funeral." 2 Bl. Com. 429. See Hammond's Ed. 651, and note on page 653.

The subject of the right of burial and the protection of the bodies of the dead arose in the matter of the widening of Beekman street in the city of New York, and was referred to Hon. Samuel B. Ruggles, as referee. He made a learned and elaborate report, which was confirmed by the court. It will be found published in 4 Brad. R. 503 et seq., and from it the following excerpts are taken: "The power thus exercised by the ecclesiastical tribunals was not spiritual in its nature, but merely temporal and juridical. It was a legal, secular authority, which they had gradually abstracted from the ancient civil courts, to which it had originally belonged; and that authority, from the very necessity of the case, in the state of New York, must now be vested in its secular courts of justice. The necessity for the exercise of such authority, not only over the burial, but over the corpse itself, by some competent legal tribunal, will appear at once, if we consider the consequences of its abandonment. If no one has any legal interest in a corpse, no one can legally determine the place of its interment, nor exclusively retain its custody. A son will have no legal right to retain the remains of his father, nor a husband of his wife, one moment after death. A father cannot legally protect his daughter's remains from exposure or insult, however indecent or outrageous, nor demand their reburial, if dragged from the grave. The dead, deprived of the legal guardianship, however partial, which the church so long had thrown around them, and left unprotected by the civil courts, will become, in law, nothing but public nuisances; and their custody will belong only to the guardians of the public health, to remove and destroy the offending matter, with all practical economy and dispatch. The criminal courts may punish the body snatcher who invades the grave, but will be powerless to restore its contents. * * * The sacred relics of Mt. Vernon may be torn from their 'mansion of rest,' and exhibited for hire in our very midst, and no civil authority can remand them to the tomb. * * * It will be seen that much of the apparent difficulty of this subject arises from a false and needless assumption, in holding that nothing is property that has not a pecuniary value. * * * The world does not contain a tribunal that would punish a son who should resist, even unto death, any attempt to mutilate his father's corpse, or

tear it from the grave for sale or dissection; but where would he find the legal right to resist, except in his peculiar and exclusive interest in the body? The right to the repose of the grave necessarily implies the right to its exclusive possession." The report of the referee has been criticised by a writer in 10 Cent. Law J. 303; but it has been cited with approval by nearly all the courts which have since dealt with the questions there involved. It is said Mr. Ruggles added a note to the original report in explanation of the term "next of kin," stating that it "was not employed for the purpose of denying or questioning the legal right of a surviving husband to bury his wife's remains, or to reinter them if disturbed." Hackett v. Hackett, 18 R. I. 157, 26 Atl. 42, 19 L. R. A. 558, 49 Am. St. Rep. 762. For those who desire to consult law literature on burial grounds, burials, etc., an extended list will be found in a note to 18 Abb. N. C. 75. In Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667, it was held that, "while a dead body is not property in the strict sense of the common law, it is quasi property, over which the relatives of the deceased have rights which the courts will protect." Potter, J., delivered an able opinion in that case, reviewing the matter both from the standpoint of history and of authority. In Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, it is held that "the right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin. This right is one which the law recognizes and will protect, and for any infraction of it—such as an unlawful mutilation of the remains—an action for damages will lie. In such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proved." In Bogert v. City of Indianapolis, 13 Ind. 135, it was held that "the bodies of the dead belong to the surviving relatives, in the order of inheritance, as property, and they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated." In Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249, it was held that "where a husband and wife employed undertakers to keep the body of a deceased daughter until they might be ready to inter it, and the defendants negligently took or allowed it to be taken and buried, or otherwise disposed of it, an action for damages would lie." In Doxtator v. Railroad Company (Mich., 1899) 79 N. W. 922, 45 L. R. A. 535, a similar rule was recognized, but a recovery was denied on other grounds. See, also, 6 Am. L. Rev. 182; 8 Am. & Eng. Enc. Law (2d Ed.) 835; Foley v. Phelps, 1 App. Div. 551, 37 N. Y. Supp. 471; Hackett v. Hackett, 18 R. I. 155, 26 Atl. 42, 19 L. R. A. 558, 49 Am. St. Rep. 762, supra.

In this state the right of the owner of an easement of burial in a cemetery lot, or one who is rightfully in possession of it, to recover damages from a person who wrongfully enters upon it and disinters the remains of persons buried therein, has been recognized; and it was held that in a suit for wrongfully disinterring a dead body, if the injury has been wanton and malicious, or the result of gross negligence or a reckless disregard of the rights of others, equivalent to an intentional violation of them, exemplary damages may be awarded, in estimating which the injury to the natural feelings of the plaintiff may be taken into consideration. Jacobus v. Congregation of the Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; Roumillot v. Gardner, 113 Ga. 60, 38 S. E. 362, 53 L. R. A. 729. In Wright v. Hollywood Cemetery Corp., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621, it was held that an unlawful and unwarranted interference with the exercise of the right of burial was a tort, which gave to the grandmother and brother of the deceased, who were proceeding to have the corpse interred, a right of action; and the same ruling was made with respect to the damages recoverable as in the case of Jacobus v. Congregation of the Children of Israel, supra. From these decisions it will be seen that in Georgia, where ecclesiastical courts have never been recognized, rights with respect to burial, cemeteries, and dead bodies are protected by the secular courts. Indeed, if this were not so, and if all matters which were cognizable by the ecclesiastical courts and thus withdrawn from the common-law administration could not be dealt with by the courts of this state, many most important rights would be left unprotected. Thus until a comparatively recent date in England the jurisdiction of the ecclesiastical tribunals included, among other things, cases of marriage, divorce, and testamentary causes. In Turner v. Thompson, 58 Ga. 271, 36 Am. Rep. 297, it is said: "Our own statute, which adopted the English common law and the old English statutes, adopted them only where applicable to our people in this new country, and the circumstances surrounding them here."

Some courts have quoted the statement from Blackstone set out above, and announced in broad language that a dead body is not the subject of property. But, when particular cases arose, it generally became necessary to hold that a husband or wife, or next of kin, did have an interest in the body of the deceased which the law would protect, whether that interest and the right of control and possession was technically denominated property, or quasi property, or by some other name. If this is not true, for stealing or wrongfully withholding the custody of a dead body there might be an action for dam-

ages in some cases, but no method of recovering or restoring the body to its proper resting place. An illustration of the class of cases just referred to is Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759. This decision announced that a dead body was not the subject of property, and that after burial it became a part of the ground to which it had been committed. Yet, for an improper disinterring and removing of the remains it was held that an action of tort "in the nature of trespass quare clausum fregit" would lie, and, if there was a willful disregard or careless ignorance of the plaintiff's rights, the injury to his feelings might be considered in measuring damages. Nevertheless the same court held at a later date that "an action against a hospital for an autopsy performed upon the dead body of a child without the consent of the father, who was the natural guardian, and who intrusted the child to the hospital for treatment, does not fail on the ground that there was no right of property in the dead body." In the decision the case of Meagher v. Driscoll is cited, not as conflicting with, but rather supporting, the later adjudication. Burney v. Children's Hospital (Mass., 1897) 47 N. E. 401, 38 L. R. A. 413, 61 Am. St. Rep. 273.

If, then, there is a property right, or a quasi property right, in a dead body, subject, of course, to the necessity for proper disposition, and not to allow it to become a nuisance or injurious to the public welfare, what is the status of the defendant company, which undertook to transport it for hire? In Hale v. Bonner, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850, it was held that a declaration by a widow against a railway company for negligence in the delivery of the body of her husband shipped upon such railway, causing delay in the funeral, by reason of which decomposition resulted, set out a cause of action. In Beam v. Cleveland Ry. Co., 97 Ill. App. 24, it was held that "a brother of a deceased person, who undertakes to pay for the transportation of his body from the place of his death to that of his burial, has such an interest in the dead body as entitles him to damages for an injury to it by the negligent act of the railway while transporting it for hire." This was not a decision of the highest court of the state, but is, nevertheless, a decision which may be properly cited and considered. In Hockenhammer v. Lexington & Eastern Ry. Co. (Ky., 1903) 74 S. W. 222, a suit was brought against the railway company for striking with one of its trains a wagon containing the corpse of a child and throwing it to the ground. On the subject of the right of the father in regard to the corpse of his child, after citing various authorities, it is said: "We therefore conclude that the great weight of authority sustains the rule that there is a legal right in the bodies of the dead, which the courts will recognize and protect by the proper action, as the case may be." The recovery was denied on the ground that the petition did not allege any injury to the corpse. It was said that if the child had been alive, and was simply thrown down, but not hurt, there could have been no recovery, and that a like rule would be applied by analogy to its body. See, also, Perley on Mortuary Law, 103.

Apparently conflicting with these various adjudications, in Griffith v. R. Co., 23 S. C. 25, 55 Am. Rep. 1, it was held that "an administrator has no property in the cadaver of his intestate, and therefore cannot maintain an action for its willful and negligent mutilation, but he may sue for injury to the wearing apparel of the deceased." In that case a man was murdered, and his corpse placed on a railroad track to conceal the crime, and it was run over and mutilated by the trains. It also involved the review of a reversal by the judge of a referee's report, on the ground that the alleged negligence had not been proved. The direct ruling on the subject of property rights in regard to a dead body was that the administrator had no such right. This was said to be "the precise point before us; i. e., the rights of the administrator" under the statute of South Carolina. In the course of the decision Simpson, C. J., makes use of the following language: "But can there not be a qualified property in the dead—one which gives control to some one, with the view to protection, to decent interment, and to undisturbed repose, while they are dissolving and returning to the dust from which they were created? Can it be that there is no legal guardianship of the dead, and that, when the life escapes, the body is left, so far as the law is concerned, without protection, even from wanton and malicious depredation, and that those to whom it was bound in life by the tenderest of ties can invoke the aid of no court in preventing its mutilation? And must they resort to violence and force for this purpose? If such be the fact, it is a reproach to our judicial system, and one which calls earnestly for legislative interposition. And yet such seems to be the fact, at least the matter is left in great doubt, so far as our limited examination of the cases, both in this country and in England, amid the press of our duties, has enabled us to ascertain. Certainly the administrator has no legal control or authority over the dead body of the person upon whose estate he has administered." We cannot concur in this language as applicable to a husband or wife under the law of Georgia. The principle that for every right there shall be a remedy has been embodied in our Code and adopted as statute law (Civ. Code 1895, § 4829), although it was, long before the adoption of our Code, announced by distinguished jurists. Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 240, 14 Am. Rep. 667, supra.

In the present case it is not necessary to enter into a discussion as to whether the de-

fendant could have been compelled or not to receive this corpse for transportation, or on what agreement. The plaintiff alleges that the defendant did receive it and agreed to transport it for hire. Nor is it necessary to discuss the difference between carriers and common carriers, or the question whether railroad companies are generally common carriers of corpses, argued in the brief of counsel for plaintiff in error. The declaration in effect alleged that the plaintiff delivered the body of her husband to the defendant, a common carrier, to be carried from Atlanta to Warrenton, where it was to be buried; that she notified the defendant of this intention, and offered to pay for transportation between the two places; that defendant's agent at Atlanta refused to sell her transportation further than Camak, a junction on its road, but informed her that the body would be carried by the defendant, and that she could buy transportation from Camak to Warrenton; that she paid the transportation to Camak; and that defendant agreed to transport the body from Atlanta to Warrenton, and accepted pay therefor. Under these allegations, it will be seen that it was not in contemplation either of the plaintiff or of the defendant that there should be a final delivery or removal of the body, with its accompanying coffin and shroud, at this junction, but its temporary stop there was merely to await the defendant's other train to the place of destination. It was not the intention of either party that the body should merely be shipped to Camak, and there stopped. Fairly construed, the allegations of the declaration mean that the body was to be transported from Atlanta to Warrenton, that both parties so understood and agreed, that as a part of the through transportation between these two points payment was made to the junction, and that payment was to be made from that point on to Warrenton. At Camak, the point of junction, therefore, the depositing of the coffin upon the defendant's platform did not constitute a final delivery to the plaintiff which would exempt the defendant from all further duty or liability. Plaintiff alleges that she offered to pay the entire transportation, and there is nothing to indicate that she was not ready to pay the second part of it, or that any act on her part changed the duty of the defendant. It certainly cannot be said by the defendant company that a corpse is sufficiently property for a railroad company to receive and accept pay for its transportation, but is not sufficiently property to authorize a recovery for a breach of duty arising therefrom, or to prevent any duty from arising under such circumstances. If it received this body to be transported for hire, it was bound to discharge the duties arising from so doing, and for a failure to do so would be liable to an action. We do not know what facts the evidence may establish upon the trial, but we hold that, under the allegations of the declaration, which, as against a demurrer, are to be taken as true, a cause of action was set out. Civ. Code 1895, § 2279. Not only negligence, but gross negligence, is alleged.

The demurrer, being general, and not special, does not raise the direct question as to the measure of damages, or the extent to which there may be a recovery, if one is had. We will, therefore, not discuss the measure of damages further than to say that this case does not fall within the ruling in Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, where it was sought to recover from a telegraph company damages on account of mental pain and suffering alone, alleged to have resulted to the plaintiff from failure of the company to deliver a message in due time. Here the action is for a tort, and there is an allegation of actual pecuniary damage to the coffin and shroud, and of injury to the body. So that, as to this point, the case is quite similar to those of Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759, and Jacobus v. Congregation of the Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141, supra.

Judgment affirmed. All the Justices concur, except CANDLER, J., absent.

(122 Ga. 110)

SMITH et al. v. HIGHTOWER.

(Supreme Court of Georgia. May 15, 1905.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

This case falls within the rule repeatedly announced by this court, that, where it does not affirmatively appear that the verdict was demanded under the law and the evidence, the grant of a first new trial will not be disturbed, though based on a specified ground of the motion, whether such ground was meritorious or not. Elliott v. McCalla (Ga.) 50 S. E. 960.

(Syllabus by the Court.)

Error from City Court of La Grange; F. M. Longley, Judge.

Action between Alice Smith and others and M. H. Hightower. From an order granting a new trial, Smith and others bring error. Affirmed.

D. J. Gaffney, for plaintiffs in error. F. P. Longley and Isaac Jackson, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur, except CANDLER, J., absent.

(122 Ga. 330)

WHITE v. YOUNG.

(Supreme Court of Georgia. May 11, 1905.)

1. POWER OF ATTORNEY—CONSTRUCTION—AUTHORITY THEREUNDER.

A formal power of attorney, executed with deliberation, is subject to a strict construction. General terms in it are restricted to consistency with the controlling purpose, and will not extend the authority so as to add new and dis-

tinct powers different from the special powers expressly delegated.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 844.]

2. SAME—POWERS.

A written power authorising an attorney in fact to enter upon certain described land, to claim and demand possession thereof, to institute such suits as to the attorney should seem proper for the recovery of such land, and, if necessary, to employ counsel to prosecute such suits, does not include the power to employ counsel to defend suits brought by other parties to recover the land after possession of it had been obtained, or to institute a proceeding to enjoin certain persons from trespassing on the land.

3. SAME.

This is true although the power of attorney may contain the general expression, "and generally to do such acts and things as my said attorney deems necessary in the premises, ratifying whatever my said attorney may lawfully do in the premises."

(Syllabus by the Court.)

Error from Superior Court, Rabun County; D. M. Roberts, Judge.

Action by B. A. Young against S. E. White. Judgment for plaintiff, and defendant brings error. Reversed.

W. D. Young brought suit against Sarah E. White on an open account containing a number of items. Some of them were for amounts paid to an attorney for defending titles to certain land and for a fee and expenses for instituting proceedings to enjoin parties from trespassing on the land. The plaintiff recovered a verdict against the defendant. The latter moved for a new trial. The presiding judge refused it upon condition that the plaintiff should write off a portion of the verdict, which was done, and the defendant excepted.

J. C. Edwards, Payne & Tye, and Winfield Jones, for plaintiff in error. Robt. McMillan, for defendant in error.

LUMPKIN, J. (after stating the above facts). The brief of evidence in this case is not clear, nor is it easy to determine how the presiding judge arrived at the amount which he required to be written off from the verdict. It is evident, however, that the right to incur at least a portion of the expenses claimed by the plaintiff in the account depended upon a power of attorney given by the defendant to W. D. Young on September 5, 1883, which contained the following provisions: "I, Sarah E. White, of the city and state New York, have made and constituted and appointed and by these presents do make, constitute and appoint W. D. Young, of the county of Rabun and state of Georgia, my sufficient attorney for me and in my name to enter upon certain lots of land [describing them], and possession of the same to claim and demand for me in my name. To institute such actions as to my said attorney shall seem proper for the recovery of said lands, if necessary to employ counsel to prosecute the same, and generally to do all such other acts and things as my said attorney deems necessary in the premises hereby ratifying whatever my said attorney may lawfully do in the premises." This was a formal power of attorney, apparently deliberately executed, attested, and recorded. It will therefore be strictly construed and in view of the controlling purpose, and the addition of general words will not be construed to extend the authority so as to add new and distinct powers different from those expressly delegated. Claflin v. Continental Works, 85 Ga. 42, 11 S. E. 721, and authorities cited; Born v. Simmons, 111 Ga. 869, 36 S. E. 956. Power to the agent to recover possession of certain property, to institute suits therefor, if necessary, and to employ counsel to prosecute the same, contemplates a recovery of property not in the possession of the maker of the power. After recovery has been had, such a power of attorney does not continue indefinitely of force so as to authorize the attorney in fact to defend a suit which may at some future time be brought by others seeking to recover the land, or for the purpose of enjoining persons who may in the future trespass upon it, and to incur expenses and employ an attorney in such suits. It appears that the presiding judge charged the jury as follows: "I charge you that an agent who has discharged his duty is entitled to his commission (but in this case the parties are not suing for commission), and all necessary expenses incurred about the business of his principal. If he has violated his engagement, he is not entitled to commission, though it is not contended in this case that the agent has violated his engagement." This appears to be good abstract law, but it is not well to charge the jury about matters which are not in the case; and, if a contention is in fact in a case, it is erroneous to charge that it is not. Some of the items in the account other than those mentioned may not have been very clearly shown by the evidence, but, as a new trial is to be had, it is unnecessary to rule further than as set forth above.

Judgment reversed. All the Justices concur, except CANDLER, J., absent.

(123 Ga. 106)

ATLANTA & W. P. R. CO. v. HUDSON.

(Supreme Court of Georgia. May 15, 1905.)

1. NEGLIGENCE—QUESTION FOR JURY.

Except where a particular act is declared to be negligence, either by statute or by a valid municipal ordinance, the question as to what acts do or do not constitute negligence is for determination by the jury, and it is error for the presiding judge to instruct them what ordinary care requires should be done in a particular case.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 279, 858.]

2. TRIAL—INSTRUCTIONS.

Language used by the Supreme Court in deciding a case before it, especially where used in discussing the facts of such case, is often

inappropriate for use by the judge of a trial court in charging the jury.

3. RAILROADS—KILLING STOCK.

In an action against a railroad company for the killing of cattle, it was error for the presiding judge to instruct the jury that if they should find, from the evidence, that the defendant "did use all the means at its command, after the cattle were discovered on the track, or so near thereto as the court has already charged you, and exercised all ordinary care and reasonable diligence to prevent the train from running over the cattle," the presumption arising from proof of killing the cattle would be rebutted. The requirement that the company should use "all the means at its command" was more stringent than the law provides.

(Syllabus by the Court.)

Error from City Court of La Grange; D. J. Gaffney, Judge pro hac.

Action by A. C. Hudson against the Atlanta & West Point Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hudson brought suit against the Atlanta & West Point Railroad Company, seeking to recover for the killing and injury of certain cattle alleged to have been struck by one of its trains. It is unnecessary to set out the evidence. The jury found for the plaintiff. The defendant moved for a new trial, and, upon its being denied, excepted.

Dorsey, Brewster & Howell and O. H. Thompson, for plaintiff in error. J. R. Terrell and F. P. Longley, for defendant in error.

LUMPKIN, J. (after stating the facts). 1, 2. Several charges of the court were alleged as error, on the ground that they undertook to instruct the jury what acts ordinary care required the employés of the company to do. In one instance he charged as follows: "You will look to all these questions under the evidence in this case to determine the truth of the same for yourselves, for the law imposes the duty on the railroad company to maintain a lookout to discover cattle on its track, to stop its train as soon as cattle appear upon its track, or in the act of approaching it, or so near to the same that a slight change of position by them would result in their destruction or injury." This was error. "In the trial of an action in a court of this state for a negligent tort, it is error for the court to tell the jury what facts do or do not constitute negligence, unless there is a statute or valid municipal ordinance which in terms or in effect declares the act referred to to be negligence." Savannah, Florida & Western Ry. Co. v. Evans, 115 Ga. 315, 316, 41 S. E. 631, 90 Am. St. Rep. 116.

That the Supreme Court may employ certain language in discussing a case, especially in regard to the facts under consideration, does not necessarily render such language proper for use by the judge of a trial court in charging a jury. A justice of the Supreme Court, in giving reasons for a judgment rendered, often uses argumentative language which would be wholly inappropriate for use in a charge by a judge of a trial court. There is no prohibition of law against an expression of opinion on the facts of the case by the Supreme Court. There is a direct prohibition as to an expression of such an opinion by a trial judge in his charge. Civ. Code 1895, § 4334. The presiding judge gave to the jury as propositions of law substantially certain statements which were made in opinions of this court in discussing the facts of cases then before it. East Tenn. Railway Co. v. Burney, 85 Ga. 636, 11 S. E. 1028; Central of Ga. Ry. Co. v. Ross, 107 Ga. 75, 32 S. E. 904; Atlantic Coast Line R. Co. v. Williams, 120 Ga. 1046, 1047, 48 S. E. 404. What was said in those decisions was in connection with the question of whether the verdicts were sustained by the evidence and whether there was in fact evidence of negligence. The difference between such discussion and legal propositions suitable for a charge is obvious. The trial judge should not tell the jury what acts would constitute negligence and what would not, but should instruct them as to the proper measure of diligence and leave them to determine, in view of all the evidence bearing on the subject as to the time, place, circumstances, and happenings, and the whole transaction as disclosed by the evidence, as to whether there was or was not a want of due care. Central of Ga. Ry. Co. v. McKinney, 118 Ga. 535, 45 S. E. 430; Calvin v. State, 118 Ga. 73, 44 S. E. 848; Savannah Ry. Co. v. Evans, 115 Ga. 315, 316, 41 S. E. 631, 90 Am. St. Rep. 116. There is no conflict between this ruling and that in W. & A. R. Co. v. Burnham, 50 S. E. 984. There is a wide difference between charging as to a duty imposed by law upon a carrier of passengers and telling the jury that it was the duty of the railroad to do certain specified acts to avoid injury to cattle along the road.

3. The measure of duty required of the employés of a railroad company in respect to stock along the line of its road is ordinary care. A charge which submitted to the jury to determine whether the defendant company "did use all the means at its command" declared too stringent a rule and was erroneous. See cases cited in Hopkins on Personal Injuries, §§ 121, 123.

Judgment reversed. All the Justices concur, except CANDLER, J., absent.

(123 Ga. 86)

WRIGHT v. HORNE.

(Supreme Court of Georgia. May 15, 1905.)

ACTION ON NOTE—PLEADING—AMENDMENT—SPECIAL JUDGMENT.

In an action in the superior court on a promissory note containing a waiver of homestead and exemption, the petition may be amended by alleging that prior to the institu-

tion of the suit the defendant was adjudged a bankrupt, that certain property has been set apart to him as an exemption by the trustee in bankruptcy, and that the plaintiff has not proved his debt in the court of bankruptcy, and by praying for a special judgment against such exempted property.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by M. K. Horne against T. K. Wright. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Odell and W. E. Mann, for plaintiff in error. J. M. Rudulph and W. C. Martin, for defendant in error.

FISH, P. J. On March 14, 1904, M. K. Horne brought an action against T. A. Wright, returnable to the April term thereafter of Whitfield superior court, on two promissory notes given by defendant to plaintiff, dated December 9, 1902, and due, respectively, December 15th and January 15th after date. The petition was framed in accordance with the form prescribed in section 3391 of the Code of 1882, except that it was paragraphed, and alleged that the notes contained a waiver by the defendant of the right to avail himself of the benefit of the homestead and exemption laws of this state, and that the plaintiff had served the defendant with the notice prescribed by the statute for the collection of attorney's fees. Defendant filed pleas of partial payment and set-off. At the October term the defendant moved to dismiss the case, on the ground "that the court had no jurisdiction of the party and subject-matter, it being admitted that the defendant had been adjudicated a bankrupt on the * * * day of October, 1903, under act of Congress relating to bankruptcy." Plaintiff then offered an amendment to his petition, to the effect that the defendant was adjudicated a bankrupt in October, 1903, and that subsequently an exemption under the laws of this state was set apart to him in specified property by the trustee in bankruptcy, and that plaintiff had never proved his debt evidenced by the notes in the court of bankruptcy. The amendment prayed for a judgment in rem against the exempted property. Defendant objected to the allowance of the amendment, on the following grounds: "(1) Because there was no suit in court of which the superior court of Whitfield county had jurisdiction of the person or subject-matter, and therefore nothing to amend by. (2) It was an effort to convert a suit at common law into an equitable action. (3) It undertook to convert an action in personam into an action in rem, and added a new cause of action." The amendment was allowed, over the objections, and the motion to dismiss the case was overruled. The case proceeded to trial, and a verdict was rendered for the plaintiff, after allowing defendant a portion of his counterclaim, the amount of the verdict to be made out of the exempted property, and a judgment was entered accordingly. Defendant excepted to the allowance of the amendment, to the refusal to dismiss the case, and to the judgment rendered.

The practice in this state as to the allowance of amendments is very liberal. "All parties, whether plaintiffs or defendants, in the superior or other courts, whether at law or in equity, may, at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by." Civ. Code 1895, § 5097. "A petition showing a plaintiff, and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. The jurisdiction of the court may be shown, and the details and circumstances of the particular transaction may be amplified and varied by amendment. If the declaration omit to allege facts, essential to raise the duty or obligation involved in the cause of action which was evidently originally intended to be declared upon, the omitted fact may be supplied by amendment." Civ. Code 1895, § 5098. The provisions of the Code for granting appropriate relief in all civil cases are equally comprehensive. "The superior courts of this state, on the trial of any civil case, shall give effect to all the rights of the parties, legal or equitable, or both, and apply on such trial remedies or relief, legal or equitable, or both, in favor of either party, such as the nature of the case may allow or require." Civ. Code 1895, § 4833. "Any person desiring to obtain equitable relief in the superior court, may, in a separate suit for that purpose, or in connection with a suit claiming only such remedies or relief as is administered in courts of common law, claim equitable relief by appropriate and sufficient pleadings, and obtain the equitable relief proper in the case." Civ. Code 1895, § 4834. "Any person claiming equitable relief may make all necessary parties to secure equitable relief, either at the beginning of his suit, or afterwards by amendment; and may make amendments in matter of form or substance." Civ. Code 1895, § 4835. The original petition showed a plaintiff and a defendant, alleged that the latter resided in Whitfield county, and sufficiently indicated and specified the two notes which defendant had given plaintiff, containing a waiver of homestead and exemption, and which were past due and unpaid, as the cause of action upon which the suit was based. It is clear, therefore, that the petition stated a cause of action and showed that the court to which the suit was brought had jurisdiction both of the defendant and the subject-matter of the action. It is equally obvious that it contained enough to amend by and to authorize all germane amendments. While the petition alleged that the defendant

had waived his right to avail himself of the homestead and exemption laws of the state, as against the notes sued on, it failed to allege that the defendant had been adjudged a bankrupt, and that an exemption in specified property had been set apart to him, under the laws of the state, by the trustee in bankruptcy. The allegation of such waiver indicated plaintiff's intention to rely upon and to enforce whatever right it gave him to subject defendant's property to the payment of the notes. The fact that defendant had been adjudged a bankrupt placed all his estate in the jurisdiction of the court of bankruptcy, to be there administered, so that none of it could be subjected to any judgment. Plaintiff might recover on the notes against the defendant bankrupt, except so much of it as was set apart to him by the trustee as an exemption. The title to such exempted property remained in the bankrupt defendant, and never passed to the trustee, and after it was set apart the court of bankruptcy had no power to administer it. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. The plaintiff, therefore, by reason of the defendant's waiver of the benefit of exemption, had the right to subject the property set apart as an exemption by the trustee, provided a judgment for that purpose could be obtained before the defendant was discharged in bankruptcy. In order that he might recover such a judgment, the plaintiff offered the amendment to his petition. The suit was in the superior court, which, as we have seen, the statute declares shall, on the trial of any civil cause, give effect to all the rights of the parties, legal or equitable, or both, and apply such remedies, legal or equitable, or both, as the nature of the case may allow or require, and where a party desiring to obtain equitable relief in connection with a suit claiming only such remedy or relief as is administered in courts of common law may claim and obtain such equitable relief as is proper in the case, by appropriate and sufficient pleadings, and for such purpose may make all necessary and appropriate amendments, both in matter and form. In view of these provisions of our Code, we are of opinion that there was no merit in the objections to the amendment based on the grounds that it sought to convert a suit at law into one in equity, and an action in personam into one in rem, and that it added a new and distinct cause of action to the petition. "Relatively to the law of pleading, a cause of action is some particular legal duty of the defendant to the plaintiff, together with some definite breach of that duty which occasions loss or damage;" or, from the standpoint of rights, "relatively to the law of pleading, a cause of action is some particular legal right of the plaintiff against the defendant, together with some definite violation thereof which occasions loss or damage." Ellison v. Ga. R. Co., 87 Ga. 699, 670, 13 S. E. 809; City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318. See, also, Western & Atlantic R. Co. v. Burnham (Ga.) 50 S. E. 984. The cause of action set out in the petition in the present case was the duty of the defendant to pay the plaintiff the amount due on the notes set out in the petition in accordance with their tenor, together with a breach of that duty by the defendant, by his failure to pay the notes when due, and the resulting damage to the plaintiff. The amendment did not change this cause of action. It merely set forth additional facts going to show that, notwithstanding the defendant had been adjudged a bankrupt, there was certain property of his which, owing to its having been set apart under the laws of this state to him by the trustee in bankruptcy as an exemption, was beyond the jurisdiction of the bankrupt court, and which, by virtue of the waiver of homestead and exemption contained in the notes sued on and the fact that the plaintiff had not proved the debt in the bankrupt court, was subject to the payment of the plaintiff's claim under a proper judgment, and prayed, in view of the additional facts alleged, for such a judgment so subjecting this particular property. It seems to us obvious that the amendment did not set forth a new and distinct cause of action, but merely sought a different judgment upon the same cause of action.

Counsel for plaintiff in error cited Long v. Bullard, 59 Ga. 855, wherein it was held: "Complainant upon a promissory note, in the statutory form, cannot be amended by adding counts setting up that plaintiff held title to certain property as security for the payment of the debt sued on, and therefore praying that such property might be sold, the note sued on paid out of the proceeds, and the surplus turned over to the defendants. The cause of action thus set up is new, and a new judgment is prayed." Also Broach v. Kelly, 66 Ga. 148, wherein a similar ruling was made. It is sufficient to say that those decisions were rendered prior to the passage of the acts of 1885 and 1887, the provisions of which are codified in sections 4834, 4835, and 4833 of the Civil Code of 1895, which we have quoted, and prior, also, to the adoption of section 5098. Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S. E. 150, and Hudson v. Lamar Drug Co., 121 Ga. 835, 49 S. E. 735, were also cited by counsel for plaintiff in error. It was held in these cases that pending the bankruptcy proceedings the holder of a note containing a waiver of homestead has no remedy at law, but must enforce his rights arising from the waiver in a court of equity. The latter case was brought in a city court, which had no equitable jurisdiction, and in the former case it was held, in effect, that under the facts an equitable petition for receiver, etc., could be maintained, because the petitioner had no adequate remedy at law. The question of amendment was not involved in either of the cases. As the

amendment in the present case was properly allowed, the court rightly overruled the motion to dismiss the case.

Judgment affirmed. All the Justices concur, except CANDLER, J., absent.

(123 Ga. 110)

THOMPSON v. HAYS.

(Supreme Court of Georgia. May 15, 1905.)

1. BILL OF EXCEPTIONS—CERTIFICATE.

Where a certificate to a bill of exceptions is undated, it will be presumed that an acknowledgment of service appearing on the bill of exceptions was made after the bill of exceptions was certified by the judge, and within 10 days thereof.

2. CONTINUANCE—GROUNDS.

Even if, in a case at law, the judge has a discretion to continue a case more than one time for any cause at the instance of the same party, it would have been an abuse of discretion to have granted a continuance in the present case, and it was, therefore, error to sustain a ground of a motion for a new trial assigning error upon the refusal to grant the continuance.

(Syllabus by the Court.)

Error from City Court of Carrollton; W. C. Hodnett, Judge.

Action by T. J. Thompson against J. N. Hays. Verdict for plaintiff. From an order granting a new trial, plaintiff brings error. Reversed.

Thompson sued Hays in the city court of Carrollton for a breach of contract. A verdict was had in favor of the plaintiff. The defendant sued out a certiorari, which was sustained. The plaintiff in certiorari excepted, and the judgment was affirmed in this court. Thompson v. Hays, 119 Ga. 167, 45 S. E. 970. The case was tried a second time in the city court, and again resulted in a verdict in favor of the plaintiff. The defendant filed a motion for a new trial, which was granted solely upon a ground complaining that the court erred in refusing to continue the case because of the nonreturn of interrogatories. This ground of the motion was, in substance, as follows: The defendant testified that he expected to prove by Weathers, the witness whose interrogatories had not been returned, that he was a partner with the defendant and made the contract with the plaintiff upon which the suit was brought; that the interrogatories were sued out while the witness was living in Clay county, Ala., and were executed, but an objection to their return was sustained by the court; that the witness afterwards moved to Birmingham, Ala.; that defendant sent Weathers in Clay county, Ala., $5 to pay for the execution and return of the interrogatories the first time; that the motion for a continuance was not made for delay only; that the defendant expected the evidence at the next term, and could not go safely to trial without it; that he had no other witness by whom he could prove the same facts; and that the case had been once before continued at the defendant's instance on account of the nonreturn of interrogatories of another witness. The defendant's attorney stated in his place that when he learned that Weathers had left Clay county, Ala., and had gone to Birmingham, he notified counsel for the plaintiff; that plaintiff's counsel nominated two commissioners at Birmingham, one of whom was Mr. Washington; that he sent the interrogatories by mail to Mr. Washington, with the address of the witness, and requested him to execute the interrogatories in connection with the other commissioner; that no money was sent to Mr. Washington. Counsel for the plaintiff, by way of counter showing, stated in his place that a few days before he was in Birmingham and saw the witness, Weathers, and Mr. Washington; that Mr. Washington had the interrogatories, and showed him a letter from the defendant's counsel, in which he stated that he supposed the plaintiff would pay for the execution of the interrogatories; that Mr. Washington asked plaintiff's counsel what to do about executing the interrogatories, and he replied that he had nothing to do with it. The plaintiff excepted. The certificate to the bill of exceptions is undated, and a motion was made in this court to dismiss the writ of error upon the grounds that it does not affirmatively appear that the service of the bill of exceptions was made after the signing of the certificate by the presiding judge, nor that the service of the bill of exceptions was within 10 days after the bill of exceptions was signed.

E. S. Griffith and Jas. Beall, for plaintiff in error. W. F. Brown, for defendant in error.

COBB, J. 1. Both grounds of the motion to dismiss the writ of error are without merit. Porter v. Holmes (decided May 10, 1905) 50 S. E. 923; McCain v. Bonner (decided May 11) 51 S. E. 36.

2. The rule laid down in the Code in reference to a continuance for the nonreturn of interrogatories is as follows: "When a commission issues to examine a witness, it not having been returned shall be no cause for a continuance, unless the party seeking the continuance will make the same oath of the materiality of the testimony as in the case of an absent witness, and the party must show due diligence in suing out and having the same executed." Civ. Code 1895, § 5136. The showing in the present case seems to comply with the requirements of the law, except as to the diligence exercised by the defendant in securing the return of the interrogatories. We think it was fatally lacking at this point. It was certainly not an act of diligence to rely upon the opposite party to pay the fees of the commissioners, even though such commissioners were nominated by him. The law gives the right to the opposite party to select two commissioners, one of whom must act in the execution of the interrogatories; but we know of no

law which authorizes the party suing out the interrogatories to rely upon his adversary to pay the expenses of interrogatories taken out in his own behalf. Even if the judge has any discretion to grant a second continuance in a case at law, at the instance of the same party (Civ. Code 1895, § 5126), we think that the showing in this case was insufficient, and that the granting of a new trial, which was in effect the granting of a second continuance, was an abuse of discretion.

Judgment reversed. All the Justices concur, except CANDLER, J., absent.

(123 Ga. 72)

McKENZIE v. MITCHELL.

(Supreme Court of Georgia. May 15, 1905.)

1. CONTRACT — ACTION FOR BREACH — DAMAGES.

Expenses of litigation are not recoverable by the plaintiff in an action for damages for the mere breach of a contract, when it does not appear that such contract was entered into by the defendant in bad faith or procured by him by fraud or deceit.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 34.]

2. SAME—PLEADING—DEMURRER.

By a timely special demurrer, a defendant is entitled to the benefit of an itemized statement of damages claimed by the plaintiff in a lump sum, when it appears, from the plaintiff's allegations in reference thereto, that the sum claimed is made up of distinct and separate items.

3. SAME—DAMAGES.

"Any necessary expense which one of two contracting parties incurs in complying with the contract may be recovered as damages."

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 93.]

4. TRIAL—INSTRUCTIONS.

It is not error to refuse to charge the law applicable to a contention of a party, when there is no evidence to support such contention.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 596.]

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by P. L. Mitchell against W. M. McKenzie. Judgment for plaintiff, and defendant brings error. Reversed.

D. W. Blair, for plaintiff in error. Napier & Cox and J. E. Mozley, for defendant in error.

FISH, P. J. Mitchell brought an action against McKenzie for damages. The substance of the petition, so far as material to the questions presented for our consideration, was as follows: On June 12, 1901, McKenzie addressed the following letter to Mitchell: "Dear Sir: You having made settlement with the Marietta Guano Company this date, damage claim for $150, and believing firmly that you were not entitled to anything, I hereby make you the following proposition, namely: That we arrange with Judge Russell of Winder, Ga., to name a day that will be satisfactory with both of us to meet with him. You to present to him your contract and letters, and introduce such witnesses as you desire, to show wherein you have been damaged by the Marietta Guano Company. I to have the right to introduce the contract which you made with the Marietta Guano Company, or any letters that you may have written to them, or any witness that I think is relative to the case, to show that the Marietta Guano Company has not violated contract with you and subjected themselves to damages. And if Judge Russell decides under the evidence that you were entitled to more than $150, and whatever that amount should appear to be, I hereby agree to pay you 50 per cent. of said sum, and in consideration of said settlement above stated, I assume the said 50 per cent. of all damages claimed by you, and agree to raise no issue in said case except the question of direct liability between yourself and the Marietta Guano Company. W. M. McKenzie." On the same day, this proposition was accepted in writing by Mitchell, the acceptance being written upon the letter and immediately below McKenzie's signature. McKenzie was president of the Marietta Guano Company and a stockholder thereof. The foregoing agreement was made for the purpose of relieving the Guano Company from any further liability to Mitchell, and when it was made he did so relieve it. McKenzie, at the time this agreement was entered into, as president of the company, paid to Mitchell the $150 by giving him credit for that much on Mitchell's promissory note held by the company. In pursuance of the agreement a day was set at Winder for the hearing of the matter submitted to Judge Russell. McKenzie had notice of the time of such hearing, but failed to appear. Another day was subsequently set for the hearing of the matter at Monroe, of which McKenzie was duly notified, and he again failed to appear. The eleventh paragraph of the petition alleged: "That said W. M. McKenzie has acted in bad faith with your petitioner in declining to carry out his agreement of June 12, 1901, and thereby causing your petitioner the trouble of twice getting ready for said hearing, and caused him to go to Atlanta three times for the purpose of getting said McKenzie to a hearing, as agreed to by him, all to the damage of your petitioner in the sum of $20." The twelfth paragraph was as follows: "That said McKenzie has acted in bad faith with your petitioner, and is stubbornly litigious, and has caused petitioner unnecessary trouble, expense, and delay; that he has compelled him to employ counsel to bring this suit to recover his damages, and a reasonable attorney's fee in this case is $100; that petitioner's other expenses in attending the trial of this case and in getting ready for trial is $25." The defendant demurred to the eleventh paragraph "upon the ground that

the allegations therein made do not entitle the plaintiff to the recovery of any sum under said paragraph, and upon the further ground that there are no items of loss or damage alleged therein." The twelfth paragraph was demurred to upon the ground "that the allegations made in said paragraph do not authorize the recovery of any sum from defendant for counsel fees, expenses of attending trial, and getting ready for trial." The petition was then amended, the second paragraph of the amendment being as follows: "That in addition to the $20 set out as having been expended by plaintiff in preparing for the hearing of said arbitration as stated in paragraph 11 of the original petition, he has expended the further sum of $90.60 in getting ready for said arbitration, which defendant induced him to agree to, to wit, for his attorney's fee in attending hearing set at Winder by Judge Russell, $10; for expenses of said attorney in going to Winder and Atlanta, $20; for plaintiff's time lost in going to Winder and Atlanta, procuring testimony, etc., 13 days, at $2 per day, $26; for amount expended for horse and buggy, 6 days at $2 per day, $12; for amounts expended in railroad fare from Monroe to Atlanta and from Monroe to Winder and return, three trips to Atlanta and one to Winder, and one trip Monroe to Bethlehem and return, $12.60; for amount expended for hotel bills at Winder and Atlanta on said trips, $3.75; for amounts paid for telephone and telegram, 75 cents; and amounts paid witnesses' expenses for time lost, $6.50—a total of $90.60." The third paragraph of the amendment made these allegations: "That on account of having to make a second trip to Marietta to attend the trial of said case, which was continued by defendant, plaintiff will have to expend $20, in addition to the $25 named in paragraph 12 of the original petition, and asks $100 as reasonable attorney's fees as set [out] in said paragraph ($50 of which plaintiff has already had to expend), making a total damage and expenditure which plaintiff has been subjected to, in preparing for said arbitration and in suing for defendant's breach of contract to submit to same, of two hundred and thirty-five and $^{60}/_{100}$ dollars ($235.60)." The second paragraph of the amendment was demurred to as follows: Upon the ground "that it does not appear that any of said items were necessarily incurred in the preparation of said case for arbitration. Defendant demurs to all items charged as having been incurred at Winder, Atlanta, and Bethlehem as being unnecessary, and should not be charged against defendant." The third paragraph was demurred to on the ground that defendant was not liable for any of the matters therein alleged. All of these demurrers were overruled, and the defendant excepted. The case proceeded to trial, and a verdict was rendered in behalf of the plaintiff for $235.60, which included all of the items claimed by plaintiff in the eleventh and twelfth paragraphs of the petition as amended. The defendant excepted to the overruling of his motion for a new trial, and in the bill of exceptions assigned error upon the overruling of the demurrers to the petition.

1. Mitchell's attorney's fees for bringing the present action and his expenses in attending court thereon were clearly not recoverable, and the demurrer to the items embracing such attorney's fees and expenses should have been sustained. Edwards v. Kellogg, 121 Ga. 373, 49 S. E. 279; Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426. In the case last cited, it was held that the right to recover expenses of litigation in actions ex contractu "must be because of fraud, deceit, breach of trust, willful misappropriation of funds, or fraud in securing a contract or property thereunder. For expenses of litigation are not allowed for bad faith in refusing to pay, but where he 'has acted in bad faith' in the transaction and dealings out of which the cause of action arose." And again: "* * * If the original contract was made in good faith, if there is an ordinary breach, if the cause of action itself is not colored or poisoned by bad faith on the part of the defendant, he will not be mulcted with additional damages because he refuses to pay."

2. The special demurrer to the item of $20 set out in the eleventh paragraph of the original petition should have been sustained, as the defendant was entitled to an itemized statement of the amounts going to make up the $20. The amendment to this paragraph of the petition did not furnish the defendant with any further information as to the $20 claimed in the original petition. Nor do we think the expenses of Mitchell and his attorney in voluntarily going to Atlanta to induce McKenzie to comply with his agreement as to the submission were recoverable. Traders' Ins. Co. v. Mann, supra; Lampkin v. Garwood (Ga.) 50 S. E. 171.

3. The necessary expenses which Mitchell incurred in preparing for the hearings at Winder and Monroe were recoverable, if McKenzie arbitrarily or without sufficient cause failed to appear thereat. Of course, this was a question for the jury under the evidence. "Any necessary expense which one of two contracting parties incurs in complying with the contract may be recovered as damages." Civ. Code 1895, § 3806. And damages are recoverable for a breach of contract when they arise naturally and according to the usual course of things from such breach, and are such as the parties contemplated when the contract was made as the result of its breach. Civ. Code 1895, § 3799. The parties to the agreement of submission in the present case could fairly be said to have contemplated that they would each necessarily go to the expense of attending the hearings, of employing counsel to represent them at such hearings, and of securing the attendance of their witnesses. While some of the charges

for expenses set out in the amendment to the eleventh paragraph of the petition were not sufficiently itemized, there was no demurrer on this ground. The court, therefore, did not err in overruling the demurrer to the amendment to this paragraph.

4. What we have said above disposes of all of the grounds of the motion for a new trial except those relating to the refusal of the court to charge in reference to the contention of the defendant that the agreement to submit the matter to the decision of Judge Russell was without consideration. There was nothing in the evidence which tended to sustain such a contention, and there was, therefore, no error in declining to charge the jury thereon, even if the written requests were otherwise unobjectionable. The agreement itself showed a valid and sufficient consideration, to wit, the settlement of Mitchell's claim for damages against the Marietta Guano Company at and for the sum of $150, and in the writing McKenzie expressly declared that "in consideration of said settlement above stated" he assumed 50 per cent. of all damages found by Judge Russell in Mitchell's favor, in the event such damages should exceed $150. The evidence showed that the claim of Mitchell against the Marietta Guano Company had been settled in accordance with the agreement by McKenzie, as the president of such company, crediting Mitchell with $150 on a note given by him to the company, and Mitchell receipting the company in full for such claim. There was no evidence tending to show that the agreement was without consideration, or that the consideration was otherwise than as expressed therein.

Judgment reversed. All the Justices concur, except CANDLER, J., absent.

(122 Ga. 342)

McCAIN et al. v. BONNER.

(Supreme Court of Georgia. May 11, 1905.)

1. BILL OF EXCEPTIONS—WRIT OF ERROR.
Where the judge's certificate to a bill of exceptions bears a given date, and the acknowledgment of "due and legal service" of the bill of exceptions appears to have been signed on the same date, on which day the bill of exceptions was filed in the office of the clerk, the presumption is that the different steps taken in having the certificate signed, service acknowledged, and the bill of exceptions filed were in their proper chronological sequence.

2. WRIT OF ERROR—DISMISSAL.
That one of the assignments of error in a bill of exceptions cannot be considered by this court, because exception to the ruling thereby complained of was not taken in time, affords no ground for dismissing the writ of error, if there be another assignment of error in the bill of exceptions, upon which the court can properly pass.

3. CONSTABLE—ACTION ON BOND.
Suit upon the bond of a constable may be brought in the name of any person aggrieved by the official misconduct of the officer, against him and his sureties, without bringing against him any preliminary action to settle his liability to the aggrieved party for his alleged misconduct.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 388.]

4. DISTRESS—AFFIDAVIT—VERIFICATION.
When a person wishing to sue out a distress warrant prepares the necessary papers, takes them to a magistrate—explaining their character and reading over to him the affidavit on which the distress warrant is based, which affidavit the former has already signed—and he at the same time states to the magistrate that he will swear to the facts recited in the affidavit, and requests the magistrate to sign the jurat, which he immediately does, with the understanding that the affiant's intention is to swear to the truth of the facts as stated in the affidavit, and returns the papers to the affiant, properly attested, neither the affiant nor any third person can afterwards be heard to assert that the distress warrant is void because not based on an affidavit made by a person to whom an oath was legally administered. Though the affiant may have done all of the talking, and the magistrate may not, in terms, have called upon him to declare on his oath that the facts recited in the affidavit were true, yet the concurrence of present act and intent on the part of both was the fair equivalent of a formal oath solemnly administered by the magistrate, and consciously and with equal solemnity taken by the affiant.

(Syllabus by the Court.)

Error from City Court of Carrollton; W. C. Hodnett, Judge.

Action by L. G. Bonner against J. R. McCain and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Sidney Holderness, for plaintiffs in error. W. T. Brown, for defendant in error.

EVANS, J. This was a suit upon the official bond of a constable. The bond recited that J. R. McCain had been elected constable of the 1152d district of Carroll county, and was conditioned upon the faithful performance of his duties as constable for that district. The bond was payable to the ordinary, and in all respects complied with the statutory requirements. The breach alleged was that on the 3d day of October, 1902, the plaintiff sued out before W. H. Rowe, notary public, and ex officio justice of the peace for the 1152d district, a distress warrant against W. T. Phillips for the principal sum of $150, which warrant was levied by the constable on December 4, 1902, upon the crop on the place described in the warrant as the property of Phillips, which property was sufficient to more than pay the amount claimed in the distress warrant; that, instead of delivering the warrant, with a return of the property levied on, to the sheriff of the county, or his deputy, as required by law, the constable surrendered the property to Phillips upon his executing and delivering to the constable some instrument in writing not authorized by law; and that the constable still fails and refuses to deliver the distress warrant, together with a return of the property levied on, to the sheriff of the county, or his deputy, and fails and refuses to pay plaintiff the amount due on the distress warrant. The defendants demurred to the dec-

laration on the ground that suit was instituted in the name of the plaintiff, who had no right of action on the bond, and because the sureties were sued in the same action with the principal. The court overruled the demurrer, and the defendants filed exceptions pendente lite. The case went to trial, and the jury returned a verdict for the defendants. The plaintiff made a motion for a new trial, which was called for a hearing on November 4, 1904, at which time the defendants moved to dismiss the motion for a new trial on the ground that the evidence had not been briefed as required by the statute. The court declined to dismiss the motion for a new trial, heard argument thereon, and reserved his decision upon it till December 5, 1904, when he rendered a judgment granting a new trial. Defendants sued out a bill of exceptions, in which error is assigned upon the overruling of their demurrer, upon the refusal of the court to sustain their motion to dismiss the motion for a new trial, and upon the judgment granting a new trial.

1. On the call of the case in this court, the defendant in error moved to dismiss the writ of error because it did not affirmatively appear that service of the bill of exceptions was made after the signing of the certificate of the presiding judge. The date of the certificate, the date of the acknowledgment of "due and legal service" of the bill of exceptions, and the date of its filing in the clerk's office are the same—December 24, 1904. This being true, the presumption is that the different steps taken in having the certificate signed, service acknowledged, and the bill of exceptions filed were in their proper chronological sequence. Porter v. Holmes (Ga.) 50 S. E. 923. Accordingly, the writ of error will not be dismissed.

2. The defendant in error also moved to dismiss the writ of error on the ground that it did not appear that the bill of exceptions was tendered to the judge within 30 days of the date of the "decision" complained of. As has been stated, the defendants below assign error upon three distinct rulings or decisions. The complaint of the judgment granting a new trial is certainly in time, for that judgment was rendered on December 5, 1904, and the bill of exceptions was certified on December 24, 1904. The right to assign error on the overruling of defendants' demurrer was preserved by filing exceptions pendente lite. The exception taken to the refusal of the judge to dismiss the motion for a new trial is not in time; this decision having been rendered on November 4th, and the bill of exceptions having been sued out after the date of the judgment granting a new trial, rendered on December 5th. But this fact affords no ground for dismissing the writ of error. The exceptions made in time will be considered and passed on, while that which came too late will be ignored. Dodson Co. v. Harris, 114 Ga. 966, 41 S. E. 54.

3. As to the defendants' demurrer, we think it was properly overruled. Pol. Code 1895, § 12, expressly provides that, upon all bonds taken from public officers, suit may be brought "by any person aggrieved by the official misconduct of the officer, in his own name, in any court having jurisdiction thereof, without any order for that purpose." A constable is a public officer who is required by law to give bond conditioned on the faithful performance of his duties. Civ. Code 1895, § 4094. And if he commits a breach thereof, he and the sureties on his bond may be sued; no preliminary suit against him being requisite to entitle the aggrieved party to sue on the bond. Jefferson v. Hartley, 81 Ga. 716, 9 S. E. 174.

4. As this was the first grant of a new trial, the question arises whether the verdict was demanded by the evidence, for, if it was not, the discretion exercised by the trial judge is not to be interfered with. Civ. Code 1895, § 5585. The contention upon which the defendants practically rested their defense was that the distress warrant amounted to no more than void process, inasmuch as the attorney for the plaintiff, who signed the affidavit upon which the distress warrant was based, was not sworn, and took no oath before the magistrate who issued it. The evidence touching this issue was conflicting. The magistrate, who appeared as a witness in behalf of the defendants, testified that he did not know the character of the paper he was called on to sign; that he administered no oath to the attorney for the plaintiff, nor did this attorney undertake to swear to the truth of the statements of fact upon which the distress warrant was issued, though he had previously signed the accompanying affidavit. On the other hand, the attorney for the plaintiff testified as follows: "I did swear to that affidavit to get that distress warrant before Squire Rowe. I signed it and carried it down there and read it over to him, and told him what it was, and said I wanted to make an oath to it." "It is not true that I went to Squire Rowe, a newly elected justice of the peace, having little experience, * * * and said, 'Here, Squire, sign your name here and here,' and that I took the paper and shoved it down in my pocket without him knowing what it was. He swore me, and I told him I prepared the paper. * * * I read it over to him. I told him what it was." "I told Squire Rowe there was a distress warrant, and what it was about. My recollection is, and I am pretty sure, I read the first part of it. I told him it was an affidavit; would swear to the facts in it; was a distress warrant for the Phillips' crop. * * * I told him I would swear to the facts in that affidavit. He signed the paper. I told him what the other part was. Don't think I read that to him. I told him it was necessary to have his signature there." "Just as I said awhile ago,

there was a distress warrant to be levied on Mr. Phillips' crop, and I read over the first part of it to him, and told him I would swear to the facts; and my recollection is that I had already signed it up there at home. I told him I would swear to the facts in it. I don't know that he asked me if I would swear to it, but I told him I would swear to them as set out."

The jury rendered a verdict for the defendants on the plea that the distress warrant was void because no oath was administered to the person upon whose alleged affidavit the distress warrant issued. Before a distress warrant can issue, the person claiming the rent, or his agent or attorney, must make oath in writing as to the amount claimed to be due. Civ. Code 1895, § 4818. The mere handing to an officer authorized to administer oaths of an affidavit previously signed by one who is recited therein as having been duly sworn, and in whose presence the officer signed the jurat without administering a formal oath, has been held not to amount to the administration of an oath. O'Reilly v. People, 86 N. Y. 154, 40 Am. Rep. 525. In a transaction of this character there is no unequivocal and present declaration or act on the part of the affiant by which he consciously takes upon himself the obligation of an oath. If, however, the affiant, at the time of tendering the affidavit to the officer, uses language signifying that he consciously takes upon himself the obligation of an oath, and the officer so understands, and immediately signs the jurat, this will amount to such a concurrence of act and intention as will constitute a legal swearing. The acts of the officer and of the affiant must be concurrent, and must conclusively indicate that it was the purpose of the one to administer and the other to take the oath, in order to make a valid affidavit. When an affiant presents to the officer an affidavit previously signed by him, with the statement that he is familiar with its contents, that what is therein contained is true, and that he swears to the same, and the officer immediately, on the faith of such declaration, affixes his official signature to the jurat, this conduct would not only indicate that the affiant understood he was taking an oath, but also that the officer likewise so understood, and, by presently signing the jurat, evidenced his intention to administer an oath. It is not necessary that the oath administered should be formal. What the law requires is that "there must be, in the presence of the officer, something done whereby the person to be bound consciously takes upon himself the obligation of an oath." 2 Bish. Cr. Law, § 1018. "It is not essential * * * that affiant should hold up his hand and swear, in order to make his act an oath, but it is sufficient if both affiant and the officer understand that what is done is all that is necessary to complete the act of swearing." 2 Cyc. 16. The record discloses testimony from which a jury might well conclude that both the magistrate and the affiant understood that an oath was being administered and taken. There was evidence from which the contrary inference might be drawn, but this was purely an issue of fact. The evidence did not demand a finding either way.

What has been said above does not conflict with the case of Matthews v. Reid, 94 Ga. 461, 19 S. E. 247. There the officer did not attest the affidavit till long afterwards, and it did not appear that he heard the affiant when he said he wanted to swear to the paper, and that the facts stated in it were true. The officer did no present and concurrent act with the affiant which showed that both understood an oath was being administered, and on the trial testified he had no recollection whatever of being called on at the time to do anything in connection with the paper.

Judgment affirmed. All the Justices concur, except CANDLER, J., absent.

(122 Ga. 692)

ATLANTA SAV. BANK v. DOWNING et al.

(Supreme Court of Georgia. May 10, 1905.)

INSURANCE—SURRENDER OF POLICY—RIGHTS TO PROCEEDS—INTERVENTION.

Under the facts of this case, there was no error in directing the verdict complained of.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Petition by the Mutual Life Insurance Company of New York for an order requiring the Atlanta Savings Bank, C. Downing, and Jacob L. Beach to intervene. From an order for the payment of the sum in issue to Downing, the savings bank brings error. Affirmed.

This case arose on a petition filed by the Mutual Life Insurance Company of New York, praying leave to pay into court the sum of $170, and for an order requiring the Atlanta Savings Bank, C. Downing, and Jacob L. Beach to interplead and have adjudicated their respective claims to this fund. An order was entered requiring these parties to interplead, and upon the hearing the following facts appeared: The Mutual Life Insurance Company issued certain policies upon the life of J. L. Beach. Beach became indebted to Downing, and assigned these policies to him as security for the debt. The policies had a cash surrender value, and it was subsequently agreed that they should be surrendered and the amount due Downing paid. On November 1, 1900, Downing wrote to the general agent of the insurance company at Atlanta, stating that he had directed that the Beach policies be forwarded to the agent; that Beach appeared to be in need of money, and had asked the writer to sell the policies to the company, pay himself, and

turn over the balance to Beach. The letter then proceeds as follows: "If the surrender value will pay this to me and $300, or more or less, be left over, I am willing to sell and you may fix up papers for signature and I will sign same. You will probably want Mr. Beach and Mrs. Beach's relinquishment also, which you can get from them." The agent of the company replied to this letter, acknowledging receipt of the policies, and stating that proper papers for surrendering them had been handed to Beach. It was also stated that the aggregate cash value of the policies was $680. On November 5th Downing wrote the agent, directing him to retain and pay on a note of Downing to the company the sum of $416.65, the amount of Beach's debt to him, and to pay over to Beach the sum remaining. This credit was, however, never given Downing on his note, and he subsequently took up the note with other funds. On November 10th, Downing wrote to the company's agent, stating that Beach seemed to be in need of money, but "I can't advance any more. If you can see your way to give him his part, taking full receipts therefor and have check drawn to order of cash, I would be glad you would do so." This was not done. The company sent from New York to its agent in Atlanta three checks, each of them made payable to C. A. Prellor, and by him indorsed so as to make them payable to the order of Jacob L. Beach, Jacob L. Beach, guardian, and C. Downing. The first check was for $170, and, when it arrived, Downing allowed Beach to retain the entire amount. When the second check for $340 arrived, Beach was allowed by a representative of Downing to have $80 of the proceeds, while Downing received the balance. The third check, for $170, was delayed in its arrival. On November 23d, the last check not having then arrived, Beach applied to the Atlanta Savings Bank for a loan, offering his interest in the policies as security. The bank inquired of the insurance company's agent as to the equity of Beach in the policies, and the agent either showed the bank or informed it of the substance of Downing's letter, in which he stated what was the extent of his interest in the policies. Upon receiving this information, it appearing therefrom that Beach's interest was greater than the amount of the loan applied for, the bank loaned to Beach $102.50, and took an order on the agent of the company, signed by Beach and his wife, directing him to hold the check or checks of the company in settlement of the cash surrender value of the policies until indorsed in his office and until the bank paid the amount of its loan to Beach. When the third check arrived, on December 5th, the agent of the company turned it over to the bank. Downing refused to indorse the check, and claimed that he was entitled to payment out of it of the balance of his debt. The bank contended that it had a right to collect the check and reimburse itself. The judge directed a verdict in favor of Downing, and the bank excepted.

Brown & Randolph, for plaintiff in error. W. E. Kay, King, Spalding & Little, and J. H. Gilbert, for defendants in error.

FISH, P. J. We are not concerned with any equities which may exist between Downing and the insurance company, or between that company and the bank. The question to be decided is whether the bank or Downing had a better claim to the fund, as between each other. It is clear that Downing had legal title to the policies by virtue of his assignment. Liverpool Ins. Co. v. Ellington, 94 Ga. 785, 21 S. E. 1006. Downing informed the insurance company what was the extent of his interest in the policies. He had a right to control the amount due on the policies, and to be first reimbursed therefrom. He, consequently, had a right to direct the company to retain the amount due him, or pay over that sum to him, before the balance of the amount due on the policies was paid to Beach. There is no suggestion in any of the letters from Downing to the insurance company that he was willing, under any circumstances, for Beach to be paid before he was reimbursed the amount of his debt. At the time the bank made the loan to Beach it was aware of Downing's statement as to the amount of his debt, and it also knew, or could easily have ascertained, what direction Downing had given to the insurance company as to its payment. Moreover, it knew that Downing had a right to give such direction to the company, inasmuch as it was aware of the assignment of the policies to him. This being so, it was the plain duty of the bank, before making the loan to Beach, to make inquiry of Downing to see if he had been paid. Knowing that Downing had legal title to the policies under his assignment, it knew that Beach could assign to it only such interest in the policies as he had after Downing was paid. Downing had priority. Until his debt was satisfied, the bank had no claim on the money due on the policies. It made the loan at its peril, without inquiring whether Downing's debt had been paid. Downing had no notice of the bank's claim until asked to indorse the check turned over to it by the agent of the insurance company. It was no concern of the bank that Downing permitted Beach to take his part of the fund out of the first checks sent. He was under no obligation to the bank to reimburse himself first. Downing was guilty of no fraud or misrepresentation to the bank, nor had he made any statement to the agent of the insurance company which would estop him from collecting his debt as against the bank. His mere statement as to the amount of his claim certainly could not have this effect.

There was but one fund in the hands of the insurance company due on the policies.

This was a lump sum which Beach and Downing were to divide in accordance with the private arrangement between them. Nor did the company undertake to divide the fund when it drew its checks. It treated it all the time as a lump sum due on the policies. The checks were made payable jointly to Beach and Downing, and were sent to Beach. The order given by the Beaches to the bank did not undertake to assign any particular fund or check, but directed the company to hold any check or checks until the bank had been paid. But even if the order be treated as an equitable assignment, there was no separate check payable to Beach. He had no right to direct the company to hold a check payable to himself jointly with Downing, nor did the company have a right to hold such a check on his order. The bank was chargeable with notice of these facts, and knew that, as against Downing, it had no right to receive the check, or to call on him to indorse it until he had himself been reimbursed. When Beach gave the bank the order, nearly his entire interest in the policies had been satisfied, and the bank could easily have ascertained this if inquiry had been made of Downing. Downing's equity was superior to the bank's, and there was no error in directing a verdict in his favor.

Judgment affirmed. All the Justices concur, except CANDLER, J., absent, and LUMPKIN, J., disqualified.

(138 N. C. 516)

NICHOLSON v. TRANSYLVANIA R. CO.

(Supreme Court of North Carolina. May 25, 1905.)

SERVANTS' INJURIES—FELLOW SERVANT ACT—CONSTRUCTION OF STATUTE—OPERATION OF RAILROAD.

The fellow servant act (Priv. Laws 1897, p. 83, c. 56, § 1), giving a servant of any railroad company "operating" in the state a right of action against the company for injuries sustained through the negligence of a fellow servant, is not applicable to an injury sustained by a servant assisting in the construction of a railroad at a point five or six miles from the completed track, and still further from the track on which trains were being operated.

Appeal from Superior Court, Jackson County; Ferguson, Judge.

Action by W. Nicholson against the Transylvania Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Geo. A. Shuford, W. A. Gash, Walter E. Moore, and Shepherd & Shepherd, for appellant. Coleman C. Cowan, for appellee.

CLARK, C. J. The evidence tended to show that the plaintiff was injured by the negligence of a fellow servant, and the defendant asked the court to charge that, if the jury should find such to be the fact, and "should further find from the evidence that the defendant, although a railroad corporation operating a railroad in this state, was not operating a railroad at the point where the plaintiff received his alleged injury, nor within a nearer distance to said point than five or six miles, and had laid no track at said point nor within said distance from said point, but was engaged in constructing a railroad at said point, and the plaintiff was employed at said time as a construction hand, and was engaged in the work of building a trestle at said point, and while so engaged was injured by the negligence of said fellow servant, then the plaintiff is not entitled to recover, and the jury will answer the third issue 'No.'" The refusal of this prayer was error. The "fellow servant act," unaccountably printed in Priv. Laws 1897, p. 83, c. 56, provides (section 1) "that any servant or employee of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any such employee who shall have suffered death, in the course of his services or employment with said company, by the negligence, carelessness or incompetency of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company"; and section 2 renders nugatory any waiver, express or implied, of the benefit of said act. The recent origin, and the reason of the rule exempting the master from liability for the negligence of a fellow servant were first discussed in this court in Hobbs v. Railroad, 107 N. C. 1, 12 S. E. 124, 9 L. R. A. 838, and attention was called to the fact that the rule had been abrogated as to railroad employés by statute in many states. After the passage in this state in 1897 of the above-cited statute abolishing the fellow servant doctrine as to railroad employés, the act was fully discussed, and its constitutionality sustained, in Hancock v. Railroad, 124 N. C. 222, 32 S. E. 679, Coley v. Railroad, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817, and in the same case on rehearing, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, and that ruling has been sustained in all the cases since; and similar statutes in other states have been held not in violation of the fourteenth amendment by several decisions of the United States Supreme Court. In Mott v. Railroad, 131 N. C. 237, 42 S. E. 601, it was sought to curtail and restrict the act so that it should apply only to railroad employés engaged in operating trains, but the court held to the contrary, and said: "The language of the statute is both comprehensive and explicit. It embraces injuries sustained by [quoting the act] 'any servant or employé of any railway company * * * in the course of his services or employment with said company.' The plaintiff was an employé, and was injured in the course of his service or employment." In that case the plaintiff, working in the

repair shops, was injured by the negligence of a fellow servant while removing a red-hot tire from an engine, and it was held that he could recover. The same ruling was repeated in Sigman v. Railroad, 135 N. C. 184, 47 S. E. 421, where it is said: "The plaintiff was injured by the negligence of a fellow servant while working upon and repairing a bridge of the defendant railroad. It is settled that the fellow servant law (chapter 56, p. 83, Priv. Laws 1897), applies to railroad employés injured in the course of their service or employment with such corporation, whether they are running trains or rendering any other service." Then, after quoting the above extract from Mott v. Railroad, 131 N. C. 237, 42 S. E. 601, it is added that to the same effect were "Railroad v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675, cited since with approval in Tullis v. Railroad, 175 U. S. 352, 20 Sup. Ct. 136, 44 L. Ed. 192; Railroad v. Harris, 33 Kan. 416, 6 Pac. 571; Railroad v. Koehler, 37 Kan. 463, 15 Pac. 567; Railroad v. Stahley, 62 Fed. 363, 11 C. C. A. 88; and many other cases." To these we now add (from among many) the well-considered case of Callahan v. Railroad (Mo.) 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746, which, reviewing the authorities to date (it was filed December, 1902), holds with this court that "a statute making a railroad company liable for injuries to servants through the negligence of fellow servants does not violate the equality clause of the federal Constitution, although it does not confine such liability to acts performed in the operation of trains, but extends it to risks similar to those incurred by the employés of persons or corporations engaged in other lines of work." Knowing from the history of the strenuous discussion for and against the passage of the act, and from its language as well, that the intention of the Legislature was that the doctrine of the nonliability of the master for injuries to an employé caused by the negligence of a fellow servant should be abolished as to all employés in railroad service, "whether (as we have said in Sigman v. Railroad, supra) they are running trains or rendering any other service," we have no disposition to do other than to affirm fully our rulings already made and cited above. But the act applies only to employés of a "railroad operating"; not that such employés must be operating the trains, but they must be employés in some department of its work, of a railroad which is being operated. Such business is a distinct, well-known business, with many risks peculiar to itself, and all the employés in such business, whether running trains, building or repairing bridges, laying tracks, working in the shops, or doing any other work in the service of an "operating railroad," are classified and exempted from the rule which requires employés to assume the risk of all injuries which may be caused by the negligence of a fellow servant. It is not necessary to show that the plaintiff was injured by a fellow servant while operating a train, but he must "show that he was injured while performing a service necessary to or connected with the use and operation of the road." Railroad v. Vincent, 56 Kan. 344, 43 Pac. 251; Stubbs v. Railroad, 85 Mo. App. 192; Thompson v. Railroad, 54 Ga. 509; Railroad v. Ivey, 73 Ga. 504. Here the railroad was being "constructed," not "operated." It was five or six miles from the completed track, and still farther from the track on which trains were being operated. Though it was in the construction of the extension of a railroad, the work was that of building a bridge or trestle, and the liabilities of the employer were the same as those of any one else engaged in bridge building. It does not matter that elsewhere the same employer was "operating" a railroad. It was not doing so at this point. Here it was not a railroad at all. It was constructing—building—what later would become a part of an "operating railroad." It is true an employé injured by the negligence of a fellow servant while building or repairing a bridge on the line of an operating railroad under precisely similar circumstances could recover of the railroad company, while here he cannot. That is because the statute must draw the line somewhere, and the Legislature has seen fit to restrict the repeal of the former law to "any servant or employé of any railroad company operating" in this state, which means in the course of its "operation" of that business, in any of its departments, but not in the course of its "construction." We must read the act as it has been written by the lawmaking power, neither restricting nor extending its effect.

For the error in refusing this prayer, there must be a new trial.

(138 N. C. 500)

AREY v. ROWAN COUNTY COM'RS.

(Supreme Court of North Carolina. May 25, 1905.)

TAXATION—DISTILLER—RECTIFIER.

Under Acts 1903, pp. 340, 341, c. 247, §§ 60, 63, imposing a tax on distillers and also on rectifiers, a distiller who also rectifies his liquor is subject to the latter tax, the occupations seeming to have been regarded as distinct by the Legislature, and there being nothing in the Constitution which prohibits the General Assembly from imposing the increased tax upon the distiller who also operates a rectifying plant.

Appeal from Superior Court, Rowan County; Bryan, Judge.

Controversy without action between D. L. Arey and the commissioners of Rowan county. From the judgment, D. L. Arey appeals. Affirmed.

Burton Craige and W. H. Woodson, for appellant. T. C. Linn, for appellee.

BROWN, J. The controversy is submitted to determine the legality of a tax assessed

against the plaintiff under sections 60 and 63, c. 247, pp. 340, 341, Acts 1903. The plaintiff operates a 40-bushel distillery, and it is admitted he is liable to the tax of $125 assessed against him under section 63. He operates also a rectifying plant at the same place, and rectifies the product of his own distillery. Section 60 imposes a tax of $200 on rectifiers of liquor. The plaintiff, in his brief, contends "that the tax is unconstitutional; that the process of purifying the whisky is one and the same process in manufacturing whisky, and that the manufacturer's license covers the business in which he is engaged"; and he also contends "that rectifying or purifying his own whisky is not a trade or business in itself, such as to be taxable under the Constitution." We are not conversant with the processes of distilling and manufacturing liquor, but the General Assembly, exercising its knowledge, has classified rectifying as a business entirely distinct from distilling. It has taxed rectifying in the section with wholesalers, and has exempted the rectifier from the wholesaler's tax. Therefore the rectifier may deliver his product, under section 60, to the common carrier, without additional tax. The same privilege is given distillers in section 63, but nowhere in that section is the rectifier associated with the distiller. The two seem to have been regarded by the legislative mind as separate and distinct vocations, although dealing in the same commodity. The burden of proof is on the plaintiff to show that the two are but one and the same trade or business. There are no facts set forth in the record from which we can infer it. Assuming that the two occupations of distilling and rectifying may be united in one, and conducted by one person, there is nothing in our Constitution which prohibits the General Assembly from imposing the increased tax upon the distiller who also operates a rectifying plant. Subject to the organic law, the power of the General Assembly to tax is supreme.

Affirmed.

(138 N. C. 502)

LEDFORD v. EMERSON.

(Supreme Court of North Carolina. May 25, 1905.)

EVIDENCE—PAROL EVIDENCE RULE—COLLATERAL WRITINGS.

In an action to recover plaintiff's share of the proceeds of the sale of options procured by plaintiff and placed in defendant's hands for sale, the options are collateral to the issue, and their contents may be proved by parol.

Appeal from Superior Court of Cherokee County; Shaw, Judge.

Action by John Ledford against A. S. Emerson. From a judgment of nonsuit, plaintiff appeals. Reversed.

Busbee & Busbee, Axley & Axley, and E. B. Norvell, for appellant. Dillard & Bell, for appellee.

BROWN, J. The plaintiff alleges that he procured options on about 60,000 acres of land, and placed the same in the hands of the defendant for sale; that the defendant sold the options for $10,000 cash, and paid the plaintiff $600, and, by false and fraudulent statements to the plaintiff, obtained from the plaintiff a receipt in full. The plaintiff sues to recover $4,400, the remainder of his half of the $10,000. Neither the options nor their contents are in litigation.

On the trial the plaintiff proposed to show by his own evidence that he had performed his part of the contract between himself and defendant; that he took options for about 65,000 acres of land, and delivered the same to the defendant; and that the defendant sold them for $10,000. On objection of defendant, the court refused to allow the plaintiff to show this; holding that the plaintiff could not speak of the options without producing them, and refusing to allow the evidence offered by the plaintiff.

His honor misconceived the kind of action that was being tried, for, from his ruling, he must have thought that the options or their contents were in litigation—were the gravamen of the action—when they were not. The purpose of the action is to recover the plaintiff's share of the proceeds of the sale of the options, which the plaintiff alleges the defendant has fraudulently withheld from him. It was competent, therefore, to permit parol evidence of the options and their contents. They were collateral to the issue. Our reports contain numerous precedents. Carden v. McConnell, 116 N. C. 875, 21 S. E. 923; Pollock v. Wilcox, 68 N. C. 50; Reynolds v. Magness, 24 N. C. 26; 1 Greenleaf, Ev. 275–279.

The rule that parol evidence cannot be allowed as to the contents of a written instrument applies only in actions between parties to the writing, and when its enforcement is the substantial cause of action.

The contention of the defendant that the plaintiff had waived or abandoned his right to appeal cannot be sustained.

New trial.

(138 N. C. 504)

HEMPHILL et ux. v. HEMPHILL et al.

(Supreme Court of North Carolina. May 25, 1905.)

1. EVIDENCE—HEARSAY—DECLARATIONS AS TO BOUNDARIES—INTEREST OF DECLARANT.

Recitals of a deed as to the location of the grantor's boundary line are hearsay on the issue of the true location of such line, because of the interest of the grantor.

2. SAME—GENERAL REPUTATION — BOUNDARY LINES.

On the issue of the true location of a boundary line, evidence of a witness who had known the land for 50 years, and knew the general reputation in the community as to the true location of the line, and that, according to such reputation, it ran along the top of a certain ridge, is competent, under the rule admitting evidence of general reputation as to the location of divisional lines where the same has its origin

at a time comparatively remote and ante litem motam, and attaches itself to some monument or natural object.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 155.]

Appeal from Superior Court, Buncombe County; Justice, Judge.

Ejectment by Benjamin C. Hemphill and wife against T. C. Hemphill and others. From a judgment for plaintiffs, defendants appeal. Reversed.

The question at issue is the location of the line dividing the lands of the plaintiffs and defendants. Both of these tracts originally constituted one tract, owned by Andrew Hemphill. About 1850 a parol division of this land was made between B. C. Hemphill, one of the plaintiffs, and John R. Hemphill, both sons of Andrew Hemphill. The plaintiffs claim that the line in question, located when the land was divided, runs from the mouth of the branch emptying into Reem's creek to the point of a ridge, and thence in a southeasterly direction on the face of the mountain across minor ridges and gullies to the Jump Corner. The defendants claim that the line runs from the mouth of the branch to the point of the ridge, and thence in a northeasterly direction up the ridge to the Vance line. Between these two lines contended for is the triangular piece of land in controversy. In 1860 John R. Hemphill executed a bond for title to a portion of the land to John Brigman. John Brigman died, and John R. Hemphill, in accordance with the terms of the bond for title, executed a deed to the heirs of John Brigman. This land was sold by J. G. Chambers, administrator of John Brigman, to pay the intestate's debts, and James Hemphill became the purchaser. James Hemphill conveyed the land by deed to his children, Eliza, Jane, Brank, and Bettie Shope, defendants. Verdict and judgment for the plaintiffs, and the defendants appealed.

Frank Carter, Locke Craig, and H. C. Chedester, for appellants. Moore & Rollins, for appellees.

HOKE, J. (after stating the facts). The rights of the parties to this controversy were made to depend upon the correct location of the divisional line between Benjamin C. and John R. Hemphill, under whom the defendants claim; and the defendants contend that the true location of this line runs from the "mouth of the branch to the point of the ridge, and thence in a northeasterly direction up the ridge to the Vance line." In order to establish this position, the defendants offered, first, the deed from John R. Hemphill, now dead, to the heirs of John Brigman, bearing date November 14, 1866, as a declaration of John R. Hemphill on the correct location of the line in dispute. The defendants further proposed to prove by a witness (John G. Chambers) that he had known the land in controversy for 50 years; that he knew the general reputation in that community as to the true location of this divisional line; and that, according to such reputation, the same ran along the top of this ridge, and was placed as the defendants claimed. On objection by the plaintiffs, this testimony was held incompetent, and the defendants excepted.

It is the law in this state that, under certain restrictions, both hearsay evidence and common reputation are admissible on questions of private boundary. Sasser v. Herring, 14 N. C. 340; Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154; Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782.

The restrictions on hearsay evidence of this character—declarations of an individual as to the location of certain lines and corners—established by repeated decisions are that the declarations be made ante litem motam, that the declarant be dead when they are offered, and that he was disinterested when they were made. Bethea v. Byrd, 95 N. C. 309, 59 Am. Rep. 240; Caldwell v. Neely, 81 N. C. 114. The declarations of John R. Hemphill in this deed to the heirs of John Brigman as to the location of his own line are hearsay. They are incompetent for the reason that he was interested when the same were made, and the judge below ruled correctly in excluding them.

On the second point—the evidence offered from the witness John G. Chambers on the general reputation as to the location of the divisional line: Such evidence has been uniformly received in this state, and the restriction put upon it by our decisions seems to be that the reputation, whether by parol or otherwise, should have its origin at a time comparatively remote, and always ante litem motam; second, that it should attach itself to some monument of boundary or natural object, or be fortified and supported by evidence of occupation and acquiescence tending to give the land in question some fixed or definite location. Den v. Southard, 8 N. C. 45; Mendenhall v. Cassells, 20 N. C. 43; Dobson v. Finley, 53 N. C. 496; Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154; Westfelt v. Adams, 131 N. C. 379–384, 42 S. E. 823. The proposed evidence comes fully up to the requirement of these decisions. The reputation is attached to a placing reasonably definite, and the witness stated that he had known the land for 50 years; knew the general reputation in the community as to the line in dispute, and where such line was placed by that reputation. We think it appears by fair intendment that the reputation offered had its origin ante litem motam, and at a time sufficiently remote.

There was error in rejecting the proposed evidence, which entitles the defendant to a new trial.

(138 N. C. 704)

STATE v. WHITE et al.

(Supreme Court of North Carolina. May 23, 1905.)

1. HOMICIDE—EVIDENCE.
In a prosecution for murder, where it appeared that the prisoners went to the home of deceased and killed him, it was error to exclude testimony by one of the prisoners that the other asked witness to go with him to deceased's home to help him persuade deceased to marry the witness' niece, that witness informed him he would go with him, and that there was no agreement to use force or violence if he declined.
2. SAME—INSTRUCTIONS—HARMLESS ERROR.
Where the evidence in a prosecution for murder permits a consideration of manslaughter, the prisoners are entitled to have it submitted under a correct instruction, but failure to do so is not reversible error where a conviction of no lesser crime than murder in the second degree is warranted.
3. SAME—EVIDENCE.
In a prosecution for murder, where it appeared that the prisoners went armed to the home of deceased, and, calling him out, killed him after a short altercation, the evidence considered, and *held* insufficient to show that the killing was excusable on the plea of self-defense, or to mitigate the crime to manslaughter.
4. SAME—REASONABLE DOUBT.
In a prosecution for murder, where it appeared that the prisoners went armed to the home of deceased, and were acting together, the existence of a reasonable doubt as to which fired the fatal shot could not entitle both to acquittal.

Appeal from Superior Court, Rowan County; Cooke, Judge.

Thomas J. White and another were convicted of murder in the second degree, and appeal. Affirmed.

The eyewitnesses to the transaction were Mrs. A. E. Sherrill, mother of deceased, and the prisoners, Thomas J. White and Chalmers L. White, and their direct testimony is here set out:

Mrs. Sherrill, mother of deceased, testified for the state: "Chal and Tom White came there very early in the morning, before I got up. It was before sunup. They came from the south. I did not see them come, but they hitched their horses on the south side of the railroad that goes in south. They were in a two-horse buggy, driving two horses. I did not know them when I went to the door. I had seen them often, but, as I say, I did not know them. The prisoners came up from the left side of the house, on the west, I might say, of the front side. They hitched their horses to a post, I suppose. Can't say whether they were hitched or not. This post was about 50 yards, or a little further, from the house or porch. The porch is on the north side of the house. Its width I do not know. I have never measured it. Its length is about 12 or 15 feet, I guess. I do not know. It is an old-fashioned piazza, with wide door, and latticed around. On the morning of September 17th I was in my room, and heard some one knock at the front door. I stepped in the front room to the window, and called to them that I would be down in a few minutes. I stepped back and dressed, opened the door, and saw two strangers. They said to me, 'We want to see Russell.' I said he was asleep, and then they asked me to tell him to come down—said they didn't want to see me, and to tell him some gentlemen wanted to see him. Russell said, 'Who is it?' And I said: 'I don't know. They are strangers. Come down.' I went down myself, and stepped into the back hall, on the front porch, and stood there until Russell came down. When he came down I stepped back, and stood about midway the door. They said to me, 'You stay back, and we will see you later.' I did not do it. I stepped immediately to the front door, near my son. Two pistols were drawn on my son in this way [indicating pistol pointing on each side]. They then said: 'We are Tom and Chal White. You are aware you have ruined our niece Annie White, and we have come to make you marry her, or we will kill you before you leave our sight.' Russell said: 'I did not ruin her. I was not the first one there.' They said: 'You did ruin her, and you will marry her, or we will kill you before you leave our sight.' I stepped between them and begged them not to kill my son. I told them, if they could not spare him for his own sake, then for mine, at least. I turned to the brothers, and they said, one of them, 'I am deaf;' and then one said: 'You go back. We will see you later.' I stepped inside the door, and they again said, 'You go back, or we will kill you.' And my son said, 'Go;' and I said, 'I will go.' The deaf man followed my son, and kept him from going into the door. They said, 'You will go with us;' and Russell said, 'I do not love her, and I cannot do it.' Two pistols fired immediately, and he fell. He fell straight back, with his head towards the west—towards the bench that he had been sitting on. Yes; when I went to the door he was seated on the bench. That bench was right along on the west side of the porch, and he was seated here [indicating] on the bench, at the west end of the porch. The bench was about five feet long. He was about midway the bench—about the middle of the porch. The bench was sitting one end back against the lattice. They were talking to me then—both pistols drawn on Russell. That's when they said: 'You go back. We will see you later.' They were still talking to him. When he was shot, I do not know whether I fell or sank down, or what I did. I must have gotten up and went to my son to see if he was dead, and spoke to him, and he did not give me any answer. I thought he was dead, and went immediately into the walkway of the yard. These two men just stepped off after they had killed him. My son, when he was shot, got up and came to the door, and would have come in, but they kept him from coming, and pushed him a little to one side, and I saw his hand go up before his face. My

son did not have a thing in his hand—not a thing. He threw up one hand. I saw only one hand. Two shots were fired right together, and then a third one. I do not know whether both men shot or not. There were two shots, though, right together, and then a third. My son was hit in the back of the head and in the face. One man was on each side of my son when he was sitting down and when he was standing. They had their pistols then." (Mrs. Sherrill then described the position of her son and the two White boys. One thing in particular the reporter caught was the close proximity of the White boys to Russell Sherrill; that is to say, they pressed him closely on each side, as Mrs. Sherrill went on to show. She demonstrated how his retreat was cut off from the door, pistols in hand.) "My son stepped out towards the deaf man, and he turned then to the left to pass the tall man. Chal White moved forward to the right." (Mrs. Sherrill here again takes up the position of the men.) "Russell fell to the left towards the bench, cater-corner—not so much so, however. When these men first came, my son was in bed, and I told him to get up. He came down in a very few minutes. Did not more than half dress himself. He just had on his pants and dress shirt and shoes. His shoes were ties, but not tied at the time, and he had a hat on his head. Q. Now, Mrs. Sherrill, Chal White testified that you came out on the porch, took a seat, and said you wanted to talk the matter over; that you were sorry this had come about; that you had tried to raise the family better. Did you say that? A. I did not say that. Q. Did you sit down? A. I did not. Q. State whether or not at the time your son was shot he was making any attack upon either of the prisoners. A. He was not. He had his hand up to ward off the pistol. Q. Did Thomas White touch you on the shoulder, as he testified he did, and * * *? A. He did not."

The prisoners testified that, having heard that their niece had been ruined by the deceased, they went to the home of Mrs. Sherrill, where deceased lived, with a view and purpose of inducing him to marry their niece and save the families the disgrace; that they each had a pistol, but there was no conspiracy between them to kill the deceased, and no intention of doing so, but thought they could persuade the deceased to marry the girl. Chalmers White testified in behalf of himself and co-prisoner: "When I left my sister-in-law's I started early, in order that we might find him at home before he would leave. I had information of his probable leaving, and I had another reason for wanting to go early. I wanted it kept as quiet as possible until it was over. It is not more than three-quarters of a mile—possibly a mile, but I do not think over three-quarters. I arrived there, I think, about six in the morning. It was a dark, cloudy morning—a fog and a very dark morning. We hitched our horses out in front of the porch, or out from the house to a hitching post, and then went to the house and knocked, walked upon the piazza, and knocked upon the door. A lady then answered it. My brother took part in the conversation down to my sister-in-law's. He talked, but not as much as I did, and not as long, but he talked with her. Mrs. Sherrill came to the door, and I told her, 'Good morning,' and asked if Russell Sherrill was at home. She said, 'Yes.' I told her I would like to see him on some business. She handed us two chairs. We sat down and waited till he came. Presently he came down. His mother with him. I spoke to him, and introduced myself and my brother. We both shook hands with him, and I told him we wanted to see him on some business privately. He then said to his mother, 'You go back into the house,' which she did. She walked back into the hall, and he stepped back and closed the door. He then walked out on the piazza, to the front end of the porch, and sat down on the bench. We walked up near him, around him, in front of him. I said to him, 'Mr. Sherrill, you are aware of the fact that we came here to make you keep your promise.' He replied, 'I did not do it.' I said, 'You must marry her,' and he said: 'I cannot. I do not love her.' And I said, 'You can't get out of it that way.' He said: 'I will fix it up, but I will not marry her. I will die first'—and sprang to his feet in an angry, threatening attitude. I stepped back and drew a pistol. He said, 'I will marry her,' and I said, 'I am glad of it.' Mrs. Sherrill heard a part of the conversation, and came out into the hall. She said: 'What is the trouble? Don't kill my boy.' And I said, 'He has ruined our niece Annie White, and we have come up to get him to marry her.' She said, 'Well, do not kill my boy;' and I said, 'I do not want to kill him.' She said, 'Let's talk the matter over, and save shame and disgrace.' I told her I would. She sat down on a chair just back of us, and said she was sorry her family had come to this; that she had tried to raise the boy better. I then turned and walked back to where Mr. Sherrill was, and told him to come on and go with us. He then seemed very angry, began to advance, and then said, 'I will die first,' and as he said that he sprang towards us, or forward us, and I shot him. My brother fired at him about the same time. I do not know who shot first. We shot nearly at the same time. As he started towards me, Mrs. Sherrill ran from the porch into the hall, screaming at the top of her voice, and as she fell to the floor we walked off. She was not inside when we fired. She screamed and ran into the hall. He was very close to me, and I think just a little, possibly, to the center of the door. He was very close to me. I thought he was going to strike me with something when he ad-

vanced. He was in a striking attitude, and in an angry frame of mind. I think he was going to strike me because he was rushing on me, and I thought I saw something. He could not see that I was armed, and I thought he was armed, and I did not think he would attack me unless he was. I could not see the knife in his hand. He could have held a knife or something I could not see. It was a dark, cloudy morning—a very dark, foggy morning. I went there with no purpose or idea of killing him, no intention whatever. It was only to get him to marry the girl, and save shame and disgrace. I never saw him before. My brother and I had never at any time talked about killing him. I did not know I had hit him. I knew I had shot, but did not know I had hit him. When he started at me I retreated a step, from time to time, when he started back towards the further end of the porch, from where my brother was when he sprang forward. This threw my brother behind him. My brother had been to the left, and this threw my brother almost diagonally between us." (The prisoners show on the map what they mean.) "When he sprang up, he said something to my brother, and he said for him to talk to me; that he could not hear." (Further description as to porch and position of men.) "The three of us would have made a triangle, or three sides of a triangle. He rushed on me with his arm drawn back when I fired, as if to strike, just this way." (Witness shows striking position of right hand and arm drawn back as if to deliver a blow.) "I left there—went to my buggy. I did not anticipate any trouble. I took the pistol in case I would need it to protect myself against any one and any danger. Was not going up looking for trouble; no, not even with Sherrill. I carried the pistol, though. I would rather have a pistol through the country. Q. So you expected trouble, did you? A. I did not know what I would find, I did not know how it might terminate. Q. So you took him along to help kill this man if he didn't marry your niece. Is that it? A. I didn't take him. He went because we were going on a dangerous mission. Q. And you expected trouble, eh? A. No; but I didn't know the man, and didn't know how it would end. From the time we struck that porch until the time he came down. I presume the whole time would be about four or five minutes before he was lying on his back on the floor, dead. It was not my intention to kill him. He didn't give us the opportunity to hear his refusal and go back to Mrs. Archer's quietly. I knew my brother had a pistol. He borrowed it. I do not know where he borrowed it—in Concord, I guess. He sprang to his feet, and we drew our pistols. The pistols were not pointing in his face—pointing at him, though, I suppose. My brother's was pointing at him, too. By the State: Q. Did you see anything in his hand? A. I could not tell what he had in his hand. Q. Did you see the knife? A. He had his hand drawn back this way [striking attitude]—drawn back as though to strike. I could not see what was in his hand. Q. Was there anything in his hand? You say you could distinguish Mrs. Sherrill was a lady when she came to the door. Now, if he had had a knife, why couldn't you have seen that? I say, why couldn't you? A. I did not know what he had in his hand. I thought there was something in his hand. I could not tell what it was. Redirect: My testimony was interrupted very much by counsel on both sides at the preliminary hearing, and I could not give the testimony as fully as I wanted to. I never had any difficulty in my life before. Yes; I stated a while ago I thought I shot twice. I ascertained I did not after the pistols had been examined and brought to the attorney's office. That was the day of the preliminary hearing. The pistols were examined, and my pistol showed I shot only once. My brother shot twice, as his pistol showed. I did say awhile ago we did not want to kill him, and because that would have made matters more public—worse—and the shame would have gone further. I had no intention of killing him."

Thomas White's testimony in behalf of himself and co-prisoner (he is deaf): "I can hear through a trumpet in my right ear, but not as well as I can in the other. It was about six when we got to Mrs. Sherrill's house. It was daylight. The morning was cloudy and threatening rain. The first thing after arriving, we tied our horses (two horses and a top buggy) to a hitching post about 40 or 50 yards off. We went up to the house, and my brother knocked at the door. Soon after he knocked, Mrs. Sherrill responded. When she came to the door a conversation took place between her and my brother. I knew Mrs. Sherrill, and did not see why she did not know me. I did not hear the conversation after Mrs. Sherrill came to the door. She set out two chairs. My brother took one, and I took the other, occupying opposite sides of the piazza. I said to my brother in a low tone, after she had gone back in the house, 'Is he at home?' He nodded assent. In a short time after that, Russell Sherrill came down on the piazza. My brother spoke to him, shook hands with him, introduced him to me, and I shook hands. I had seen him, but was not personally acquainted with him. After he came out, Mrs. Sherrill also came out, and a conversation took place between them. Sherrill said something to his mother, and she went back into the hall. Sherrill followed her and closed the hall door. He closed the inner door, then came back, and sat down on the bench at the end of the piazza. My brother then went to him, and again the conversation began. In a few minutes after the conversation he sprang to his feet and assumed a threatening attitude. At that time

my brother drew his pistol and stepped back one step. I did not know what had passed. I was just judging from my brother's actions. Then almost immediately after that, just after the pistols were drawn, Mrs. Sherrill came out of the hall, and a conversation took place between her and my brother. We were all sitting down at the beginning, but at the time Mrs. Sherrill came out we were all standing, and then the conversation took place between her and my brother. Mrs. Sherrill turned to me, and I said, 'talk to my brother. I cannot hear you;' and just at that moment she stepped between us, and I touched her on the arm or shoulder, and told her not to come between us. This seemed to infuriate Sherrill, from his actions and expression of his face. He was directing his conversation to me after I touched his mother on the shoulder. It seemed as if I had angered him very much. I said: 'Talk to my brother. I cannot hear you.' I then asked my brother if Sherrill would marry her, and he said he would. Then I said to Sherrill, 'Come and go in the buggy.' Mrs. Sherrill had stepped back a few paces, and was near the hall door. The next thing, Sherrill advanced very rapidly on my brother; my brother retreated, and I kept in line with Sherrill; and after passing just beyond the door, halfway, he drew back as if to strike. I saw his hand fly up, I did not see a blade was in it. My pistol was not drawn. I drew and fired. My brother fired just the instant I did. I think my brother shot just the moment before I did. Sherrill fell diagonally, with his head towards the end of the porch. At the moment he fell, my brother walked around. We went out, loosed the horses, and I said, 'Let's go and surrender at once;' and he said, 'Let's go back and tell Jennie what has happened.' My object in going was to induce him to marry my niece and save disgrace, not to themselves, but to all concerned."

The prisoners appealed from a judgment pronounced upon the verdict of guilty of murder in the second degree.

Montgomery & Crowell, Overman & Gregory, T. F. Kluttz, R. L. Wright, and C. B. Watson, for appellants. L. H. Clement, T. C. Linn, and B. B. Miller, with the Attorney General, for the State.

HOKE, J. (after stating the facts). The above statement gives the direct evidence of all the living persons who saw the occurrence, and presents the case sufficiently to a proper understanding of the court's decision.

In developing their case before the jury, the prisoners proposed to prove by the witness White, one of the prisoners, that his brother, the other prisoner, asked the witness to go with him to Sherrill's to help him persuade Sherrill to marry the witness' niece, and that the witness informed his brother he would go with him for that purpose, and there was no agreement or conspiracy to use force or violence on Sherrill if he declined. To this testimony the state objected. The objection was sustained, and the prisoners excepted. We are of opinion that this ruling was erroneous, and the evidence should have been received. The argument to sustain the objection was put on the ground that the proposed testimony was a mere declaration of the prisoner in his own favor, and, as such, was incompetent. This was no declaration of the prisoner, but his sworn statement in a matter relevant to the issue. The purpose of the prisoner in going to the home of the deceased, in some aspects of the case, was very pertinent, and the prisoner's testimony of such purpose was relevant as substantive testimony, and the declaration to his brother was relevant as corroborative evidence. State v. Hall, 132 N. C. 1102, 44 S. E. 553. Again, while the judge below, in one portion of the charge, submitted the question of manslaughter to the jury, in closing the charge he said: "You will consider and determine, upon consideration of all the evidence in this case, and applying the principles of the law as instructed, whether or not the prisoners, or either of them, is guilty of murder in the first or murder in the second degree." This was, no doubt, an inadvertence on the part of the court; but the effect, we think, was to withdraw from the jury the question of manslaughter. The prisoners excepted. Where there is evidence permitting a consideration of manslaughter on an indictment of this kind and facts of this character, the prisoners are entitled to have the same submitted under a correct charge, and the failure to do so would be error, because, though the verdict may be for a higher offense, the jury might have convicted of the lower crime if the same had been submitted under a proper charge. We do not think, however, that either of these exceptions presents a case of reversible error, because, assuming the rejected evidence to be true—that in going to the home of the deceased there was no conspiracy to do violence, and that they only went to persuade the deceased to marry their niece—we are of opinion that in considering the entire testimony, including that rejected, and accepting the statements of the prisoners as true, there is no aspect of the case that would justify a verdict of a lesser crime than murder in the second degree. Of this the prisoners were convicted, and the error of withdrawing the question of manslaughter from the consideration of the jury was immaterial. The question of murder in the first degree not being before us, and an intentional homicide having been admitted by the prisoners, on the evidence in this case the law presumes the killing to be murder in the second degree, and it must be so declared, unless from the entire testimony the prisoners satisfy the jury that the killing was excusable on the plea of self-defense, or of facts which mitigate the crime to manslaughter. State

v. Smith, 77 N. C. 488. In that case Faircloth, J., speaking for the court, says: "Homicide is murder unless it be attended with extenuating circumstances, which must appear to the satisfaction of the jury. If A. assaults B., giving him a severe blow, or otherwise making the provocation great, and B. strikes him with a deadly weapon, and death ensues, the law, in deference to human passion, says this is manslaughter." And the case further states that if the "provocation be slight, and it can be collected from the weapon used or any other circumstances that the prisoner intended to kill or do great bodily harm, and death follows, it is murder." Foster's Crown Law, 291. It cannot be contended here that this is a case of excusable homicide. Two strong, vigorous, and determined men, in the presence of a boy just grown, called him from his bed about daylight in the morning, without arms or means of defense. They were near enough to have seized the deceased at any time during the difficulty, and could have easily overpowered him. The killing was without necessity, and there is no statement or claim by the prisoners that they or either of them were in reasonable apprehension of bodily harm at any time. Thomas White's evidence: "Q. You shot him in the back of the head, when you could have caught and held him? A. I could have caught him. Q. You say you did not want to hurt him? Then why didn't you catch him, and keep from hurting him—two great, large men like you were? A. Because he attacked us. Q. You were mad then? A. No; not mad. Q. Not mad, and yet you preferred to shoot him in the back of the head, instead of holding him? A. I shot him because of the fight on hand. My brother was not struck at all—neither of us hit. Q. And yet you shot and killed young Sherrill? A. Yes; I shot once, and I do not know how many times my brother shot."

Nor is there any well-considered principle of manslaughter to which the conduct of the prisoners could be reasonably referred. It is contended first that there was a fight between the parties, and that the homicide should be referred to the anger aroused by mutual combat. It is true that when men fight upon a sudden quarrel, and one kills the other in the heat of passion aroused by the combat, the law ordinarily refers such a homicide to the anger, and considers the killing a case of manslaughter. The doctrine, however, has this limitation: That the combatants must fight on equal terms, at least at the outset, and no unfair advantage must be taken. In Russell on Crimes, p. 729, it is said: "Where the combat is not an act of deliberation, but the immediate consequence of sudden quarrel, it does not, of course, come within the foregoing doctrine; yet in cases of this kind the law may come to the conclusion of malice if the party killing began the attack with circumstances of undue advantage, for, in order to save the party making the first assault upon an insufficient legal provocation from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be put on an equal footing in point of defense, at least at the outset, and this more particularly where the attack is made with deadly and dangerous weapons." Again, the same author says on page 731: "If, after an interchange of blows on equal terms, one of the parties, on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will be only manslaughter. * * * But if the party at the beginning prepared a deadly weapon, and has at the time the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with the weapon, such killing will be murder." And Bailey, J., in charging a jury in an indictment for malicious cutting, said, among other things: "If persons meet originally on fair terms, and, after an interval, blows having been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters in a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder." Accordingly, in State v. Ellick, 60 N. C. 450, 86 Am. Dec. 442, we find it declared: "If, on a sudden quarrel, the parties fight by consent at the instant with deadly weapons, and one is killed, it is but manslaughter, provided the parties fight on equal terms and no undue advantage is taken, for the fairness of the fight rebuts the implication of malice, and the law mitigates the offense out of indulgence to the frailty of human nature." And applying the principle it is there held "that where words passed between the prisoner and the deceased, who were sitting on a doorsill, and the prisoner got up; the deceased then got up, and reached his hand inside the door and got a stick, which was a deadly weapon; and as he was turning around, with the stick, the prisoner stabbed him with a bowie knife—it was held to be murder." To the same effect is Price v. State, 36 Miss. 531, 72 Am. Dec. 195. In several of the decisions establishing the limitation here stated the weapon was concealed, and mention is made of this fact. But the principle underlying the decisions seems to be that the party commenced the fight with a deadly weapon previously prepared, and fought at an undue advantage.

The principle, then, by which an unlawful and intentional homicide is, under certain circumstances, mitigated to manslaughter by reason of the anger aroused in mutual combat, has no application here. The prisoners, armed with deadly weapons, commenced the fight on unequal terms, fought

throughout at undue advantage, and killed without necessity. Their conduct can receive but one construction. They intended from the beginning of the combat that it should have a fatal termination. Again, it is urged that the prisoners are entitled to have this view presented: That the deceased caused a final difficulty by making an assault on the Whites; that he had acquiesced in their demand, and all had become peaceful and quiet, when the deceased provoked a further altercation by advancing on Chalmers White, and was in the attitude of striking him, and that in the anger aroused by that assault the deceased was slain. But we do not think that any such position is open to the prisoners on their testimony, or that it has support either in law or fact. In the first place, there was no such pause in this heart-rending occurrence which permits its division into two altercations. The whole affair did not occupy five minutes of time. Chalmers White testified: "From the time we struck the porch till he came down, I presume the whole time would be about four or five minutes before he was lying on his back on the floor, dead." Allowing a reasonable time for the deceased to dress and come to the porch, the time consumed in this fateful interview was indeed short. When the deceased said he would not marry their niece—he "did not love her"—both men drew and presented their pistols. The deceased then said he would marry her. Thomas White then seems to have put his pistol up, but this is left uncertain by the testimony. His evidence is as follows: "I read about where my shot hit him—read about it. He was then with his face towards my brother. I could not have shot him in the back of his head from in front of him. I do not know whether he had anything in his hand or not. I did say he was attacking my brother. My brother had a pistol. I do not know where he got it. When he got up from the chair he assumed a threatening attitude. We never put the pistols back in our pockets; had them in our hands. We did not have the pistols drawn until he made the attack. We had them in our hands, but did not have them covered on him. We had them in our hands for protection. Q. And then you shot him, not from what he had in his hand, but because he was attacking your brother. A. I saw there was a fight. I did not stop to see what kind of a fight. Q. You shot him in the back of the head, when you could have caught and held him. A. I could have caught him. Q. Didn't you say you didn't want to hurt him? Then why didn't you catch him, and keep from hurting him—two great, big men like you? A. Because he attacked us. Q. You were mad then? A. No; not mad. Q. Not mad, and yet you preferred to shoot him in the back of the head, instead of holding him? A. I shot him on account of the fight on hand. My brother was not struck at all—neither of us hit. Q. And just for that, killed young Sherrill? A. Yes; I shot once, and I do not know how many times my brother shot." But Chalmers White never put up his pistol till the fatal shots were fired. The deceased was then standing on his own porch, with one armed man on either side, and not allowed to withdraw from their presence even to go into his own door; one of the men, at least, keeping his pistol in evidence all of the time. There was never any pause in this scene, and not for one instant any change of attitude. Here, again, the conduct of the prisoners can receive but one reasonable construction: "Do what we demand, and do it now, or your life is forfeited." Any inference, therefore, which depends upon the position that the deceased was the aggressor by bringing on a second altercation, in which he was killed, has no basis in fact, and cannot be maintained. And if it were otherwise—if the deceased did bring on a second altercation—any assault he may have made under the circumstances just stated was entirely insufficient provocation to mitigate this killing to manslaughter. The deceased had no knife, and neither of the prisoners says that he had. They do not swear that they thought so. There is nothing but a suggestion that he might have had one. Here is the testimony of Chalmers White: "I then turned and walked back to Sherrill, and told him to come on and go with us. He then seemed very angry, and began to advance, and said, 'I will die first.' And as he said that he sprang towards us and forward, and I shot him. My brother fired, I think, about the same time. I do not know who shot first. We shot nearly at the same time. He was very near to me. I thought he was going to strike me with something when he advanced. He was in a striking attitude, and an angry frame of mind. I think he was going to strike me, because he was rushing on me, and I thought I saw something. He could see that I was armed, and I thought he was armed, and I did not think he would attack me unless he was. I could not see the knife in his hand. He could have had a knife or something. I could not see. It was a dark, cloudy morning." Again this witness testified: "When he sprang up, we both drew our pistols on him. I did not see any knife up to that time. I could not see what he had in his hand. Q. Did you see anything in his hand? A. I could not tell what he had in his hand. Q. Did you see the knife? A. He had his hand thrown back this way [striking attitude]—drawn back as though to strike. I could not see what was in his hand. Q. Was there anything in his hand? A. I did not know what he had in his hand. I thought there was something in his hand. I could not tell what it was. Q. Couldn't you have seen the flashing of a knife blade as he drew back to strike? A.

It was dark and cloudy. I could not see. He could have a knife, and I could not have seen it. Q. Will you swear he had anything in his hand? A. I thought he had something in his hand. Q. Will you swear that he had a knife? A. He had something. I could not tell what it was. Q. Was it long or short? A. I do not know. I can't tell whether it was long or short, or anything about it. It was something. Q. Was it black? A. I can't tell. I cannot describe what it was." And Thomas White testified: "I had side-stepped and kept in a direct line with Sherrill, because I did not know what was going on at that time, nor what he was going to do. He continued to advance on my brother, and drew back as if to strike. At the moment he did that, he sprang forward, and that put him just in front of me, or diagonally in front. I drew my pistol, and we both fired about the same time. He had his hand in a striking position. I do not know whether he had a pistol or not. I could not see whether there was a knife in it or not." The mother of the deceased said that the deceased never raised his hand, except to ward off the pistol. But put it as the prisoners claim, and on the facts of this case as disclosed by the testimony—suppose he did raise his hand as if to strike, and was shot down, both prisoners firing at the same time. This was no such provocation as the law deems adequate to reduce the grade of this offense. In Clark on Criminal Law, p. 197, it is said: "Voluntary manslaughter is where the act causing death is committed in the heat of sudden passion caused by provocation. The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man. The act must be committed under and because of the passion." Again, at page 198: "Intentional killing is manslaughter if it is committed under and by reason of a passion caused by what the law deems sufficient provocation. The law does not merely look to see if a man was provoked and enraged, and, if so, reduce his crime to manslaughter; but it also looks at the provocation, and does not excuse him at all if it was inadequate to excite his passion. The provocation must be sufficient, in the eye of the law, or it is murder." Again, on pages 203, 204: "In all cases the mode of resentment must bear a reasonable proportion to the provocation. A homicide is not reduced to manslaughter where a deadly weapon is used unless the provocation was extreme." To the same effect, State v. Smith, supra; State v. Chavis, 80 N. C. 353.

The suggestion that, if there be a reasonable doubt as to which one fired the fatal shot, both must be acquitted, cannot be sustained. The prisoners may have gone to the house without any purpose to kill or do unlawful violence. They had a common purpose, and when they drew their weapons they entered on that purpose unlawfully, and were so manifestly acting together, one in the aid of the other, that a killing by either, under the facts of this case, would inculpate both.

The court is of opinion that there is no reversible error disclosed in the record, and the judgment of the court below was correct.

No error.

(138 N. C. 724)

STATE v. McGINNIS.

(Supreme Court of North Carolina. May 23, 1905.)

1. GAMING—DEALING IN FUTURES—CONSTITUTIONAL LAW.

Laws 1905, c. 538, prohibiting dealing in futures, where it is not intended by the parties that the articles agreed to be sold and delivered shall be actually delivered, is not violative of Const. U. S. Amend. 14, guarantying the equal protection of the laws, because of section 7, providing that such act shall not apply to any person, corporation, etc., engaged in the purchase or sale of the necessary commodities required in the ordinary course of their business.

2. SAME—UNLAWFUL DISCRIMINATION.

Laws 1905, c. 538, § 5, preventing dealing in futures, and providing that proof that nothing was actually delivered at the date of the contract, and that a margin was put up, shall be prima facie evidence that the contract is a wagering one, forbidden by Laws 1889, p. 233, c. 221; and section 7, providing that the act shall not apply to purchases or sales by manufacturers or wholesale merchants of the necessary commodities required in the ordinary course of their business—is not a discrimination forbidden by Const. U. S. Amend. 14, since the prescribing when and under what circumstances and as to what offenses a certain act shall be prima facie evidence is a legislative discretion in the exercise of the police power.

3. SAME—BUCKET SHOPS.

Were the provision as to prima facie evidence as to certain purchasers on margin void because not applying to all purchasers on margin, it would not invalidate the portion of the act forbidding carrying on the business of running a "bucket shop."

4. SAME—WHAT CONSTITUTES.

A purchase for actual delivery of necessary commodities required in the ordinary course of business, and not for wagering or gambling on the fluctuations of the market, is not a violation of Laws 1905, c. 538, prohibiting dealing in futures.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 22.]

Appeal from Superior Court, Wake County; Neal, Judge.

E. C. McGinnis was convicted of maintaining a bucket shop, in violation of Laws 1905, c. 538, to prevent dealing in futures, and he appeals. Affirmed.

Busbee & Busbee and Argo & Shaffer, for appellant. The Attorney General, for the State.

CLARK, C. J. This is an indictment under chapter 538, p. 544, Laws 1905, "to prevent dealing in futures." By chapter 221, p. 233, Laws 1889, "to suppress and prevent certain kinds of vicious contracts," it was, in substance, enacted as follows: Section 1

made void all contracts for the sale of articles therein named for future delivery, wherein (notwithstanding any terms used) it is not intended that the articles agreed to be sold and delivered shall be actually delivered, but only the difference between the contract price and the market value at the time stipulated shall be paid. Section 2 enacted that when the defense provided by that act is set up in a verified answer the burden shall be upon the plaintiff to prove a lawful contract, but the answer shall not be used against the defendant on an indictment for the transaction. Section 3 made the parties to such contract and agents concerned therein indictable, and section 4 made persons while in this state consenting to become parties to such contract, made in another state, and all agents in this state aiding and furthering such contract made in another state, indictable. Chapter 538, Laws 1905, provides (section 1) that it shall be unlawful to open or establish an office in this state for dealing in futures, as forbidden by aforesaid act of 1889. Section 2 makes such act a misdemeanor. Section 3 provides that no person participating in such act shall be excused from testifying, but a party so testifying is pardoned for such offense. Section 4 specifies certain acts which shall be prima facie evidence of a violation of this statute. Section 5 specifies what shall be prima facie evidence of a contract forbidden by the act of 1889, and section 6 provides what shall be prima facie proof of the opening and establishing an office in violation of this act and of the act of 1889. So far the provisions of both acts clearly fall within the police power of the state, and it is not denied that, if nothing further appeared in the statute, the defendant is guilty upon the facts found in the special verdict, which are that the defendant opened and established an office in Raleigh for the purpose of carrying on the the business forbidden by the above-cited statutes, Laws 1889, p. 233, c. 221, and Laws 1905, p. 538. The business forbidden by the act of 1905 is—to avoid a paraphrasis, and following the usual American method of describing an act by a word or a phrase—the business of running a "bucket shop," which is defined by the Century Dictionary as "an establishment, nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of bets, or wagers, usually for small amounts, on the rise or fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stock or commodities nominally dealt in." In Board of Trade of Chicago v. Odell Commission Co. (C. C.) 115 Fed. 574, the president of the board of trade, in answer to a question, thus defined a "bucket shop": "It is a place where dealings are had upon the fluctuations in the market price, without any bona fide transactions." The definition of "bucket shop" in Webster's Dictionary is, "An office or place where facilities are given for betting small sums on current prices of stocks, petroleum, etc." In Smith v. Tel. Co., 84 Ky. 664, 2 S. W. 483, the court describes the manner of dealing at a bucket shop in full detail, and defines its business, "while purporting to be actual transactions," as being "in fact merely wagers on the market price of some commodity at some specified time in the future," and in the absence there of any statute held that such business was "a species of gambling as well defined and reprehensible as that of keeping a faro bank or a dice machine, and it is therefore illegal, and contrary to public policy." A bucket shop is defined (Bryant v. Tel. Co. [C. C.] 17 Fed. 825, and Fortenbury v. State, 47 Ark. 192, 1 S. W. 58) as "a place where wagers are made upon the fluctuations in the price of grain and other commodities," and in both cases the course of dealings at such establishment is fully described, as in Smith v. Tel. Co., supra; but in all these cases, of course, solely upon the information given the learned judges by the testimony of witnesses set out in the record. In Weare v. People, 209 Ill. 528, 70 N. E. 1076, is a recent, full, and able discussion of statutes against bucket shops, sustaining Soby v. People, 134 Ill. 66, 25 N. E. 109. Indeed, the word "bucket shop," as well as the business it transacts, is mentioned and denounced in many statutes and decisions, and both the name and the business have become matters of general knowledge. In Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623, it was held that the Illinois statute making all "dealings in futures" gambling contracts, and punishable, was within the police power of the state, and not prohibited by the fourteenth amendment; affirming s. c., 186 Ill. 43, 57 N. E. 798, 50 L. R. A. 762, 78 Am. St. Rep. 229. In Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, the court said: "If under guise of the contract to deliver goods at a future day the real intent be to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, the whole transaction is nothing more than a wager, and is null and void." Wagner v. Hildebrand, 187 Pa. 136, 41 Atl. 34; Jamieson v. Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302; Wheeler v. Stock Exchange, 72 N. H. 315, 56 Atl. 754; Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183; Pickering v. Cease, 79 Ill. 328; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; 1 Cook on Stock & Stockholders (3d Ed.) § 341. Freund on Police Power (1904) p. 186, says: "It is well established that, if there is no intention to buy or sell, but only to pay or receive differences in value, the transaction is simply betting on the rise or fall of market prices, and hence illegal and void."

While the facts found bring the defendant within the words of the statute, it is contended that the addition of the seventh and last section made the whole act unconstitutional and void under the fourteenth amendment to the Constitution of the United States, which guaranties the equal protection of the laws. Said section 7 reads: "This act shall not be construed so as to apply to any person, firm, corporation or his or their agent, engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of the necessary commodities required in the ordinary course of their business." This section is stated by counsel, and we believe was admitted on the argument, to have been added upon the passage of the bill in the second house. It was doubtless hastily drawn, for it is clearly not germane to the statute, which is for the prohibition of the establishment or opening an office for the purpose of engaging in or carrying on the business of a bucket shop; i. e., dealing in the sale of futures, where "it is not intended by the parties thereto that the articles agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them" that merely the difference between the contract price and the market price of the article at the time specified shall be paid. Such condemned business has no connection with, and the constitutionality of the prohibitive act is in no wise affected by, the provision in section 7 that when any person, firm, or corporation engaged in manufacturing or wholesale merchandise shall purchase or sell "the necessary commodities required in the ordinary course of their business," it shall not be deemed a violation "of this act"—the act forbidding the business of carrying on a bucket shop. The defendant, however, contends that the purpose of section 7 is to provide that where any manufactory or wholesale merchandising house shall contract to deliver goods at a future date such establishment may protect itself, or "hedge" (as it is called), by purchasing a "future" contract for raw commodities, without intending to demand actual delivery of those identical goods; but, by the profit thereby made, to recoup the loss by the rise in price of the same commodity subsequently bought, perhaps for actual delivery nearer home, to save freight. It is enough to say that no such intent is expressed in section 7, and we must construe it as it is written. But a purchase for actual future delivery of necessary commodities required in the ordinary course of business, and not for wagering or gambling on the fluctuations of the market, would not be against the statute. The statute of this state does not prohibit all purchases or sales for future delivery, but only such dealings as are in the nature of gambling or wagering contracts. Though section 7 mentions only manufacturers and wholesale mercantile establishments as authorized to make bona fide dealings in "futures," this was done unnecessarily, we think, and only out of abundant caution. It is not a discrimination, for there is no prohibition upon any one else or any other business to buy commodities for future delivery bona fide in the "ordinary course of such business," when not for speculative or gambling purposes. That no other businesses or persons are mentioned as authorized to deal bona fide for the purchase of commodities on "margin" is not an implied restriction upon others to do an act not forbidden by any statute. Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the act of 1905 to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business.

The defendant further contends that by section 5, c. 538, Laws 1905, proof that nothing was actually delivered at the date of the contract, and that a "margin" was put up, shall be prima facie evidence that the contract is a wagering one, and forbidden by chapter 221, p. 233, Laws 1889, and that section 7, c. 538, Laws 1905, providing that this last act shall not apply to purchases or sales by manufacturers or wholesale merchants of the necessary commodities required in the ordinary course of their business, is a discrimination forbidden by the fourteenth amendment. We do not think so, for the prescribing when and under what circumstances and as to what offenses a certain act shall be prima facie evidence is necessarily a matter left to legislative discretion in the exercise of the police power. There may be good reasons why the purchase of "necessary commodities required in the ordinary course of their business" for future delivery on a margin by manufacturers and wholesale merchants shall not raise a presumption that such dealings are wagering contracts, while purchases by them, not of such commodities, or when not "required in the ordinary course of their business," or the purchase by others of any commodities, when made on the deposit of a margin and for future delivery, shall raise the presumption of a wagering contract. Whether the reason is good and sound for making the purchase of commodities upon margin prima facie evidence of a wagering contract under a certain state of facts, and providing that upon a different state of facts such purchase upon margin does not constitute prima facie evidence of a wagering contract, is a matter for the Legislature. The courts have no veto power upon such exercise of the police power. State v. Barrett (at this term), 50 S. E. 506.

But aside from what we have already said, the defendant is indicted for carrying on a bucket shop business. The Legislature had unquestioned power to make such business indictable. Booth v. Ill., 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623, and other cases cited supra. The facts found are that the defendant was carrying on the forbidden business. It can in no wise affect the validity of the statute making such business indictable that the purchase of commodities by others upon margin shall, under certain circumstances, raise a prima facie case that such purchases were void, and under other circumstances shall not constitute such prima facie evidence. A statute may be void in part and valid in part. If the provision as to prima facie evidence as to certain purchasers upon margin were null because not applying to all purchasers upon margin, this would in no wise invalidate that part of the statute which forbids carrying on the business of running a bucket shop. The defendant is not indicted for buying commodities for future delivery upon a margin; nor are manufacturers and wholesale merchants, nor any one else, exempted from the prohibition of carrying on the bucket shop business. Upon the special verdict the defendant was properly adjudged guilty.

No error.

(138 N. C. 749)

STATE v. GATEWOOD.

(Supreme Court of North Carolina. May 23, 1905.)

Appeal from Superior Court, Person County; Peebles, Judge.

Ernest Gatewood was convicted of maintaining a bucket shop, in violation of Laws 1905, c. 538, to prevent dealing in futures, and he appeals. Affirmed.

Winston & Bryant and Guthrie & Guthrie, for appellant. The Attorney General, for the State.

PER CURIAM. Upon the authority of State v. McGinnis (at this term) 51 S. E. 50, there is no error.

(138 N. C. 482)

CRESSLER et al. v. CITY OF ASHEVILLE.

(Supreme Court of North Carolina. May 23, 1905.)

1. APPEAL—PRACTICE—CASE ON APPEAL.
Errors occurring during trial can be presented only by a case on appeal, which can be dispensed with only when the errors are presented by the record proper.

2. SAME—WANT OF JURISDICTION.
Want of jurisdiction for failure of the complaint to state a cause of action is a defect upon the face of the record proper, of which the court will take notice.

3. SAME—RECORD—STENOGRAPHER'S NOTES.
Laws 1903, p. 83, c. 58, authorizing the employment of an official stenographer for Buncombe county, and providing by section 4 (page 84) that the stenographer's notes shall be typewritten, and filed with the clerk of said court, and become a part of the records, does not make those notes a part of the record proper on appeal, or of the case on appeal.

4. SAME.
Entries of continuances, and other docket entries, interlocutory judgments, and incidental matters, such as judgments nisi against witnesses, as well as the evidence, prayers for instructions, and charge of the court, are not part of the record on appeal unless there is some exception presenting them for review.

5. SAME—TRANSCRIPT ON APPEAL.
The transcript or record on appeal consists of the record proper (that is, summons, pleadings, and judgment) and the case on appeal, which is the exceptions taken, and such of the evidence, charge, prayers and other matters occurring at the trial as are necessary to present the matters excepted to for review.

6. SAME—EVIDENCE.
On appeal from an order granting or refusing a nonsuit or a demurrer to the evidence, all the evidence that appellant deems material should be sent up, but immaterial matters—especially evidence as to character, etc.—should be omitted.

7. SAME—STENOGRAPHER'S NOTES—CONCLUSIVENESS.
Under Laws 1903, p. 83, c. 58, authorizing the employment of an official stenographer, and providing that notes extended shall be filed with the clerk and become a part of the records of the court, the stenographer's notes are not conclusive as to the evidence or what occurred at the trial, but these matters must be settled by the judge; and hence a stenographer's notes cannot be made to take the place of a case on appeal.

8. SAME.
In preparing the record on appeal the stenographer's notes should not be included bodily, but their substance should be stated in narrative form.

9. CERTIORARI—WHEN GRANTED.
The mistake of appellant's counsel in sending up the stenographer's notes on appeal, instead of a properly settled case, does not entitle appellant to a certiorari.

Appeal from Superior Court, Buncombe County; Justice, Judge.

Action by Jane H. Cressler and others against the city of Asheville. From a judgment for plaintiffs, defendant appeals. Affirmed.

See 46 S. E. 738.

Davidson, Bourne & Parker, for appellant. Locke Craig, for appellees.

CLARK, C. J. There is no "case agreed" on appeal, and none "settled" by the judge; and, there being no error upon the face of the record proper, the judgment must be affirmed. See numerous cases cited in Clark's Code (3d Ed.) p. 769. Errors occurring during the trial can be presented only by a "case on appeal." It is only when the errors are presented by the record proper, as in an appeal from a judgment upon a demurrer, or upon a case agreed, or judgment granting or refusing an injunction to the hearing heard upon affidavits, that a case on appeal can be dispensed with. Id. p. 770. When there is a defect of jurisdiction, or the complaint fails to state a cause of action, that is a defect upon the face of the record proper of which the

court will take notice. Cummings v. Hoffman, 113 N. C. 267, 18 S. E. 170; Appomattox v. Buffaloe, 121 N. C. 37, 27 S. E. 999.

By chapter 58, p. 83, Laws 1903, an official stenographer was authorized for Buncombe county; and a clause in section 4 (page 84) of said act provides that "such stenographic notes shall be typewritten and filed with the clerk of said court and shall become a part of the records of the court." But that did not make them a part of the "record proper" on appeal, which are the summons, pleadings, and judgment. Still less did it make such notes a part of the "case on appeal," which is a statement of the exceptions taken on the trial, and so much only of the evidence or charge or other happenings during the trial as is necessary to present intelligibly the exceptions. This court has, both by decisions and an express rule (No. 22), endeavored always to avoid the unnecessary expense and oppression of copying into a transcript and printing superfluous matter that can throw no possible light upon the exceptions taken. Clark's Code (3d Ed.), and cases cited on page 918.

The entries of continuances, and other docket entries, interlocutory judgments in the cause, and incidental matters, as judgments nisi against witnesses, and many other matters, are "a part of the records of the court" in a case, but are not part of the "record on appeal," unless there is some exception presenting it for review. "The evidence forms no part of the record." State v. Godwin, 27 N. C. 401, 44 Am. Dec. 42. Prayers for special instructions are no part of the record on appeal. 24 A. & E. Enc. 165. Though the charge of the court, when in writing (Code, § 414), and prayers for instructions (Code, § 415), must be filed and become a "part of the record of the action," just as these stenographer's notes, they are not a part of the "record proper," nor do they become a part of the transcript or record on appeal, except such parts as some exception may require being put into the "case on appeal" by counsel, if they agree, and, if not, then by the judge when he "settles" the case on appeal.

The "transcript or record on appeal" consists of the "record proper" (i. e., summons, pleadings, and judgment) and the "case on appeal," which last is the exceptions taken, and such of the evidence, charge, prayers, and other matters occurring at the trial as are necessary to present the matters excepted to for review. When the appellant makes out his "case on appeal," he should set out only so much of the evidence as is necessary to point his exceptions to evidence, or to point his exceptions to the charge given or prayers refused. The appellee can accept the appellant's "case," or, if he adds or rejects anything, the judge "settles" the case on appeal.

When there is a nonsuit granted or refused, or a demurrer to the evidence, all the evidence that the appellant deems material should be sent up, but even then immaterial matters—especially evidence as to character and like matters—should be omitted, and, indeed, all except the evidence claimed to be material. While the stenographer's notes are filed under the statute, the "case on appeal" must be made up under the provisions of section 550 of the Code, just as in all other cases. The appellant will prepare "a concise statement of the case," presenting such matters as were excepted to. If there was a nonsuit refused or taken, and the parties cannot agree upon the evidence, the judge must settle it. The stenographic notes will be of great weight with the judge, but are not conclusive if he has reason to believe there was error or mistake. The stenographer cannot take the place of the judge, who is alone authorized and empowered by the Constitution to try the cause, and who alone, if counsel disagree, can settle for this court what occurred during the trial.

Here the appellant, under an erroneous opinion as to the function of the stenographer's notes, served no "case on appeal" on the other side, but sent up a certified copy of such notes as conclusive both of what the evidence was, and as to what exceptions were taken, and as to what rulings were made. This gave neither the appellee nor the judge any opportunity to scrutinize their correctness. Of course, if such notes were conclusive as to the evidence, they should be equally so as to what exceptions were taken and rulings made, and all other matters occurring in the progress of the trial. This would simply depose the judge, and place the stenographer in his place for all the purposes of an appeal. All the care taken to secure men of high integrity and impartiality to discharge the functions of the important office of judge of the superior court, and the retention of the rotating system to prevent unintentional bias by his knowing too intimately parties and causes, become of secondary importance if a stenographer appointed by the clerk of the court, and not the judge elected by the people of the state, is to decide what were the exceptions, rulings, evidence, and other incidents of a trial. Now, as always, these matters must be settled by the judge when counsel disagree. The stenographer's notes will be a valuable aid to refresh his memory. But the stenographer does not displace the judge in any of his functions. Now that stenographers are coming into more general use, it is timely that this court should again repeat what it has heretofore said (Durham v. Railroad, 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1; Mining Co. v. Smelting Co., 119 N. C. 415, 26 S. E. 27; Hancock v. Railroad, 124 N. C. 228, 32 S. E. 679), that such notes should not be "dumped" into the "case on appeal." Whether a part or all the evidence is to come up, it should not be sent up in the

form of questions and answers (except when on some point it is material), but the appellant should prepare, as the statute requires "a concise statement." The evidence should be stated in a narrative form. If the evidence as stated by the appellant does not suit the appellee, he can amend it, and the judge can then settle it; giving, of course, in the parts necessary to point an exception, as nearly the literal words used as possible, as he may recall them, refreshed by the aid of the stenographic notes. In every trial of any length a very large part of the evidence is incidental, and throws no possible light upon the matters to be reviewed, and should not be sent up in the "case on appeal." The increasing disposition, which is fostered by the use of stenographers, to dump into the case on appeal all the evidence, however useless to the review to the exceptions taken, is an abuse which must be guarded against by the courts and by counsel, to prevent the growing and needless expense of appeals, which must work hardship and oppression to many suitors. See rule 22, 128 N. C. 640, and the decisions under that rule, Clark's Code (3d Ed.) p. 918.

The appellant, by sending up the stenographer's notes, instead of settling a case on appeal in the mode required by the statute (Code, § 550), has failed to present his intended ground for review; i. e., that the judge refused to nonsuit the plaintiffs upon the evidence, and an exception to evidence. This misconception of counsel as to the requirements of the law in making up the case on appeal does not entitle the appellant to a certiorari, as we have already held at this term in Barber v. Justice, 50 S. E. 445. The motion for certiorari must therefore be denied, but we will say, however, that, having carefully looked through the record, we find no ground either for a motion to nonsuit, or for the exception to evidence, had they been properly presented.

Affirmed.

(138 N. C. 488)

WRIGHT v. TEUTONIA INS. CO.

(Supreme Court of North Carolina. May 25, 1905.)

PLEADING—COMPLAINT—SUFFICIENCY—STATUTES.

By Code, § 260, all pleadings are to be liberally construed, with a view of substantial justice; and under section 425 any relief may be granted which is consistent with the case made by the complaint and within the issue, although other relief may be demanded in the prayer for judgment. By section 276, all defects in the pleadings and proceedings which do not affect the substantial rights of the adverse party are to be disregarded; and, by section 261, a complaint may be ordered made more definite and certain if the precise nature of the charge is not apparent. In an action on a fire policy, the complaint alleged that the policy was written on tobacco, but that defendant had agreed to transfer the insurance from the tobacco to certain machinery in the same building. The destruction of the machinery by fire, the making of proofs of loss, and refusal to pay, were alleged, and it was charged that defendant was indebted to plaintiff in a specified sum, but there was no allegation as to the value of the property. Defendant answered, not having demurred or made any motion to make the pleadings more definite and certain. *Held* that, though plaintiff failed to show any transfer of the insurance from the tobacco to the machinery, he was entitled to recover for any loss sustained by the destruction of the tobacco.

Brown, J., dissenting.

Appeal from Superior Court, Durham County; Peebles, Judge.

Action by R. H. Wright against the Teutonia Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

This action was brought to recover the amount of a policy of insurance issued by the defendant to the Gorman-Wright Company "on leaf and scrap tobacco and tobacco stems, their own, or held by them in trust or on condition, or sold but not delivered," to an amount not exceeding $1,500. The plaintiff alleged the insurance of the tobacco by the policy, and that the defendant had agreed to transfer the insurance from the tobacco to certain machinery in the same building, the property of J. N. & P. H. Gorman, and worth $4,000. He further alleged that the tobacco and the machinery were totally destroyed by fire in July, 1903, during the life of the policy; "that proof of loss was promptly made out and submitted to the defendant for the payment of said policy of $1,500, which policy, as plaintiff is advised by counsel, on account of said transfer, covered said machinery in said prizehouse"; that defendant denied its liability on the policy, and refused to adjust the loss and pay the amount thereof; that the policy was assigned to the plaintiff in November, 1903, after the loss occurred, and he is entitled to recover the amount thereof; and "that the defendant is justly indebted to the plaintiff in the sum of $1,500, 75% of the value of said machinery being in excess of this sum." The plaintiff then demands judgment for $1,500 and interest, and for such other and further relief as he may be entitled to have in the premises. The defendant filed an answer, in which it admitted the issuing of the policy, and the destruction by fire of the prizery, but alleged a want of knowledge or information as to whether or not there was a total loss of the property contained therein. It denied the transfer of the insurance from the tobacco to the machinery, and also denied the transfer of the amount due on the policy to the plaintiff. The plaintiff tendered the following issues: "(1) Is plaintiff the assignee of the interest of the assured, the Gorman-Wright Company? (2) What was the value of the tobacco destroyed by fire? (3) What was the value of the machinery destroyed by fire?" The defendant tendered issues confined to the transfer of the policy to the machinery, and the amount, if any, the plaintiff is entitled to recover for the loss of the machin-

ery. His honor stated that he would not settle the issues at the beginning of the trial, but would hear the evidence, and at its conclusion would frame such issues as he thought necessary. There was much evidence as to the transfer of the insurance to the machinery, and the proof of loss of tobacco and machinery (the value of each being shown by the proof and the schedule annexed thereto) was put in evidence. The evidence tended to show that the tobacco stems (worth $100) belonged to the Gorman-Wright Company, and the strips (worth $1,600) were held in trust by them for other parties. At the close of the testimony the court nonsuited the plaintiff, and he appealed.

Manning & Foushee, for appellant. Winston & Bryant and Busbee & Busbee, for appellee.

WALKER, J. (after stating the case). It must be conceded that if, in any view of the testimony, considered in the most favorable light for him, the plaintiff was entitled to recover, there was error in the ruling of the court. Counsel, in their arguments and briefs, discussed principally the question whether, if the plaintiff had failed to show a transfer of the insurance from the tobacco to the machinery, there were sufficient allegations in the complaint to entitle him to recover for the loss of the tobacco, or any part of it. It may be granted that the plaintiff failed to show any transfer of the insurance from the tobacco to the machinery, and yet, this being so, the insurance, of course, remained upon the tobacco; and he is entitled to recover for any loss sustained by its destruction, to the amount of the policy, and to the extent that he has acquired his alleged assignor's right or interest. It is very true that the complaint seems to have been drawn by the pleader for the purpose of recovering for the loss of the machinery, but this fact does not defeat the plaintiff's right to recover for the loss of the tobacco if the allegations of the complaint are otherwise sufficient for that purpose.

The common-law rule that every pleading shall be construed against the pleader is modified by the present code system, which requires that all pleadings shall be liberally construed, with a view of substantial justice between the parties. Code, § 260. If the complaint is merely defective in form, but a cause of action is stated in substance or by reasonable intendment, the defendant waives the defect by answering to the merits, and it is cured by verdict, and sometimes by averments in the answer. When the defect is organic and vital, so that it cannot be cured by amendment, it is not waived by pleading over or by verdict, and it can be taken advantage of even in this court. Harrison v. Garrett, 132 N. C. 172, 43 S. E. 594. Even where a material allegation is omitted, it is a defective statement of a cause of action, merely, and not a statement of a defective cause of action. Johnson v. Finch, 93 N. C. 205; Garrett v. Trotter, 65 N. C. 430; Bank v. Cocke, 127 N. C. 467, 37 S. E. 507.

In the case at bar the plaintiff alleges the issuing of the policy, and the loss of the property insured. Upon these averments he might recover, if otherwise entitled, the value of the property destroyed by fire, not exceeding the amount of the policy. The only allegation omitted is the one as to the value of the property insured at the time of the fire. But even if this allegation is essential to the statement of a complete and perfect cause of action, its omission is but a defect which can be cured by amendment, and is waived by answer—as much so as the omission to allege the determination of the former action in a suit for false arrest, which was the defect in Johnson v. Finch, supra. The mere fact that the plaintiff sought to recover for the loss of the machinery does not prevent the application of that principle to this case. In Stokes v. Taylor, 104 N. C. 394, 10 S. E. 566, it was held that where a plaintiff sues upon a special contract, and fails in his proof, he may nevertheless recover upon a quantum meruit if sufficient facts are alleged upon which to base such a recovery, and this can be done without amendment. Jones v. Mial, 82 N. C. 252. Under the present system of pleading and practice, any relief may be granted which is consistent with the case made by the complaint and embraced with the issue, although other and different relief may be sought by the pleader and demanded in the prayer for judgment. Clark's Code, § 425, and notes. Any and all defects in the pleadings and proceedings which do not affect the substantial rights of the adverse party shall be disregarded in every stage of the action, and no judgment shall be reversed or affected by reason of the same. Clark's Code, § 276, and notes. The plaintiff cannot, of course, sue upon one contract, and prove another and essentially different contract. This is more than a mere variance. It is a failure of proof. But if he sues for specific relief, to which he is not entitled, upon facts which show him entitled to other and different relief, he may be adjudged to have that relief to which he is in law entitled.

We do not understand it to be seriously questioned that, if there are sufficient allegations, the plaintiff can recover for the loss of the tobacco, although he evidently sued for the loss of the machinery; but it is insisted that he has not made sufficient allegations for that purpose, as the value of the tobacco at the time of the fire is not stated. In Jones v. Ins. Co., 55 Mo. 342, where the plaintiff sued on a policy, and failed to state the value of the property destroyed, the court held that averments substantially like those in this case were sufficient as to the value of the property. "These averments of value and loss," says the court, "would seem to be sufficient after verdict. That the property

insured was totally destroyed by fire would seem to be a distinct averment of loss to the value of the property. That an insurance was given on this property to the amount of $1,200 would strongly imply that, in the estimation of the underwriters, it was at least worth as much as that, or more." To the same effect is Lane v. Insurance Co., 12 Me. 44, 28 Am. Dec. 150, in which the court also says that the defendant should have taken advantage of the alleged defect by special demurrer, which we know was always directed against the form of the declaration, as framed in violation of some rule of pleading, and not against the substance of the declaration, as disclosing a case insufficient on the merits. Stephen on Pleading (9th Am. Ed.) pp. 44, 140; Ins. Co. v. Seitz, 4 Watts & S. 273; Ins. Co. v. Cornick, 24 Ill. 463. Discussing a similar question in Wright v. Williams, 20 Hun, at page 326, the court says: "Suffice it at present to say that an actual total loss is averred, and that a cause of action for some amount is fairly deducible from the complaint as thus framed." See, also, May on Insurance (4th Ed.) § 590. The rules of pleading may require that an allegation of the value of the property at the time of the fire should have been made, and also that the plaintiff should have inserted two counts or causes of action in his complaint—one for the loss of the tobacco, and the other for the machinery; but these are mere defects of form, which should have been pointed out by motion to make the pleading more definite and certain, or by demurrer, as may have been proper. The defendant preferred to answer, and the plaintiff thereupon tendered issues not only as to the machinery, but as to the tobacco. It was announced by the court that the issues would be settled at the close of the testimony. There certainly was nothing in the evidence adduced by the plaintiff that affected his right to the issue as to the tobacco, but, on the contrary, there was direct proof of the insurance of the tobacco, and its loss by fire, and of its value, and there was no objection to this evidence by the defendant. His honor could have ordered the complaint to be made more definite and certain if "the precise nature of the charge was not apparent" (Code, § 261), so that the allegations might in all respects correspond with the proof; but he erred in summarily dismissing the action, without submitting issues to the jury, and trying the case upon its real merits, especially when there was a sufficient allegation in the complaint of the right to recover for the loss of the tobacco, although imperfectly made. McKinnon v. McIntosh, 98 N. C. 89, 3 S. E. 840. The insertion of the claim for the machinery, which proved to be unfounded, and which could not be made to answer a useful purpose, will be disregarded, and not allowed to vitiate the preceding good averment as to the tobacco, from which the insurance is alleged to have been transferred. "Utile per inutile non vitiatur." If the transfer was invalid, the insurance still rested on the tobacco, and this appears reasonably and by the clearest intendment from the pleadings. The defendant was aware of it, as it admitted the original insurance of the tobacco, and denied the validity of the transfer. It followed necessarily that the tobacco was insured. How, then, could the defendant have been surprised or misled? The plaintiff, on his present complaint, can recover "such damages as by law he may be entitled to, unless he chooses to ask for and is allowed an amendment." Jones v. Mial, supra.

The rights of the insured under a policy of this kind have not been discussed, as they are fully considered and decided in Lockhart v. Cooper, 87 N. C. 149, 42 Am. Rep. 514, and as the argument of counsel was mainly addressed to the other question.

New trial.

CLARK, C. J. (concurring). The complaint alleges that the policy of insurance issued by the defendant was for $1,500 insurance on tobacco; that the tobacco was destroyed during the life of the policy by fire; that the plaintiff had theretofore requested defendant's agent to transfer the insurance from the tobacco to the machinery; that said agent had authority to make such transfer, and had frequently made similar transfers. There is no averment that the transfer of the insurance to the machinery was in fact made, though the complaint does allege that "plaintiff is advised by counsel that the policy, 'on account of such transfer,' covered said machinery." This is evidently merely an allegation that the legal effect of such request to the agent, etc., was to transfer the policy to the machinery; and, further, the complaint asks judgment for the recovery of $1,500 upon the value of the machinery. The answer denies any transfer of the insurance to the machinery, and on the trial there was no proof of such transfer, and the policy itself, being put in evidence, showed that in fact no transfer had been made. Thus there was neither allegation nor proof of a transfer of the insurance to the machinery. There was allegation that the insurance was upon the tobacco, and proof by the policy itself that it had not been transferred; supporting the averment of the answer to the same effect. The indirect statement that by "such transfer" the policy covered the machinery is the assertion of a legal inference, merely, and is not supported by any allegation of fact in the complaint. It is true that the complaint asks for judgment for $1,500 upon the machinery, but the demand for judgment is immaterial. The court will grant any relief which is "authorized by the facts alleged and proven," whether such relief is demanded in the prayer for judgment or not, and even when an entirely different relief is prayed for. Clark's Code (3d Ed.) pp. 200, 201, and numerous cases there cited.

The distinguishing feature of the reformed procedure is that cases shall be tried upon their merits, disregarding technicalities and overrefinements. Code, § 260, provides that "pleadings shall be liberally construed with a view to substantial justice between the parties"; and section 269 provides, "No variance between the allegation in a pleading and the proof shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits." This section further provides that the adverse party must allege that he was misled, and must prove that fact "to the satisfaction of the court," and wherein he was misled, and the only penalty and remedy prescribed is an amendment upon such terms as the court may deem just. There is no penalty allowed of dismissal of the action, or loss of substantial rights by either party. The sole object is that the case shall be tried and decided upon its merits. Here the defendant did not allege that he was misled, and the judge did not find that this was shown to his satisfaction. Had he done so, justice and the statute prescribe as the sole remedy an amendment upon such terms as the court might deem just. The court could not visit upon the plaintiff, as a penalty for inadvertence in pleading, or a mistaken allegation of fact, if made, a dismissal of the action. In fact, it is clear that the defendant was not "misled," to his prejudice, "in maintaining his action upon the merits." His own averment of no transfer was proven, and the plaintiff, having alleged and shown the insurance upon the tobacco and its loss, was entitled to recover its value, not to exceed the amount of the policy. There was no need to aver the value of the tobacco lost. That was a matter to be determined, not to exceed the contract for indemnity, $1,500. If the defendant wished the amount more definitely stated, he could have asked for an order to require the plaintiff to make his pleading more definite upon that point. See numerous cases in Clark's Code (3d Ed.) pp. 290–293, 275–278.

There was no need to amend the complaint, for the insurance upon the tobacco and the loss of the tobacco were alleged and proven. There was no direct allegation of a transfer of the policy of insurance, as a fact, and no proof of it, but a denial of such transfer, and proof that the insurance had not been transferred. There was no need to amend the prayer for judgment, for its purport was immaterial. Averment of the total loss of the tobacco entitled plaintiff to show its value.

In granting judgment of nonsuit there was error.

BROWN, J. (dissenting). The question presented is as to whether there was a material variance between the allegations and proof, which prevented a recovery upon the proof offered, in the absence of an amendment to the complaint, which was not asked. I have examined the case with care, impressed with the conviction that the merits are with the plaintiff. Nevertheless I am impelled to conclude that there was such a variance as prevented a recovery upon the complaint in its present form. The allegations of the complaint are that on January 15, 1903, W. L. Brown was agent of the defendant company in Greenville, N. C.; that on the date mentioned the defendant, through said agent, issued its policy to the Gorman-Wright Company, insuring certain tobacco contained in a building in Greenville occupied as a tobacco prizery; that the lot on which the prizery was situated and the machinery in the prizery were owned by J. N. & P. H. Gorman; that J. N. Gorman was the secretary and general manager of the Gorman-Wright Company; that on April 9, 1903, J. N. Gorman notified said agent to transfer said policy from the tobacco to the machinery in said prizery, which machinery belonged to the partnership of J. N. & P. H. Gorman; that said machinery was worth $4,000; that said agent was authorized to make said transfer, and that J. N. Gorman had frequently had similar transfers made by said agent; that in July, 1903, the said prizery, tobacco, and machinery were destroyed by fire; that proof of loss was filed with the defendant for the payment of said policy of $1,500, which policy, on account of said transfer, covered said machinery; that on November 25, 1903, the Gorman-Wright Company and J. N. & P. H. Gorman transferred all their interest in said policy to the plaintiff; that the defendant is indebted to the plaintiff in the sum of $1,500, being 75 per cent. of the value of said machinery in excess of this sum. Section 8 of the complaint is in these words: "That proof of loss was promptly made out and submitted to the defendant company for the payment of said policy of $1,500, which policy, as plaintiff is advised by counsel, on account of said transfer, covered said machinery in said prize-house; but defendant failed and refused to pay said policy, or to adjust the loss thereon, claiming that it was not liable in any amount therefor." Section 10 is as follows: "That the defendant is justly indebted to the plaintiff in the sum of $1,500, 75 per cent. of the value of said machinery being in excess of this sum."

Nowhere in the complaint is the value of the tobacco stated, or any allegation made of damage sustained by plaintiff on account of its loss. The only allegation whatever of any loss is on account of the machinery. It was admitted upon argument, and it is virtually admitted in plaintiff's brief, that the proof failed to show that the policy had ever been transferred from the tobacco to the machinery. The plaintiff now contends that, notwithstanding that defect in the proof, he is entitled to recover for the loss of the tobacco which was covered by the policy. This is not a case where the policy covers all the

property destroyed. It did not cover the tobacco and machinery, both. It covered one only, and the plaintiff thought it was the machinery, and not the tobacco. So the complaint is framed with the idea and purpose to exclude the tobacco and include the machinery within the protection of the policy. Having failed to show that the policy covered the machinery, how can plaintiff recover for loss of the tobacco upon a complaint which completely negatives the idea that the tobacco was insured by the policy at the time of the fire? The doctrine of aider in pleading cannot apply here. The denials in the answer raise issues as to the transfer of the policy from the tobacco to the machinery, and as to the assignment to plaintiff. The fact that the answer denies the transfer of the policy from the tobacco to the machinery will not permit the plaintiff to recover for the tobacco. It is a simple denial, and not a statement of the facts. Even if it recited the facts, the plaintiff will not be allowed to abandon the averments in the complaint, and recover upon a collateral statement of facts set out in the answer. Grant v. Burgwyn, 88 N. C. 95. The proper course was to ask leave to amend. Rand v. Bank, 77 N. C. 152; Willis v. Branch, 94 N. C. 142. In this latter case it is said: "A variance arises when the proofs do not sustain the cause of action alleged in the complaint. If it is immaterial, it will be disregarded. If material and misleading, the court may, in its discretion, allow an amendment." Issues arise on the pleadings. They do not arise on the proofs. Therefore the rule that allegata et probata must correspond obtains under the Code, the same as under the old system. The only difference is that a new rule has been introduced for determining what a variance is, and its consequences. Pomeroy on Remedies, § 553. An immaterial variance is one which is so slight and unimportant that the adverse party could not reasonably be misled by it. The court may then order an amendment, or disregard the variance and proceed without amendment. When the variance is substantial—such that the adverse party may have been misled by the averments—if the proof bears some apparent relation to the averments an amendment may be allowed. Carpenter v. Huffsteller, 87 N. C. 278. But the amendment is essential, for proof without allegation is as ineffective as allegation without proof. McLaurin v. Cronly, 90 N. C. 50; McKee v. Lineberger, 69 N. C. 217. In Shelton v. Davis, 69 N. C. 324, Chief Justice Pearson said: "The idea of giving the plaintiff judgment upon a state of facts not alleged in the complaint, and entirely inconsistent with it, whatever may be said in regard to the progress of the age and the liberal and enlarged views of the Code of Civil Procedure, is a proposition which no member of this court can for a moment entertain." In this case the complaint practically avers that the machinery was insured, and the tobacco was not. The proof shows that the tobacco was insured, and the machinery was not. The suit is brought to recover for the machinery. The statement of the matter is sufficient to satisfy me that the court below committed no error.

(138 N. C. 507)

WOOD et al. v. TINSLEY.

(Supreme Court of North Carolina. May 25, 1905.)

1. SALE OF LAND—REGISTRATION OF CONTRACT—SUBSEQUENT PURCHASE WITH NOTICE.

Under Acts 1885, p. 233, c. 147, providing that no conveyance of land or contract to convey shall be valid to pass any property as against purchasers for value from the donor or bargainor but from the registration of such deed, one purchasing land by oral contract, going into possession thereunder, paying the purchase price, and making improvements, cannot assert right to remain in possession, till compensated for his improvements, against the purchaser under a subsequent recorded mortgage from the vendor, though the mortgagee and the purchaser under the mortgage had notice of the contract.

2. EJECTMENT—CLAIM FOR BETTERMENTS.

A claim for betterments under the statute cannot be set up on the trial of an action for land, but must be by petition filed after a judgment declaring plaintiff the owner of the land.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 509.]

Appeal from Superior Court, Transylvania County; Shaw, Judge.

Action by T. S. Wood and another against Pearce Tinsley. Judgment for plaintiffs. Defendant appeals. Affirmed.

Action for the recovery of land. The plaintiffs alleged that they are the owners of the land described in the complaint, and that the defendant was in the wrongful possession thereof. The defendant, by way of answer, alleged that prior to December 1, 1893, one W. L. Lankford was the owner in fee of the land described in the complaint, and contracted in parol to sell the land to the defendant, with the exception of 10 acres; that in pursuance of said contract the defendant paid Lankford the sum of $75, the purchase price thereof; that, relying on said contract, he erected a dwelling house, cleared six acres, and planted an orchard thereon; that the plaintiffs had full knowledge of the fact that he had purchased the land from Lankford, and had paid him for it, and had made improvements on it, taking the deed therefor. The plaintiffs, by way of reply, admitted that Lankford was the owner of the land, denied that they had any knowledge or information in regard to the alleged contract of purchase or improvements, etc. The only issues submitted to the jury were as to the plaintiffs' ownership and the defendant's possession. On the trial the defendant offered to prove that he had made a verbal agreement with Lankford to purchase the land, and had gone into the possession of the same in the year 1893; that

he had paid the purchase money, and had built a dwelling house, etc., on the land. The defendant also offered to prove that Pless, the mortgagee, and the plaintiffs all had notice of said contract, etc. The plaintiffs objected to all of the evidence on the ground that the alleged contract of purchase was not in writing, and that they claimed under the mortgage executed by Lankford to one Pless, which was duly registered, and that, pursuant to the power in the mortgage, Pless sold the land, which was bought by the plaintiffs, who took a deed therefor, which was duly recorded. The objection was sustained, and the defendant excepted. Under the instruction of the court the jury returned a verdict in favor of the plaintiffs, and from the judgment thereon the defendant appealed.

W. W. Zachary, for appellant. Geo. A. Shuford and Shepherd & Shepherd, for appellees.

CONNOR, J. (after stating the facts). The sole question presented by the defendant's exception is whether, since Act 1885, p. 233, c. 147, one going into possession of land under a parol contract to convey, paying a part or all of the purchase money, and making improvements thereon, can resist an action for the possession by a purchaser for value from the vendor until he has paid the amount expended for purchase money and improvements. Said chapter 147 enacts that "no conveyance of land, nor contract to convey, nor lease for more than three years, shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor or bargainor, but from the registration of such deed." This court has consistently, and without the slightest variation, held that the statute placed deeds and contracts to convey upon the same footing, as to registration, as mortgages and deeds of trust had theretofore been since the act of 1829 (Code, § 1254). Reade, J., in Robinson v. Willoughby, 70 N. C. 358, said: "Prior to 1829, it was settled by elementary writers and by the decisions of our own courts that an unregistered incumbrance would be upheld by the courts of equity against a subsequent unregistered incumbrance or conveyance with notice of the former, and that creditors and purchasers for value were affected by notice of prior equities." He said that such was then the law, except as to deeds of trust and mortgages, concluding: "Since that statute, the decisions have been uniform that deeds in trust and mortgages are of no validity whatever, as against purchasers for value and creditors, unless they are registered, and that they take effect only from and after registration, just as if they had been executed then and there." Blevins v. Barker, 75 N. C. 436; Todd v. Outlaw, 79 N. C. 237; and many other cases. In Hinton v. Leigh, 102 N. C. 28, 8 S. E. 890, Merrimon, J., says that no notice, "however clear," of a prior unregistered mortgage, could prejudice a purchaser for value. Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99. It is thus settled beyond controversy that, as against purchasers for value, an unrecorded mortgage has no validity, either by way of passing title or creating a lien, equitable or otherwise. Referring to the act of 1885 in Hooker v. Nichols, 116 N. C. 157, 21 S. E. 207, Faircloth, C. J., said: "It will be noted that the effective words of this act are identical in substance with section 1254 of the Code, and we are driven to the conclusion that the Legislature, with full knowledge of the meaning and effect of said act of 1829, intended to apply the same rule to all conveyances of land as declared in the late act of 1885, and we must give the same effect to it." Allen v. Bolen, 114 N. C. 560, 18 S. E. 964. In Collins v. Davis, 132 N. C. 106, 43 S. E. 579, we held that no notice, however full or formal, will supply the want of registration. In Maddox v. Arp, 114 N. C. 585, 19 S. E. 665, Shepherd, C. J., referring to the position of one claiming under an unregistered contract to convey, said: "Actual notice of a prior unregistered contract to convey cannot, in the absence of fraud, affect the rights of a subsequent purchaser for value whose deed is duly registered according to law." These and other cases in our Reports fully sustain the proposition that if the defendant had taken a written contract from Lankford to convey, and paid the entire purchase money, going into possession and putting improvements upon the land, and had failed to register such contract, it would not be valid at law to pass any property in the land against the plaintiff. It must follow from the statute and these decisions that if, after the execution and registration of the mortgage to Pless, Lankford had, in accordance with his parol contract, executed a deed to the defendant, it would have been of no validity as against the plaintiff. It is difficult to perceive how the defendant, being in possession under a parol contract not enforceable against Lankford, can be in any better or stronger position than if he had Lankford's deed unregistered, or how he has any equity affecting the legal title to which he can resort to prevent the plaintiff's recovery.

Our attention is called to a number of decisions of this court in which it is held that, when one induces another to enter upon and improve land under a parol promise to convey, he will not, upon repudiating his contract, be permitted to oust him until he has compensated such person for the enhanced value of the land, less reasonable rents and profits. The doctrine is first announced by this court in Baker v. Carson, 21 N. C. 381. The right of the vendee to retain possession does not rest upon the idea that any equitable right to or trust attaches to the legal title by virtue of the parol agreement, fol-

lowed by possession and improvement. This right was recognized by the English chancellors under the doctrine of part performance. Mr. Bispham thus illustrates the doctrine: "Hence, if a verbal contract is made for the sale of real estate, and is acted upon to the extent above indicated, neither party can then refuse to perform it on the ground that the provisions of the statute of frauds have not been complied with. If, for example, upon the faith of a parol agreement, the purchaser has gone into possession, has paid the purchase money, and has made valuable improvements, the vendor will not be suffered to set up the statute of frauds as a ground for refusing to execute the contract. The case, as it is said, is taken out of the statute." Eq. 384. This doctrine is held and enforced in many of the states of the Union, but has been repudiated by this court. Ellis v. Ellis, 16 N. C. 341, and other cases. In Baker v. Carson, supra, the court, speaking of the right to remain in possession, asserted by the vendee, said: "This claim to relief is not founded upon the supposed existence of any contract of which it seeks execution, or for the breach of which it asks compensation or damages. It is an appeal to the court to prevent fraud." This decision was followed in Albea v. Griffin, 22 N. C. 9. Gaston, J., said: "If they [the vendors] repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have conferred upon the property." In all of the cases found in our Reports involving this equitable doctrine, the same principle prevails. Prior to Luton v. Badham, 127 N. C. 96, 37 S. E. 143, 53 L. R. A. 337, 80 Am. St. Rep. 783, the principle was invoked by the vendee to be permitted to retain possession until he was compensated for his improvements. In that case the court held that the vendor, being in possession, is liable to the vendee for the value of the improvements. In none of the cases is it suggested that the vendee under such circumstances may have the vendor declared a trustee, or upon any other principle acquire the title, either legal or equitable, to the land. No right in or to the property accrues to the vendee by virtue of the parol contract to convey. If he seek to enforce it, and it be denied, he cannot show its terms; or, if it be admitted and the statute be pleaded, the court will not enforce it. It may be said that, as Lankford could not oust the defendant until he has compensated him for his improvements, the plaintiff, taking title with notice of the inability of his grantor, stands in his shoes, and takes subject to the burden or duty resting upon him. It is true that, when one takes with notice of an equity, he takes subject to such equity. To permit him to take free from an equity attaching to the title in the hands of his grantor, with notice thereof, would be to permit him to participate in a fraud and profit thereby. There is another well-settled maxim, "Equity follows the law." As we have seen, the law expressly declares that the contract to convey is void as against the plaintiff, because not registered. It is difficult to see how any equity can attach to the plaintiff's perfect title by reason of a void, unregistered agreement made with his grantor. For the grantor in an unrecorded deed to sell and convey the same land to another person is a fraud, and, if the second grantee has notice of the first deed, he participates in the fraud. Yet, in obedience to a well-defined and settled public policy which finds expression in clear and explicit language in the statute, the second grantee takes the title free from any rights or claims of the first grantor or vendor. The answer to the objection is, "Ita lex scripta est." The right to retain possession as against the vendor, repudiating his parol agreement, does not rest upon the statute giving compensation for betterments. As we have seen, it had its origin long before the passage of the act of 1871–72 (Code § 473). In Justice v. Baxter, 93 N. C. 405, the defendant claimed his betterments under the statute. The plaintiff objected, for that the contract to convey made by a husband and his wife, the latter being an infant, was never recorded. The plaintiff insisted that the defendant, in tracing his title back, would have discovered that the title was in a feme covert, and had never been divested by any valid conveyance or contract to convey on her part. The court held that such a construction of the statute was too narrow. The basis upon which betterments may be claimed is the finding by the jury that the person in possession, or those under whom he claims, believed at the time of making the improvements, and had reason to believe, the title good under which he and they were holding the premises. We do not think the defendant is in a position to claim the benefit of this statute. Even if he were in other respects, the exception does not present the question. A claim for betterments under the statute cannot be set up on the trial to resist the plaintiff's recovery, but by petition filed after a judgment declaring the plaintiff the owner of the land. This is illustrated by what is said in Rumbough v. Young, 119 N. C. 567, 26 S. E. 143.

We have had our attention called to no case in which the defense or claim of the defendant was set up against a purchaser from the original vendor, except as hereinafter noted. However the question may have been decided prior to the act of 1885, we are of the opinion that since that statute no such claim can be maintained against a purchaser for value holding under a duly registered deed. Our attention is directed to the opinion in Kelly v. Johnson, 135 N. C. 647, 47 S. E. 674. We decided in that case that one who had been let into possession under a parol agreement and had made im-

provements was entitled to be compensated, and that, as the purchaser had not paid all of the purchase money to the vendor, the vendee interpleader should be paid out of the balance remaining due. The writer, in justice to the other members of the court, assumes the responsibility for the expressions used in that opinion conflicting with what is here decided, and corrects it by admitting the error into which he fell. The decision in that case is correct; the language, in so far as it expresses the opinion that the purchaser was affected by the parol unrecorded agreement, was erroneous, and the opinion in that respect is modified.

We carefully refrain from expressing any opinion in regard to the operation of the act of 1885 as affecting equities attaching to the legal title, as against purchasers for value, beyond what is necessary to the decision of this case. As we have endeavored to show, the defendant here cannot assert against the plaintiff the right to remain in possession until he is compensated for his improvements, because he claims under an unregistered agreement to convey, which comes directly within the express words of the statute. What effect the statute has upon equities and equitable titles arising out of parol trusts or attaching to the legal title by construction or implication, we express no opinion. The question is important and interesting. Whether persons entitled to such rights come within the words of the statute as claiming under the "donor, bargainor or lessor" must be left for future consideration, and be decided when presented. The purpose of the statute was to enable purchasers to rely with safety upon the examination of the records, and act upon the assurance that, as against all persons claiming under the "donor, bargainor or lessor," what did not appear did not exist. That hardships would come to some in applying the rigid statutory rule was well known and duly considered. That every possible effort to reduce the number of such hardships to the smallest possible limit consistent with the integrity of the statute and the enforcement of the policy upon which it was founded was made, is shown by the carefully drawn provisos and safeguards. The change in our registration laws was demanded by the distressing uncertainty into which the title to land had fallen in the state. No one could say for himself or advise others with any certainty or safety in regard to a title. Deeds which for years had not been seen or heard of beyond the family chest or drawer were brought forward and registered, destroying "by relation" titles which were supposed to be perfect and for which full value had been paid. The statute has been in force without amendment for 20 years. This court has uniformly so construed it that the purpose of the Legislature has been effectuated. If the defendant has sustained an injury by the conduct of the person with whom he made a parol contract which should have been in writing and recorded, it is to be regretted, but it is not the fault of the law. Its protective provisions are clear and explicit. To permit him to disregard it at the expense of the plaintiff, who has obeyed it, would be to seriously impair the value of the statute and return to many of the evils which its enactment sought to remove.

The judgment must be affirmed.

WALKER, J., concurs in result.

(128 N. C. 533)

BROWN v. ASHEVILLE ELECTRIC LIGHT CO. et al.

(Supreme Court of North Carolina. May 26, 1905.)

1. STREETS—ERECTION OF ELECTRIC POLES AND WIRES.

The authority given a city, after condemnation of land for a street and sidewalk, to permit the erection of poles and wires over streets, merely authorizes the city to grant franchises over a street, subject to the rights of abutting owners; and an electric light or street railway company appropriating any of the reserved rights of such abutting owners must compensate them therefor.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 312.]

2. SAME—TREES IN SIDEWALK—RIGHTS OF ABUTTING OWNERS.

Trees standing on the edge of a sidewalk, and not interfering with the use of the street or sidewalk, cannot be cut down without compensating the abutting owners.

3. EMINENT DOMAIN—NECESSITY.

An electric light or street railway company cannot, by eminent domain, acquire the right to cut down trees in the edge of the sidewalk for mere convenience in erecting poles and wires; it not being necessary therefor.

Appeal from Superior Court, Buncombe County; Justice, Judge.

Action by B. C. Brown against the Asheville Electric Light Company and others. Judgment for plaintiff against such defendant and the Asheville Street Railroad Company, and they appeal. Affirmed.

J. C. Martin and F. A. Sondley, for appellants. Frank Carter and H. C. Chedester, for appellee.

CONNOR, J. For the purpose of disposing of the questions presented upon this record, we may take certain propositions as settled: The land over which are the street and sidewalk upon which plaintiff resides was the property of the grantor of the plaintiff. By condemnation proceedings duly had, the city of Asheville acquired an easement over said land for the purpose of enabling it to open and maintain a public street and sidewalk for the use of the citizens of Asheville. That the fee to said land remained in the owner, and was granted to plaintiff, together with the lot, to the outer edge of the sidewalk. The tree cut down by the defendants stood upon the sidewalk, on the

outer edge, and was not a nuisance to or interference with the public use of the sidewalk. That the city, by its charter and amendments thereto, had control of the street and sidewalk, with all of the powers in regard to the use thereof and of removing obstructions therefrom necessary and convenient to that end. That such powers included the right to cut down and remove this or any other tree on the street or sidewalk which, in the judgment of the city authorities, was a nuisance to or an obstruction of the public in the use of the street and sidewalk. That said tree afforded shade to the premises and residence of plaintiff, and its removal depreciated the value of plaintiff's property to the extent of $499, as found by the jury. In view of his honor's instruction to the jury, we must assume that the jury found, and we find ample reason to justify such finding, that the defendant electric light company, with the permission of the superintendent of streets of the city of Asheville, afterwards approved by the board of aldermen, removed the tree for the purpose of more conveniently erecting its poles and stringing its electric wires along the street. His honor thus stated the contention on the part of the defendants: "The defendants contend that they had the right to cut down this tree on account of the fact that the land was condemned for a street, that they had the right to cut it down for any purpose, and especially that they had the right to cut it down for the purpose of allowing electric light wires to pass there, which they say was for the benefit of the public. The court charges you that if that was the purpose, and the city allowed the corporations that ran the electric light wires and the railroad company to do so more conveniently, then it would be your duty to answer the first issue, 'Yes.' The city would not have the right, as the court views the matter, to cut down that tree for the purpose of appropriating that part of the land for the use of the defendants, unless the condemnation was for the purpose of the city, and they would not have the right to go there and cut down the tree unless they were going to use it for the purpose for which it was condemned." Before discussing the exceptions which challenge the correctness of this and other instructions involving the same principle, it is proper to say that, by an amendment to the charter of the city made subsequent to the condemnation of the land for a street and sidewalk, the city authorities were given power to permit the erection of telegraph, electric light, poles and wires, etc., on and over the public streets of said city. This power, of course, in no manner affects the rights of abutting owners. The Legislature could not have intended, because it had no authority, to confer such power, to be exercised in violation of such private rights. It simply empowered the aldermen to grant the franchise over the streets of the city, subject, of course, to the rights of the citizen in respect to his private property. The Legislature had no power itself to empower corporations to appropriate private property without compensation, and, of course, could not authorize the city to do so. C. & P. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219.

There are a large number of exceptions to his honor's charge, both in respect to instructions given and refused. We do not deem it necessary to pass upon all of them, because, in our view of the case, assuming the facts to be as contended by defendants, we find no error in the record. Conceding to the city of Asheville the largest possible powers in respect to opening and controlling its public streets, they must all be construed and exercised within the well-defined limitation that they are held and to be used as a public trust for the benefit of the citizens of Asheville, and not for the convenience or even the necessities of private persons or corporations. In speaking of the exercise of this power, the New York court says: "But we think it cannot, under guise of exercising this power, appropriate a part of the street to the exclusive, or practically to the exclusive, use of a railroad company, so as to cut off abutting owners from the use of any part of the street without making compensation for the injury sustained." Reining v. N. Y., L. & W. R. Co., 128 N. Y. 168, 28 N. E. 640, 14 L. R. A. 133.

As the question is one of much practical importance to the people of the state, we will endeavor to mark the line which limits the power of municipal and quasi public corporations, or private corporations engaged in public service, in interfering with the rights of abutting owners upon streets and highways. This court has in Tate v. Greensboro, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671, defined the power which the duly constituted city authorities have in opening, widening, using, and controlling public streets. That this power, when exercised for the purpose and objects for which it is granted, and in good faith, is not subject to the supervision of the courts, is well decided in that case. We have no disposition to bring that decision, or anything said therein, into question. We adopt what is said by Mr. Justice Burwell as stating the principle upon which our decision is based: "It is not to be denied that the abutting proprietor has rights as an individual in the street in his front, as contradistinguished from his rights therein as a member of the corporation or one of the public. The trees standing in the street along the sidewalk are, in a restricted sense, his trees. If they are cut or injured by an individual who has no authority from the city to cut or remove them, he may recover damages of such individual. His property in them is such that the law will protect it from the act of such wrongdoer and trespasser." Where it is said "who

has no authority from the city," it is meant no lawful authority, because, as we shall see, the city has no power to confer authority except in the manner and for the purpose for which it may do the act itself. Many of the decisions discussing the right of abutting owners upon streets and highways make a distinction between owners holding the fee in the land, and those who have only such rights as accrue from their location on the side of the street. It is conceded that the fee to the land upon which the sidewalk is located and the abutting lot is in the plaintiff. We shall discuss the case from that view. The condemnation for a street and sidewalk therefore gave to the city an easement, the limit and extent of which, both in respect to the use and the time of its enjoyment, are measured by the public necessity. "Where an easement only is taken for a public highway, the public acquires a paramount right to use and improve the land taken for highway purposes, which includes not only the right of passage, but such other incidental uses as have been immemorially accustomed to be made of public highways, such as the laying of sewers, gas and water pipes, and the like." 2 Lewis, Em. Dom. § 589; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224. This court has uniformly held that the right acquired by condemnation is confined to the public necessity, and to the uses for which property is taken or burdened with the easement; that, for any additional burden placed upon the servient tenement, compensation must be made. Story v. N. Y. El. R. R., 90 N. Y. 122, 43 Am. Rep. 146; White v. R. Co., 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639; Phillips v. Telegraph Co., 130 N. C. 513, 41 S. E. 1022; Hodges v. Tel. Co., 133 N. C. 225, 45 S. E. 572. Such conflict as may be found in the decisions arises out of the application of the principle. It is uniformly held that an easement acquired for one purpose, either by grant, dedication, or condemnation, cannot be appropriated to another purpose. "It is certainly well settled that, where a grant is made or trust created for a specific and defined purpose, the subject of the grant or trust cannot be used for another and foreign purpose without the consent of the party from whom it was derived, or for whose benefit it was created. We are not considering the right of the corporation to part with whatever interest it possessed under the dedication and trust, but the power of the corporation under the Legislature to deprive the owner of a lot fronting on land so dedicated. * * * It cannot be successfully contended either that the dedication of land for a highway gives to the public an unlimited use, or that the Legislature have the power to encroach upon the reserved rights of the owner by materially enlarging or changing the nature of the public easement." Elevated R. R. Case, supra.

In respect to an easement acquired by condemnation the reason is obvious: In assessing compensation the commissioners are restricted to such damages as are incident to the specific use for which the condemnation is made. While the city authorities had ample power to confer upon the defendants a franchise to lay their tracks, erect their poles, and string their wires along the streets or sidewalks, if such franchise did not materially restrict or interfere with the public use for which it was held in trust, such power could not affect the right of abutting owners to demand compensation for any additional burden imposed upon their property. The fact that the defendant corporation was operating a public utility does not affect the question; the only difference being that if the city conferred the privilege upon a private citizen or a corporation operating a private business, and its enjoyment interfered with the right of an abutting owner, no right to continue the use of the privilege could be acquired except by grant, whereas, if the person or corporation is conducting a business concerning the public—one conferring the right of eminent domain—the right to use the franchise or privilege may be acquired by condemnation, and paying the abutting owner compensation for the additional burden. The doctrine is well stated in Reining v. N. Y., L. & W. R. Co., supra: "It is quite probable that the general interests of B. and of the larger public are promoted by this appropriation of the streets, but it by no means follows that a lot owner whose property is injured should bear the loss for the public benefit. * * * The power conferred by the charter of B. upon the common council to permit the track of a railroad to be laid in, along, or across any street or public ground must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded." In the same case Gray, J., concurring said: "Here the object was to subserve the railroad use, and the appropriation of this embankment is practically exclusive. The street was subjected to a new use, with consequences as direct, in the permanent deprivation of the abutting property owner's appurtenant easement, as though the railroad was operated in front of his premises upon a structure physically incapable of other uses." In Eels v. A. T. & T. Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640, Peckham, J., says: "We think neither the state nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous, and exclusive use by setting up poles therein, although the purpose for which they are to be applied is to string wires thereon, and thus transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation, but the Constitution provides that private property shall

not be taken for public use without compensation to the owner. Where land is dedicated or taken for a public highway, the question is, what are the uses implied in such dedication or taking? Primarily there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner, and he retains the ownership of the land, subject only to the public easement." To impose any different or additional burden without compensation cannot be done by the Legislature, either directly, or by granting the power to a city. We cannot assume that it was intended to do so. Such intent is not to be gathered from the statute. White v. R. Co., supra. The question is exhaustively discussed in Story v. N. Y. El. R. R., supra.

There is some conflict of judicial opinion in respect to what constitutes an additional burden. The Supreme Court of Maryland, in C. & T. Tel. Co. v. MacKenzie, 74 Md. 36, 47, 21 Atl. 690, 693, 28 Am. St. Rep. 219, says: "And so the condemnation of private property for a highway subjects the land so taken merely to an easement in favor of the public, and does not divest the owner of the fee. Planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property, and unlawful, unless the right to do so is acquired by contract or condemnation." After discussing the rights of the public in the street, the court proceeds to say: "Subject to these and other like rights in the municipality and the public to the use of the street for street purposes, the owner of the fee in the bed of the street possesses the same right to demand compensation for additional servitudes placed thereon that the owner of the bed of a highway in the country is entitled to. If, then, the fee of the bed of the street be in the appellee, the planting of the pole was an additional servitude imposed upon her land, for which she could claim compensation, and the act of the Assembly could not deprive her of it." In Broome v. Tel. Co., 42 N. J. Eq. 141, 7 Atl. 851, the chancellor says: "In order to justify the defendants in setting up the poles, it is necessary for them to show that they have acquired the right to do so, either by consent or condemnation, from the owner of the soil. The designation by the city or town authorities of the streets where the poles may be set up is not enough." The same view is held in B. T. Tel. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453. That was an action of trespass, as the one before us. It appeared that in addition to putting the poles upon the highway, in which plaintiff owned the fee, the employés of the company "cut away the hedge because it was in their way, and they also cut down two hedge trees." The court said: "The position taken by the defendant is that the state can rightfully, as it has done, authorize the county board to permit defendant to construct its line of telegraph upon the highway without consent of the abutting landowner; that it imposes no new or additional burden thereon, and that when the public acquire an easement over land, for a compensation fully made, the public obtain all the rights the landowner had, and the state may authorize any use of it not inconsistent with its use as a highway." After stating the contention of the landowner, the court says: "The latter position is the one best sustained by authority, and rests on sounder principles. * * * The principle is, neither the state nor a municipal corporation has any rightful authority, under the Constitution, to grant away the private property of the citizen; and if corporations quasi public, in the exercise of the right of eminent domain with which they are clothed by the sovereign power of the state, seek to appropriate it so that they may have a benefit therefrom, every principle of justice demands that they should make just compensation, whether the property taken is of little or great value. But aside from all considerations of right and justice, the Constitution has so declared, and its mandate in that respect may not be disregarded." Ind., B. & W. R. R. v. Hartley, 67 Ill. 439, 16 Am. Rep. 624; Willis v. Erie T. & T. Co., 37 Minn. 347, 34 N. W. 337; Stowers v. Postal Tel. Co. (Miss.) 3 Am. Electrical Cas. 855; Joyce on Elec. Law, § 321. That shade trees may not be removed, except when necessary for the use of the street by the public, is well settled. Lewis, Em. Dom. § 132. There are some authorities to the contrary, but we think the view taken by those cited the sound one.

We have no hesitation in holding that assuming that, the board of aldermen of the city of Asheville had met and formally granted to the defendants authority to remove the tree, finding that its removal was necessary to put up its poles and wires either for the electric light or street railway upon and along the sidewalk, such action would not have justified the act of defendants. It was not within the power of the city to deprive the plaintiff of his property for such purpose without compensation. We find, however, no averment or evidence that it was necessary to remove the tree. It is suggested that it was more convenient to place the poles and string the wires with the tree out of the way. This falls far short of the essential conditions upon which private property may be taken, or burdens imposed upon it. The right of eminent domain has been so freely conferred upon corporations, upon the mere suggestion that their business is in some way connected with service to the public, that we are in danger of forgetting that it is one of the most delicate and dangerous powers conferred by the people upon their government. Public franchises have been so generously and lavishly conferred and so freely used without compensation that those who wish to enjoy them forget that one of the chief ends for which government is cre-

ated and taxes paid is the protection of private property, and then only with compensation. The record in this case shows that a valuable right of property, affecting the comfort, health, and welfare of the citizen and his family, has been taken, upon the suggestion of a private corporation to the superintendent of streets, without inquiry by the board of aldermen, notice to the plaintiff, or any opportunity to be heard in defense of his rights. No person shall be deprived of his property, except by the law of the land, or due process of law, which has been defined to mean the right to be heard before he or his property is condemned. This sacred right is binding upon every department of the government, and all of its agencies, including municipal and private corporations.

While it is held in Tate v. Greensboro, supra, that the power to remove shade trees, where their removal is necessary for the use of the street as a public highway, may be conferred upon the street committee, it would be more in accordance with due and orderly procedure to do so only after due notice to the owner, and a hearing before the legislative body of the city. The tree was cut on March 21, 1901. This action was brought on July 5, 1901. On September 16, 1904, the board of aldermen adopted a resolution reciting that the action of three corporations named "or one or more of them in cutting down and removing the tree in front of the place then owned and occupied by B. C. Brown," etc., "some years ago in putting a line of street railway and appurtenances upon said street in front of said property, or replacing thereon certain light wires be and is hereby ratified and confirmed, said tree having been so cut and removed by direction of the proper authorities of the said city." It is evident that at the time of the passage of this resolution the board were not certain to what corporation the power was given to cut the tree, or for what purpose it was conferred. It is not suggested in the resolution that it was necessary to remove the tree, or that it interfered with the street railway or the light wires. Indeed, it is apparent that the board knew but little about the matter which they "ratified and confirmed."

We have discussed the case upon the assumption that the tree was on the sidewalk. The testimony shows that, while the condemnation took place in 1892, the land had never been used as a sidewalk. The plaintiff testified without contradiction that he had at the time the tree was cut lived at the place six years, and "there had never been any sidewalk there." The tree was removed in March, 1901, and the hole out of which it was taken, "about ten feet square," was open at the time of the trial. The testimony further shows that the tree was cut by the superintendent of the defendant companies while Mr. Brown was away from home; that when his wife phoned him, and he directed her to forbid the removal of the tree, the parties gave no heed to her request: and that in some way the wires connecting the phone were cut.

We are impressed with the wisdom of the words of Judge Peckham in concluding his opinion in Eels v. A. T. & T. Co., supra. Referring to the argument that cases of this character should be decided with reference to the wants of an advancing civilization, which is doing so much to render life more comfortable and attractive, he says: "Let the defendants pay the owners for the value of the use it makes of the land outside and beyond the public easement in the highway, and the necessity of the broader decision is done away with. It has the power to take the land upon making compensation, and hence the refusal of the owner will not stop the proposed undertaking."

We have carefully examined the record and the exceptions to his honor's rulings. We find no error of which the defendants can complain. We are of the opinion that the allegations were sufficient to entitle the plaintiff to demand exemplary and punitive damages, and the testimony shows ample ground upon which to base the claim. In the entire transaction there was on the part of the defendants a painful disregard of the rights of the plaintiff. While extensive powers and wide discretion are given municipal authorities for the discharge of their duty to the public, it should always be borne in mind by those who serve in public positions that in our system of government there is no room or place for arbitrary power. The law which is a rule of action for the citizen is equally so for the official. Every man, when his right of person or property is invaded, has a right and it is his duty to demand, "Quo warranto."

The judgment must be affirmed.

(138 N. C. 733)

STATE v. LYTLE.

(Supreme Court of North Carolina. May 26, 1905.)

1. INTOXICATING LIQUORS—UNLAWFUL SALE—FORMER CONVICTION.

When a tax or license is required by the state, and another tax or license is exacted by a town in the state, for selling intoxicating liquors, selling the same glass of liquor may be a violation of the town ordinance and also a violation of the state law, where license has not been obtained from both, and hence, on a prosecution by the state a plea of former conviction, based on a conviction and sentence by a police court for the same offense, is not available.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 404.]

2. COURTS — CREATION — JURISDICTION—CONSTITUTIONAL LAW.

Laws 1905, c. 35, creates a special court in Asheville, to be styled the "Police Court." Section 4 confers on the court all the jurisdiction and powers in all criminal offenses occurring within the corporate limits of the city "which are now or may hereafter be given jus-

tices of the peace." Section 5 provides that the court shall, in addition to the jurisdiction conferred by section 4, have exclusive original jurisdiction of all other criminal offenses committed within the corporate limits of the city below the grade of felony "as now defined by law," and that all such offenses committed within the city are declared to be petty misdemeanors. Section 13 gives the right of appeal in all cases to the superior court of the county, but the act does not provide for a jury or grand jury. *Held* that, since the Constitution does not make the jurisdiction of justices of the peace exclusive as to offenses cognizable by them, the act, so far as section 4 is concerned, is a valid exercise of the power conferred on the General Assembly by Const. art. 4, § 14, authorizing it to establish special courts for the trial of misdemeanors in cities and towns.

3. SAME—TRIAL BY JURY.

Section 5 of the act is not repugnant to Const. art. 1, § 13, providing that no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court, but that the Legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal, objection to it on that ground being met by the right of appeal given by section 13.

4. SAME.

In view of Const. art. 11, § 2, leaving entirely to the General Assembly the punishment to be inflicted for any crime, it was competent for the Legislature to define and mark the offenses classifiable as "petty misdemeanors," as it did in section 5 of the act, and hence that section is not repugnant to Const. art. 1, § 12, providing that no person shall be put to answer any criminal charge except as hereinafter allowed by indictment, presentment, or impeachment.

5. SAME.

Nor is the act rendered repugnant to the Constitution merely because it declares certain offenses "petty misdemeanors" in Asheville, and triable without a finding by a grand jury, while it is not so enacted as to other parts of the state.

Appeal from Superior Court, Buncombe County; Neal, Judge.

Mark Lytle was convicted of retailing spirituous liquor without a license, and he appeals. Reversed.

Frank Carter, for appellant. M. W. Brown, with the Attorney General, for the State.

CLARK, C. J. By chapter 35, Laws 1905, there was created a special court in Asheville, to be styled the "Police Court," to be presided over by a police justice, providing for his election, term of office, qualification, and compensation. Section 4 of said act confers upon said court "all the jurisdiction and powers in all criminal offenses occurring within the corporate limits of the city of Asheville, which are now or may hereafter be given justices of the peace," and also "exclusive original jurisdiction to hear and determine all offenses and misdemeanors consisting of a violation of an ordinance of said city." Section 5 provides that "said police court shall, in addition to the jurisdiction conferred by section 4 of this act, have exclusive original jurisdiction of all other criminal offenses committed within the corporate limits of said city, below the grade of felony as now defined by law, and all such offenses committed within said city are hereby declared to be petty misdemeanors." By section 13 the right of appeal to the superior court of Buncombe county is given in all cases.

The defendant, who was indicted in the superior court for retailing spirituous liquor without license, contrary to the general law of this state, pleaded former conviction, and relied upon the record of his trial, conviction, and sentence in the police court for retailing spirituous liquor in violation of the town ordinance. It does not appear that it was the same sale, but, even if it were, the plea of former conviction was invalid, as was held in State v. Stevens, 114 N. C. 878, 19 S. E. 861, where it is pointed out that, while a town ordinance cannot make punishable an offense made punishable by the state law, yet when a tax or license is required by the state, and another tax or license is exacted by the town, selling the same glass of liquor may be a violation of the town ordinance and also a violation of the state law, if license has not been obtained from both; and, further, the same act may be punishable by the federal government if in violation of its statutes; and, indeed, if the purchaser is a minor, the same single act may constitute a fourth distinct offense of selling spirituous liquor to a minor, and even a fifth if the sale is on Sunday. Though there is a single act, it may be thus a violation of five statutes, and when in such case "each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution under the other." Burwell, J., in State v. Stevens, 114 N. C. 873, 19 S. E. 861 (at page 877, 114 N. C., and page 862, 19 S. E.) citing Arrington v. Commonwealth, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242; Ruble v. State, 51 Ark. 170, 10 S. W. 262; Black, Intox. Liq. § 555. The ruling in State v. Stevens has been cited and followed in State v. Reid, 115 N. C. 741, 20 S. E. 468; State v. Robinson, 116 N. C. 1048, 21 S. E. 701 (which was the case of an assault with a deadly weapon and also carrying a concealed weapon); State v. Downs, 116 N. C. 1067, 21 S. E. 689; State v. Lawson, 123 N. C. 742, 31 S. E. 667, 68 Am. St. Rep. 844; State v. Smith, 126 N. C. 1059, 35 S. E. 615.

The defendant further moved to quash the indictment and also in arrest of judgment upon the ground that by virtue of the above-recited act of 1905 the superior court had no original jurisdiction. This presents the real point in the case, which is the constitutionality of section 5 of the act. There can be no question as to the validity of so much of section 4 as gives the police court concurrent original jurisdiction of offenses cognizable by justices of the peace, for the Constitution does not make the jurisdiction of the latter exclusive. Rhyne v. Lipscombe, 122 N. C. at page 656, 29 S. E. at page 58. Counsel asked us to pass upon the constitutionality

of the other clause of section 4 which purports to give to the police court "exclusive original jurisdiction to hear and determine all offenses and misdemeanors consisting of a violation of an ordinance of said city." But that point is not presented by this record, and we would not presume to pass upon the constitutionality of an act of the General Assembly upon an obiter dictum. It is too serious a matter to be considered unless absolutely necessary to the decision of a cause, and a statute will then never be held unconstitutional if there is any reasonable doubt. Sutton v. Phillips, 116 N. C. 504, 21 S. E. 968. The Constitution (article 4, § 14) authorized the General Assembly to establish "special courts for the trial of misdemeanors in cities and towns." By virtue of this provision such courts were formerly established in Wilmington and Newbern. By the constitutional amendments of 1875 (article 4, §§ 2, 12) the General Assembly was authorized to establish "such other courts inferior to the Supreme Court" and "allot and distribute" the jurisdiction of the courts below the Supreme Court as it saw fit. Under this criminal courts and circuits were established, until finally these courts were, by statute, given the same jurisdiction, civil and criminal, as the superior courts, with the right of appeal therefrom direct to this court. In Rhyne v. Lipscombe, 122 N. C. 650, 29 S. E. 57, and Tate v. Commissioners, 122 N. C. 661, 29 S. E. 60, these acts were held unconstitutional so far as they provided for appeals direct from such courts to this court, and took away the appeal, given by the Constitution, direct from justices of the peace to the superior court. Subject to these restrictions, and the further restriction that such courts might be given only concurrent, but not exclusive, jurisdiction of matters given to justices of the peace by the Constitution, it was held that the General Assembly might "create courts inferior to the Supreme Court, with all or such part as it thinks proper, of the original criminal or original civil jurisdiction above that given by the Constitution to justices of the peace." The objection to section 5 is therefore founded upon the Constitution, art. 1, § 12: "No person shall be put to answer any criminal charge, except as hereinafter allowed, by indictment, presentment or impeachment;" and section 13: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal."

In the police court there is no jury nor grand jury. The guaranty of a jury trial is fully met by the right of appeal which is given from this police court, in all cases, to the superior court, but the objection is urged that there is no provision for a grand jury. The General Assembly might have provided for this also by enacting that upon appeal the action should be quashed unless an indictment is found. It sought, however, to attain the same end by providing that "all offenses less than felony, as now defined by law, committed within said city, are hereby declared to be petty misdemeanors." Laws 1876–77, p. 250, c. 154 (Code 1883, c. 21), established a general system of inferior courts, and gave them jurisdiction (Code § 808) "of all crimes and misdemeanors except those whereof exclusive jurisdiction is given to courts of justices of the peace and except the crimes of murder," etc.; and section 11 (page 253) of said act (Code, § 810) provided that "in all issues of fact founded upon trials of petty misdemeanors the parties may * * * waive their right to have the same determined by a jury." As these courts had no jurisdiction, either original or appellate, of any offense within the jurisdiction of a justice of the peace, it is clear that "petty misdemeanors" was not a term restricted to offenses cognizable by a justice of the peace. When the Constitution of 1868 was created, there was no distinct classification known as "petty misdemeanors." At that time "misdemeanor" was a broader term than now, and embraced many crimes that were infamous and done in secrecy and malice, or with deceit and intent to defraud, which formerly were punishable corporally, and after 1868 by imprisonment in the state's prison. Among these, as enumerated in Rev. Code, c. 34, were accessories to felony (section 54); certain grades of arson (section 30); bribery of jurors (section 34); mismarking cattle; larceny (section 57); concealing birth of child (section 28); false pretense (section 67); forgeries (section 64, 65, and 66); certain larcenies (section 31 and 32); receiving stolen goods (section 56); and perjury (section 49). By Rev. Code, c. 34, § 120, misdemeanors were to be punished as at common law, "but the punishment of the pillory shall be used only for crimes that are infamous, or done in secrecy and malice, or done with deceit and intent to defraud." Thus misdemeanors were practically divided into two classes: (1) Those which, by reason of their heinous nature, might be punished corporally, and (2) those that could not be so punished. The first class—those that could be punished corporally—were not petty. The others it would not be unreasonable to term "petty." The act of 1891, p. 173, c. 205, by defining felony as all offenses "punishable by death or imprisonment in the state's prison," transferred all of the first class, the misdemeanors formerly punishable corporally, into the class of felonies. It was competent for the Legislature to do this, and make those crimes felonies. It was equally competent for it, in the act before us, to style the misdemeanors in the second class above as "petty misdemeanors." The punishment to be inflicted for any crime is left entirely to the General Assembly, which can, in its discretion, affix lesser punishments, even for the

four crimes now visited with capital punishment. Const. art. 11, § 2. As it can fix the punishment, and can change at will the dividing line between felonies and misdemeanors, there is no constitutional inhibition upon its defining any class of lesser crimes as petty misdemeanors. The object of the statute creating the police court is to relieve the superior courts of petty business, to relieve the taxpayers, and defendants also, of heavy costs, and to give a speedy trial, lightening jail expenses, and dispensing often with long imprisonment on detention till a term of court comes around with its jury and judge. There is no harm done, since an appeal always lies open to a convicted defendant to the superior court where he has the right of trial by jury; whereas to the acquitted defendant, or to one who takes no exception to his punishment, there is a relief from unnecessary delay and costs, as well as diminution of court expenses to the public. Indictment by grand jury is still required for other than "petty misdemeanors."

The Constitution not having defined "petty misdemeanors," and there being no well-settled line of demarcation when that instrument was adopted, it was competent for the General Assembly to define and mark the offenses which should be so classified. We see no force in the argument that another Legislature may denominate all felonies as "petty misdemeanors," and thus even murders may be tried without the intervention of a grand jury. Certainly the General Assembly can reduce the punishment of any and all offenses, and leave no offense above the grade of petty misdemeanors. The judicial department assumes no supervision of the Legislature. The lawmaking body represents the people, and, unless an enactment is clearly in contravention of the organic law—the Constitution—the correction of any measure passed by the Legislature must be left to another Legislature. The courts have no such power. We cannot assume that the Legislature would attempt to evade the Constitution.

It is lastly suggested that the act is invalid in that it declares these offenses petty misdemeanors in Asheville, and triable without a finding by a grand jury, while it has not so enacted elsewhere. It is not necessary that, because there is a police justice trying petty misdemeanors without a grand jury in Asheville, there must be the same procedure everywhere throughout the state. In State v. Mallett, 125 N. C. 718, 34 S. E. 651, this court held that the Legislature could authorize appeals by the state to this court from judgments in the superior court upon appeals thereto from the Eastern District criminal court, though appeals by the state were not allowed from judgments in the superior court upon appeals thereto from the Western District criminal court. Upon writ of error to the United States Supreme Court this ruling was affirmed (181 U. S. 589, 21 Sup. Ct. 730, 45 L. Ed. 1015; reprinted 128 N. C. Append. 619), the court saying on pages 628, 629: "Each state prescribes its own mode of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the fourteenth amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states cannot be essential as regards different parts of the same state." The state Constitution contemplated a diversity of procedure in this particular when it provided in article 4, § 14, that "the General Assembly shall provide for the establishment of special courts for the trial of misdemeanors in cities and towns where the same may be necessary." Sections 12 and 13 of article 1 are to be construed together. State v. Crook, 91 N. C. 540. When article 4, § 27, dispensed with indictment by a grand jury, required by article 1, § 12, "except as hereinafter allowed" in the trial of cases before justices of the peace, and when article 1, § 13, also dispensed with it "in the trial of petty misdemeanors," without defining what such misdemeanors were, it left the classification to the General Assembly. Should the General Assembly classify as a "petty misdemeanor" a crime whose punishment is clearly not of that class of offenses, a serious point would be presented. But this was not done in this act. The superior court had no original jurisdiction of this offense, and the motion to quash and in arrest of judgment should have been sustained.

Reversed.

(138 N. C. 410)

PRESSLY v. DOVER YARN MILLS.

(Supreme Court of North Carolina. May 16, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—APPLIANCES.

A yarn mill owner was bound to supply his workmen with such safe and suitable appliances for their work as were approved and in general use.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 171, 178–192.]

2. SAME—ASSUMPTION OF RISK.

In an action for injuries to a servant, an instruction that if he knew, or by the exercise of ordinary care could have known, at the time of the injury, that the machine which he was repairing was not provided with a belt shifter, and that the belt was therefore liable to slip from the loose to the tight pulley, and plaintiff's act in attempting to repair the machine was so obviously dangerous that he knew he was taking an extra risk, then he assumed such risk, was proper.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574–600.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

An instruction in an action for injuries to a servant that if the injury would not have happened if defendant had supplied the machine with a belt shifter, and that was really

the proximate cause of the injury, that would constitute continuing negligence, and plaintiff was entitled to recover, though he might have been negligent in using the machine, was error, plaintiff not being thereby absolved from all duty to use reasonable care and prudence.

4. SAME—HARMLESS ERROR.

Where, in an action for injuries to a servant, there was no evidence of contributory negligence apart from the fact that plaintiff continued to work after knowing of the existence of the defect in the machine which caused the injury, which question was submitted to the jury under the issue of assumed risk, an erroneous instruction on plaintiff's contributory negligence was harmless.

5. SAME—CONTRIBUTORY NEGLIGENCE.

Where plaintiff was injured by the starting of a machine while he was repairing it, caused by the absence of a belt shifter, and testified that it was not usual to entirely remove the belt from the pulley to make repairs, that it was a very troublesome matter to replace the belt when entirely taken off, and sometimes required a half hour's time, he was not guilty of contributory negligence in failing to entirely remove the belt from the machine before working thereon.

6. SAME—ASSUMPTION OF RISK.

Plaintiff, a nonexpert, was employed in defendant's yarn spinning room for a short time, when he became a section hand, employed in the same room to make minor repairs to machines and look after hands. While engaged in repairing a spinning frame, he was injured by the starting of the machine, caused by the absence of a belt shifter, which permitted the belt to run from the loose to the tight pulley. Plaintiff had complained to his overseer that such shifters were needed, but they had not been furnished. *Held*, that defendant did not assume the risk as a matter of law.

Brown, J., dissenting.

Appeal from Superior Court, Mecklenburg County; O. H. Allen, Judge.

Action by J. M. Pressly against the Dover Yarn Mills. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for damages for negligence, tried before O. H. Allen, judge, and a jury, at January term, 1905, of Mecklenburg superior court. Issues: (1) Was plaintiff injured by the negligence of defendant? (2) Did plaintiff, by his own negligence, contribute to his own injury? (3) Did plaintiff voluntarily assume the risk? (4) As to damages.

There was evidence on the part of the plaintiff tending to show that at the time of the injury he was the employé of the defendant, working in the spinning room; that his position was that of section hand, and his duties were the overhauling and repairing the spinning frames, of which there were 18 in the room; that his wages were $1 a day, and he worked in the charge and under the control of one Michael, who was the overseer of the spinning and carding room; that while engaged in the performance of his duty his hand was seriously injured by reason of a defective appliance which the defendant had negligently furnished, the defect complained of being the lack of a shifter on the spinning frame. These frames were some 25 or 30 feet long, driven by mechanical power, and the same was applied at one end of the frame by means of a belt running on a pulley. There were two of these pulleys on a rod, one tight and the other loose. When the belt was applied to the tight pulley, the machine was put in motion for its work, and when it was desired to stop the machine the belt was moved to the loose pulley, in which case the power was withdrawn from the machine. These shifters were a mechanical appliance, a structural part of the machine, approved and in general use, by which this belt was pushed from one pulley to the other, and it also would hold the belt to the pulley where it was placed. On the machine in question the shifter was off. The same appliance was wanting in three other frames in this room. The plaintiff had discovered the absence of the shifters on this machine, and called it to the attention of Michael, the overseer, and told him there were some shifters needed, and the overseer replied that they needed many things they didn't have. On the day of the injury, being informed by the operator that the machine was out of fix, he got a wrench, and was in the act of fixing the gearing at the opposite end of the machine from the pulleys where the power was applied, and while so engaged the machine unexpectedly started, and the plaintiff was injured. The start was caused by the belt shifting from the loose to the tight pulley, and this would not have occurred if the shifter had not been lacking. The defendant, in its answer, admitted that there was no shifter on the machine, but denied the allegation of negligence, and also by way of defense alleged contributory negligence and assumption of risk. The defendant offered no testimony.

The court charged the jury, in substance, on the first issue, that it was the duty of defendant to furnish appliances reasonably safe and suitable, such as were approved and in general use; and if there was default in this respect, and it was the proximate cause of the plaintiff's injury, they would answer the first issue "Yes"; otherwise they would answer it "No." On the issue of contributory negligence the judge told the jury, in substance, that if they should find from the evidence that the injury would not have happened if the defendant had supplied the machine with the shifter, and that was really the proximate cause of the injury, this would be a continuing negligence, and they should answer the second issue "No," though the plaintiff may have been negligent in using the machine. On the issue as to the assumption of risk—the third issue—the court charged the jury that if they should find from the evidence that the plaintiff knew, or by the exercise of ordinary care he ought to have known, at the time of the injury, that the spinning frame which he was repairing was not provided with a shifter, and therefore the belt was liable to slip from the loose to the tight pulley, and should further find from the evi-

dence that the act of the plaintiff in so attempting to repair the spinning frame was obviously so dangerous that in its performance the probabilities of danger were greater than those of safety, as where the machinery is so grossly and clearly defective that the plaintiff knew he was taking an extra risk, then he assumes the risk, and cannot recover; and "if you should find that his conduct was of that character in continuing to work there, and he was working with a machine clearly so dangerous that he must have known he was taking an extra risk, then you will find that he did assume the risk; but if you find it was not of that character, then you will find that he did not assume the risk, and answer the issue accordingly." Under the charge of the court the jury answered the first issue "Yes," and the second and third issues "No," and awarded damages. There was judgment on the verdict for the plaintiff, and the defendant excepted and appealed.

Chas. W. Tillett and Shepherd & Shepherd, for appellant. Burwell & Cansler, for appellee.

HOKE, J. (after stating the facts). In charging the jury on the first issue the judge below properly stated the obligation of the employer to supply his workmen, in plants of this character, with machinery and appliances safe and suitable for the work in which they are engaged, and such as are approved and in general use. He charged, in substance, that if there was any negligent default in this respect, and this negligence was the proximate cause of the injury, they should answer the first issue "Yes." Witsell v. Railroad, 120 N. C. 557, 27 S. E. 125; Marks v. Cotton Mills, 135 N. C. 287, 47 S. E. 432.

The charge on the third issue—as to assumption of risk—is also supported by well-considered adjudications of this court. Simms v. Lindsay, 122 N. C. 678, 30 S. E. 19; Lloyd v. Hanes, 126 N. C. 359, 35 S. E. 611. In Hicks v. Cotton Mills (at this term) 50 S. E. 703, the court has held that, while the employé assumes all the ordinary risks incident to his employment, he does not assume the risk of defective machinery and appliances due to the employer's negligence. These are usually considered as extraordinary risks, which the employés do not assume, unless the defect attributable to the employer's negligence is obvious, and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks. This is, in effect, referring the question of assumption of risk, where the injury is caused by the negligent failure of the employer to furnish a safe and suitable appliance, to the principles of contributory negligence; but it is usually and in most cases desirable to submit this question to the jury on a separate issue as to assumption of risk, as was done in this case. When the matter is for the jury to determine on the evidence, it may be well to submit this question to their consideration on the standard of the prudent man in terms as indicated above. The charge on the third issue substantially does this, and the language used is sanctioned by the authorities. Coley v. Railroad, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817; Marks v. Cotton Mills, supra. There is no error in the charge of the court as to assumption of risk.

On the second issue—that addressed to the question of contributory negligence—the judge charged the jury, in substance, that if they should find from the evidence that the injury would not have happened if the defendant had supplied the machine with a shifter, and this was the proximate cause of the injury, this would be continuing negligence, and they should answer the second issue "No," though the plaintiff may have been negligent in the use of the machine. As we have held in Hicks v. Cotton Mills, supra, this is not a correct proposition as to every negligent failure on the part of the employer to furnish a safe appliance by reason of which the injury occurs, and is not the law in cases of the character we are now considering. The employé is not in such instances absolved from all obligation to act with reasonable care and prudence, and, if there is negligence on his part, concurring as the proximate cause of the injury, the plaintiff cannot recover. The charge, therefore, on this issue, would be reversible error, but for the fact that in the opinion of the court there is no evidence offered which shows or tends to show contributory negligence, apart from the fact that the plaintiff continued to work on after knowing of the existence of the defect which caused the injury. This question, as we have seen, was, under a proper charge, submitted to the jury on the third issue, and the defendant has had the benefit of every position which was open to him in the charge of the court addressed to that issue. The only default imputed to the plaintiff, apart from the fact that he continued to work on, was that he failed to push the belt entirely off both pulleys. But this, we think, is no such evidence of negligent default that it should be submitted to the jury as an additional defense. The plaintiff (who was the only witness examined, except as to character) testified that it was a very troublesome matter to replace the belt when it had been taken entirely off, sometimes requiring as much as one-half hour; that he had never been told by any one to take it entirely off, and it was not usual to do it, and that he had never seen the machine start that way. And we do not think that by any reasonable standard of conduct on the evidence in this case the plaintiff was required to move the belt entirely from the pulley. The only defense, therefore, available to the defendant on the facts of this case, after its negligent default was established by the verdict on the first issue, was the fact that

the plaintiff had gone on doing his work in the presence of a known defect, and this, as we have said, was submitted to the jury under a correct charge on the issue as to assumption of risk.

We are not called on to determine whether any difference exists in principle between the cases where the defect complained of was known when the plaintiff entered on the service and those where the knowledge was acquired afterwards. While many of the authorities draw such a distinction, there seems to be none in reason. But the facts of the present case do not require such decision, and many of the authorities, therefore, relied upon by the defendant do not apply. The plaintiff testified that he entered on the service of the defendant in October, 1893, and was given a place in the spinning room, his duty being to overhaul the machinery or spinning frames. He worked at that for five or six weeks, when he became a section hand, working in the same room, his duties being to overhaul the machinery, repair it, and look after the hands in that room. At the time the plaintiff became a section hand there was evidently an increase of authority, but the occupation was at the same place, and very similar in character, and there was no change in the contract of service or wages paid, so far as the testimony now discloses. So that, whether the knowledge of the defect came to the plaintiff before or after he became a section hand, it certainly came to him after he entered on the service, and it is fair to consider the case in that aspect.

It is suggested that, if a negligent failure to furnish a shifter is declared to be the proximate cause of the injury on the part of the employer, by that same token the employé, working on when aware of the defect, is also negligent, and such negligence should be held to be concurrent, and to hold otherwise would require the master to take more care of the servant than the servant takes care of itself. This position finds support in some of the decided cases, but the court does not think it is in accord with the better considered adjudications on the subject. The position had its origin in some of the older decisions rendered when the employment of labor was much more restricted, and the implements and appliances were comparatively simple, and attended with little danger. At that time it was considered of little consequence what the employé assumed, and as a matter of fact he assumed the risk of almost everything that happened to him. As business enterprises, however, were enlarged and extended, and machinery became more complicated, and larger numbers of men were being employed in its operation, it was found that the position here contended for was not a proper one by which to determine the relative rights and duties of employer and employé in regard to defective machinery and appliances. It was based upon an entirely erroneous conception that there was a perfect equality of position between the two to such defective appliances; but nothing is further from the fact, and for the reason, chiefly, that the employer controls the conditions in which the employés do their work. His duty to furnish machinery and appliances reasonably safe and suitable, such as are approved and in general use, in the exercise of a reasonable care, is absolute. As a rule, he buys the machinery from the manufacturer or dealers, who are experts, and can change when he desires; he selects and employs a superintendent and the skilled labor, and has the time and opportunity to inform himself as to the character of the machinery he buys and the hazards incident to its use; and, accordingly, the principle which holds the employé to an equality of obligation and responsibility in the respect suggested is unsound and unjust, and has been rejected in the more recent and better considered cases. Beach on Cont. Neg. § 372; Lloyd v. Hanes, supra; Patterson v. Pittsburg, 76 Pa. 389; Smith v. Baker, Appeal Cases (1891) 325.

Again, it is urged that this man was injured in repairing the machine, and in that aspect must be considered to have assumed the risk. In support of this position we are referred to the case of Spinning Co. v. Achord, 84 Ga. 14, 10 S. E. 449, 6 L. R. A. 190. In that case the plaintiff was stated to be a skilled machinist and carpenter, who had put up machinery, knew all about its conditions and defects, called attention to the lack of certain appliances which threatened its safety, and remonstrated about its condition in this respect. The machinery having gotten out of order, the plaintiff was sent to repair the defect, and was injured while so engaged. The injury was caused in part by the very defect he was called on to repair, and it might well be determined that it was one of the ordinary risks in the work he had undertaken to perform. But no such facts existed in the case we are now considering. The plaintiff was no skilled machinist, but an ordinary hand, working at $1 per day under an overseer in the same room (a sort of machinist he called himself in one place). His duty seems to have been to tighten bolts and adjust the gearing, as might be required from the ordinary wear of its work. "As good as the average man engaged in such work," he says of himself. He was not endeavoring to repair the defect which caused the injury at all. This was beyond his skill, and not within the line of his duty. He had notified the employer, or its representative, that four shifters were wanting, and the same had not been supplied, and he was unable to make or supply them himself. This was done, it seems, not so much because he anticipated injury as because he was overlooking the machine, and considered it his duty to inform the employer of ex-

isting conditions. His duty called on him to work day by day in the presence of this defect, and subject to its consequences, and which the jury, on the first issue, and under proper instructions, have found to be an appliance which the employer negligently failed to furnish, and which was the proximate cause of his injury. While engaged in his duties in adjusting some gearing at the end of the machine opposite the point where the power was applied, and by reason of the absence of the shifter, the belt was in some way shifted from the loose to the tight pulley, and he was injured. The jury have, by their verdict, declared that the defendant was negligent in failing to provide the proper appliance, and such negligence was the proximate cause of the injury, and that the plaintiff did not assume the risk. There was no evidence of contributory negligence imputable to the plaintiff, except what might exist from working on in the presence of an observed danger, and this the jury have determined against the defendant on the issue as to assumption of risk. The court is therefore of opinion that there is no error in the record, and the judgment below is affirmed.

Affirmed.

CLARK, C. J. (concurring). The doctrine of "assumption of risk" is of comparatively recent origin, and when first introduced the decisions of the courts were far from uniform, and in some cases illogical. With fuller discussion and clearer analysis, the doctrine has been repudiated that mere knowledge on the part of the servant of defective appliances, when taking employment or afterwards, is an assumption of risk which relieves the employer of the duty of furnishing reasonably safe appliances and a reasonably safe place in which to work. That rule ignored the fact that the employé was not on equal terms with the employer. It ignored the duty of the state to protect the welfare of a deserving and meritorious class of its citizens, who should not be exposed to unnecessary risks in the search for bread, and cynically made the necessities of the laborer condone and pardon the neglect of duty on the part of the employer.

There has been at times a confusion of ideas as to assumption of risks in not discriminating between "risks necessarily incident to the employment," which is all the laborer can be justly held to assume, and "risks not so incident, but arising from the circumstance that the danger was a known one—as a defective machine or an unsafe place." Railroad v. Keller (Tex. Civ. App.) 76 S. W. 802. This last the employé does not assume. To so hold was simply to maintain that the master was liable for negligence for failure to furnish safe appliances and a safe working place so long as he had no employés to be injured, but so soon as he obtained employés that fact removed his liability, as they assumed the consequences of his negligence. All that the courts can justly hold is that when the defect in the machinery is so patent that it is reckless disregard of danger to take employment, then the employé is recklessly negligent. But in such case his recklessness is contributory negligence, not assumption of risk. Hence, in Rittenhouse v. Railroad, 120 N. C. 546, 26 S. E. 922, this court properly said, "Reckless assumption of risk has always been taken in our courts as embraced in the issue of contributory negligence;" citing cases. This proposition is stated by Labatt, Master & Servant, §§ 2, 3, in somewhat different terms, but to the same effect. Section 2: "Risks resulting from the master's negligence are not assumed by the servant." Section 3: "Risks not resulting from the master's negligence are assumed by the servant." These last are necessarily the ordinary risks of the particular employment when furnished with reasonably safe appliances and a reasonably safe working place. "Assumption of risk" means that an employé takes upon himself the ordinary risks necessarily incident to any business, however dangerous or hazardous, upon which he enters. "Volenti non fit injuria." As pithily stated by Reade, J., in Crutchfield v. Railroad, 76 N. C. 320, the employé assumes the risk of injury "from accidents, but not that resulting from negligence of the employer." The employé does not assume any risks which are added to the operation of such business by the neglect of the employer to furnish suitable and proper appliances, though the employé may know, when he accepts employment, that such appliances are lacking. If he did, the maxim would read, "Scienti non fit injuria," which is not law. The difference between "scienti" and "volenti" has been recently and fully discussed. Lloyd v. Hanes, 126 N. C. 359, 35 S. E. 611. Assumption of risk, as appears from that case and in the English cases therein cited, extends beyond the above limits only to the case where a particular machine has become defective, of which the employé has knowledge and the employer has not. In such cases, if the employé works on, he assumes the extra risk; but if he reports the defect, and is told to keep on, and does so for fear of losing employment, there is no voluntary assumption of risk, and the liability for injury caused thereby is on the employer. It was so held in the leading English case, Yarmouth v. France, 19 Q. B. D. 660, cited in Lloyd v. Hanes, supra. In Crutchfield v. Railroad, 78 N. C. 300, Bynum, J., says: "The farthest the courts have ever gone in such case is this: If the servant remains in the master's employ with knowledge of defects in machinery he is obliged to deal within the course of his regular employment, he assumes the risks attendant upon the use of the machinery, unless he has notified the employer of the defects"—evidently meaning defects that have come to light during the employé's operation of

the machine, for, of course, he need not notify the employer of the absence of suitable and proper appliances when their absence is or should be already well known to the employer, and he is chargeable with negligence for not having supplied them. Judge Caldwell, than whom no abler judge has sat upon the United States Circuit bench, says in a recent opinion: "Dangers which needlessly imperil human life, and which can be remedied at little cost, are not dangers necessarily incident to the operation of a railroad, but are dangers which it is the duty of the company to remove. The necessities of laboring men are often very great. The necessity of providing food for themselves and families may drive them to accept employment at the peril of their lives. But the employer does not obtain a license to kill his employés with impunity by proclaiming his purpose to subject them to unnecessary and needless perils—to perils that a reasonably prudent man, having a due regard for human life, would remove. Common humanity demands this. Moreover, the state has an interest in the lives of her citizens, and will not permit an employer needlessly to imperil the lives of employés. The very highest consideration of public policy demands an enforcement of this rule. And the peril is unnecessary and needless where, as in this case, it can be removed at a slight expense. Notice (to employé) of the unnecessary peril in such case goes for nothing. As long as the needless peril is maintained, the employer is guilty of culpable negligence; and when, by reason of such needless peril, an employé is killed, the law presumes he was exercising due care to escape the peril, and the employer is responsible for his death unless he can prove affirmatively that the employé was guilty of negligence. In such case the death of the employé testifies that he was in the faithful discharge of his duty and in the exercise of due care, and that his death is the result of the needless peril to which he was subjected." Upon this decision a very learned law writer, the author of Thompson on Corporations, says: "It is hard, very hard, to understand how humane judges can balance the question of a slight, very slight, expense to the railroad company against the mangling and death of meritorious laboring men, the tears and agony of their widows, and the beggaring of their orphaned children." What these eminent judges have said as to injuries causing death should apply equally when maiming, disabling, and pain are the result of the employer's failure to furnish safe appliances. Indeed, the public conscience has caused the enactment of the statute here and in many other states, which, while repealing the "fellow servant" doctrine as to railroad employés, incidentally forbids "assumption of risk" as to defective appliances and ways when railroads are the employers. Coley v. Railroad, 128 N. C. 534, 39 S. E. 43; Id., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817. This last was really unnecessary, for no employé assumes such risks unless by such reckless disregard of them as amounts to contributory negligence. Greenlee v. R. Co., 122 N. C. 978, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734; Troxler v. R. Co., 124 N. C. 191, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580. The state cannot afford to be unjust to its laboring element. Public policy, recognizing that the employés are not on equal ground with the employers in large establishments using powerful machinery, driven by steam or other power, and revolving at high speed, requires that such employers shall furnish its operatives safe machines and a safe place in which to work. The test of safety is the use of approved appliances in general use. Witsell v. Railroad, 120 N. C. 557, 27 S. E. 125. Failure in this, or furnishing such machines in defective condition, is actionable negligence. The employé "assumes the risk" of such business when furnished such appliances and a safe place in which to work. He assumes nothing more. Lloyd v. Hanes, 126 N. C. 359, 35 S. E. 611.

No one would look to the House of Lords in England for a decision that is biased either in favor of labor or against capital. In that court, as elsewhere, the earlier decisions somewhat confuse the doctrine of the laborer's assumption of the ordinary risks of the employment with the totally different doctrine of his assumption of risk from the employer's known negligence in not having furnished safe appliances. But the court "righted itself," as this court and others have done on fuller discussion and consideration, and has placed the responsibility for defective appliances upon the employer who could have done his duty by the employé, but did not. In several cases in that high tribunal already quoted by us with approval in Lloyd v. Hanes, 126 N. C. 363, 35 S. E. 611, it is said that "Volenti non fit injuria" is not to be read "Scienti non fit injuria," for that knowledge of a defective appliance by a needy employé seeking bread to maintain himself and family is not to be tortured into a voluntary and free release of the employer from liability for his negligence and the assumption of that liability by the employé. The law is not fossilized. It is a growth. It grows more just with the growing humanity of the age, and broadens "with the process of the suns." The doctrine of Crutchfield's Case and two or three like cases decided not long after it and before the subject was fully discussed and viewed in all its bearings, has been long quietly ignored by this court in all the more recent cases and practically overruled. It has been resurrected and used only in the decision rendered in favor of the American Tobacco Company in Ausley's Case, 130 N. C. 34, 40 S. E. 819, by a bare majority of the court, and contrary to all the more recent decisions, and it may be noted that Ausley's Case has not been since cited with approval

in any instance. The uniform rulings of this court in the later cases for many years have been to the contrary.

Could there be greater mockery than to assert that the employer is culpably negligent and pecuniarily liable if dangerous and defective appliances are furnished, and then to hold that, if the laborer is mangled or killed, there is no liability, because by accepting employment the laborer had released the employer from liability? Labor is the basis of civilization. Let it withhold its hand, and the forests return and grass grows in the silent streets. We are told in that excellent little work by some of the leading lawyers of England, "The Century of Law Reform," which every lawyer should read, that not so long since, in England, labor unions were indictable as conspiracies, and the wages of labor were fixed by officers appointed by capital, and it was indictable for a laborer to ask or receive more. There was no requirement that employers should furnish safe appliances, no limitations as to hours of labor, no age limit. With the era of more just legislation in both this country and England and elsewhere shortening the hours of labor, forbidding child labor, requiring sanitary provisions and safe appliances, labor has been encouraged, and the progress of the world in a few years has more than equaled that of all the centuries that are dead. Justice to the laborer has been to the profit of the employer. The courts should not be less just than the laws.

BROWN, J. (dissenting). I cannot concur in the judgment or opinion in this case. The facts are few and simple, and are all taken from plaintiff's evidence, who, with the exception of two character witnesses, was the only witness examined. Plaintiff was employed by the defendant as a skilled machinist. He was first employed as an overhauler and cleaner of machinery, and was then promoted to sectionman. As overhauler he cleaned spinning frames and put spindles on them. As sectionman he had charge of 18 spinning frames, and it was his duty to repair them, and to oversee and look after the hands. While he was an overhauler and cleaner he discovered that four of these machines lacked a shifter. A spinning frame is about 25 feet long, and is operated by a shaft running through it. On one end of this shaft are two pulleys, close to each other, and of the same size. The one nearest the spinning frame is tight on the shaft, and when the belt is placed on it the spinning frame is put to work. The other pulley is loose, and when the belt is shifted from the tight pulley to it the machine is stopped, and the belt revolves the loose pulley around the shaft without turning the shaft. The plaintiff testifies that a shifter is for the purpose of shifting the belt from the tight to the loose pulley and pushing it back to the tight pulley again. It is used for the purpose of starting and stopping the spinning frame, and prevents the belt from slipping back to the tight pulley and giving the machine a sudden start. In the absence of the shifter, the belt can be pushed from the tight to the loose pulley, and vice versa, "by using the hand, or a bobbin, or something to push the belt off." The travis gear is a part of the spinning frame, and is on the opposite end from the two pulleys. While plaintiff was overhauler he called the superintendent's attention to the absence of shifters on four of the machines in his care. The superintendent did not promise to furnish the machines with shifters. On December 23, 1903, the plaintiff was called upon by an operative to repair a spinning frame. Upon examination he found the travis gear out of order. He stopped the machine by taking a bobbin and transferring the belt to the loose pulley. By some unknown means the belt got back on the tight pulley while plaintiff was at work on the spinning frame, and started it going, and cut off plaintiff's thumb. At the conclusion of the evidence defendant moved to nonsuit. I think the motion should have been granted, for these reasons: (1) Because there is no evidence of negligence; (2) because the plaintiff was guilty of negligence which caused his injury; (3) because plaintiff assumed the risk.

1. The very foundation of the doctrine of negligence, in its relation to the injurer and injured, is duty. What duty one owes to the other is to be determined by their relations to each other. The duty the defendant owed to an operative operating the spinning frame differs materially from that which it owed to a skilled mechanic, who fully understands the construction of the machine and knows its defects, while engaged in repairing it. The operative has a right to rely upon the diligence and care of the master in furnishing a safe machine to work and a safe place to operate it in, but the master is not, and never has been, declared to be an insurer of the lives or limbs of his employés, although the law holds him to a high degree of care in the discharge of his duty. If an operative working the spinning frame had been injured, by reason of the absence of the shifter, in shifting the belt and stopping or starting the machine, I should say he would be entitled to recover, unless his own carelessness at the time directly caused his injury. I gather clearly from the plaintiff's evidence that the shifter was a most convenient attachment, and used for the sole purpose of transferring the belt from one pulley to the other. While its construction was such that it would necessarily hold the belt on the pulley to which it had shifted it, it was not designed or intended as a protection to the operator of the spinning frame. It was not primarily a safety device. I am sure it was never thought of as a necessary or reasonable protection to a machinist engaged in repairing the spinning frame, and that this plaintiff, nor any other machinist,

ever so regarded it. It was used for starting and stopping the machine. The plaintiff was not injured while transferring the belt for this purpose. So far as the evidence discloses, it is perfectly safe to transfer the belt with the hand or a bobbin, but not so convenient, and according to the plaintiff it is the only time he ever knew the belt to slip. The negligence of the defendant is to be determined by this rule: Could the defendant, by the exercise of great diligence and care, have reasonably foreseen that this skilled mechanic would have been injured while repairing that spinning frame, because of the absence of a shifter? The plaintiff, a skilled mechanic, who says he understood the machine and his trade as well as the average machinist, could not foresee it. How, then, could the master foresee it? It may have been negligence of his duty to operatives upon the part of the superintendent not to get the shifters and have plaintiff put them on, but could any reasonable person foresee that the absence of the shifter might cause this particular injury, not to an operative, but to a skilled machinist, who knew of the defect, and how to render it harmless, while repairing the machine? The plaintiff says he worked in the defendant's mill over 10 weeks before he was hurt. All that time he knew the four spinning frames had no shifters. He says he was called "to repair these four particular frames every day," and again says, "on an average every other day." On these occasions he pushed the belt on and off with his hand. He states that at all times when he repaired these four machines, he would take his hand or a bobbin and push the belt over on the loose pulley while he was working on the machine. "Did the belt ever slip from the loose to the tight pulley while you were working on these machines?" he was asked. He answered, "No, sir." "Did you ever see it happen?" "No, sir. I knew the shifter was off when I went to repair this spinning frame [on October 23d, when he was hurt], but I did not think about it at the time." "Suppose you had thought about it, would you have been afraid to work on it?" "No, sir." "Why?" "Because I had never seen one start up like that." Plaintiff further states that he could have easily thrown the belt off both pulleys, and thereby prevented all possible injury. "I never had thrown the belt off the two pulleys before going to work on the frame except when I was an overhauler, and did it then to keep from wearing the bushing off." "And you never had an accident before?" "No, sir." I am at a loss to find any logical theory upon which it can be held that the defendant owed to the machinist repairer any duty to furnish a shifter for this machine. Why did plaintiff notify the superintendent of the absence of shifters? For the reason that he was charged with the duty of keeping these machines in perfect repair. Plaintiff made the report in the line of his duty, and for the convenience of the operatives, not for his own safety. He admits that he knew how to stop the machine without a shifter, and that by the easy, simple, and obvious method of pushing the belt off both pulleys he states he could not possibly be hurt while repairing it. So I think the conclusion is irresistible that, inasmuch as plaintiff was a repairer and not an operator, and knew a perfectly safe, easy, and obvious method of rendering the machine entirely harmless without a shifter, while engaged in the work of repairing it, the defendant owed him no duty to put a shifter on the spinning frame, although the defendant may have owed such duty to one regularly engaged in operating the machine. What may have been negligence to one employé is not necessarily so to another employé. Consequently I am of opinion that there is no evidence of actionable negligence so far as this plaintiff is concerned.

2. Assuming the defendant was negligent, the plaintiff was guilty of contributory negligence. There are two facts necessary to constitute contributory negligence: (a) A negligent act upon the part of the injured; (b) such negligent act must be the proximate, nearest, most immediate cause of the injury. The plaintiff admits that he was guilty of a negligent act. He is a skilled machinist, and knew the construction of the machine, and the use and effect of shifters. He knew a perfectly safe and easy method of repairing the machine without running the slightest risk from the absence of a shifter. He knew that the shifter was off, and as a skilled machinist he knew every possibly consequence that might follow. What was his duty under the circumstances to his master? Plainly, to use the safe method. He was careless and negligent in not doing so. Where there is a perfectly safe method of doing a thing and another which is not so safe, it is the duty of the servant to the master, as well as to himself, to take the safe method. If he fails to do so, and is injured, he cannot recover. Labatt on Master & Servant, §§ 391, 392. The fact that plaintiff says he forgot to do it, and did not think of it, does not absolve him from negligence. It is the very essence of negligence to forget to perform a duty which the law imposes. If plaintiff had been ignorant of the absence of the shifter, or ignorant of its uses and purposes, this would not apply. Notwithstanding the master's negligence in not remedying the defect in a machine, if the defect is known to the servant, and the latter can, by the exercise of ordinary care and prudence, save himself from injury, it is his duty to do it. If he fails to do it, he is guilty of contributory negligence. This doctrine is applied every day to railway accidents, and it is applicable to the relation of master and servant. Where the servant is employed upon work concerning which he has equal knowledge with the master, and the latter is negligent in his duty to the servant, and the servant is injured, he cannot recover if he him-

self has been guilty of negligence, and could by reasonable care have avoided the injury. Wood on Master & Servant, § 328. "The servant is himself bound to exercise proper care, and cannot claim indemnity from the master for an injury resulting to him which might have been prevented if he had himself been reasonably diligent." Wood on Master & Servant, supra. It is useless to cite more authority for this. The author is sustained by all other text-writers and adjudications with which I am acquainted, and cites many authorities in his support. See, also, Crutchfield's Case, 78 N. C. 300. The doctrine is founded upon the broad and reasonable principle that, notwithstanding another's negligence, if the injured person has the opportunity by the exercise of ordinary prudence to avoid injury from it and he fails to do so, he is himself guilty of negligence which is contributory, because it is the proximate cause. This is the foundation of the so-called doctrine of the "last clear chance," as first declared in Davies v. Mann, 10 M. & W. 546. All persons are expected to exercise ordinary care and prudence in their dealings with their fellows; consequently he who has the last clear chance to avoid and prevent an injury, and does not exercise reasonable care and prudence to do so, is himself responsible for it, for his negligence is the immediate or nearest cause. As is well said by Shepherd, C. J., in Smith v. R. R., 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287, the principle of Davies v. Mann simply furnishes a means of determining whether plaintiff's negligence is a remote or proximate cause of the injury. This suggestion of Judge Shepherd's is commented on with approval by the annotator to L. R. A., vol. 55, p. 419. The plaintiff had the last opportunity to render his master's negligence absolutely harmless. Had he exercised ordinary care, and used the knowledge he possessed, he would have pushed the belt off both pulleys. It was a simple, easy method of obviating the danger from the need of a shifter, so far as plaintiff was concerned, and he knew it. A prudent mechanic exercising his wits would thus have entirely disconnected the machine from the motive power of the mill. Then he would have been absolutely safe. But he forgot it; did not think of it. The plaintiff had the last clear chance to avoid the injury by exercising ordinary care. He failed to do it. It is negligence, and the proximate cause of the injury. If he had done what he should have done under the circumstances, the injury could not have been inflicted.

There was something said in the argument of this case about the failure to supply the shifter being "continuing negligence," and barring the defense of contributory negligence. The answer to this is very fully and clearly stated by Mr. Justice Hoke in Hicks v. Mfg. Co. (at the present term) 50 S. E. 703. I think the expression "continuing negligence" is a misnomer, a misapplication of terms. In using it in the Greenlee Case the present chief justice did not refer to it as a "doctrine of the law of negligence." He evidently meant to charge the railway company with a "continued neglect" of a statutory duty of so grave and flagrant character that it shut out entirely any consideration of the negligence of the injured brakeman. All negligence is continuing, whether that of the injurer or injured. It must be existent and potential at the moment the injury is inflicted, or it is not negligence.

3. The plaintiff assumed the risk of any injury from the absence of the shifter. I will sum up the facts pertinent to this defense. Plaintiff is a machinist of six years' experience; was an overhauler and cleaner; knew then of the absence of the shifters; called superintendent's attention to it; he failed to supply them. After that plaintiff accepted the superior position of sectionman, and contracted specifically to repair these particular machines, with full knowledge of the defect. Why was plaintiff willing to assume this risk? Because he knew an easy and safe method of guarding against all possible danger to himself from absence of the shifters, and therefore he ran no risk. "Volenti non fit injuria." Why does he fail to use such method? Because he forgot it; did not think of it; and because in all his experience he had never known the belt to shift back before this occasion. Upon such facts, I hazard the statement, no court in this country or England has permitted a plaintiff to recover. The servant, upon hiring to the master, assumes all the risks and hazard incident to the business. He assumes the risk of all plainly obvious dangers and all that he personally knows of at the time he enters into the service. Am. & Eng. Encyc. (2d Ed.) vol. 20, p. 110, and the many cases cited. Forgetfulness of the risk by the servant is no excuse. Id., p. 120. It is his duty to think. Our present chief justice has defined assumption of risk as follows: "That when a particular machine is defective or injured, and the employé, knowing it, continues to use it, he assumes the risk. The doctrine has no application where the law requires the adoption of new devices [automatic couplers], and the employé is ignorant of that fact, or expecting daily compliance." In this case the shifter was no new device required by statute to be used, and the superintendent had refused to furnish them before plaintiff contracted as section man to repair the machines. The definition of the chief justice is supported by the overwhelming weight of authority. He evidently had in mind and followed Crutchfield's Case, supra, for it expressly holds that, where the servant knows of the defect when he enters into service, or remains in service with full knowledge, he cannot recover. Crutchfield's Case was decided by a court of great ability, and the opinion written by Judge Bynum, conceded to be a law writer of great accuracy and clearness. He says, where the servant has equal knowledge

with the master he takes the risk. This servant knew of the defect before he accepted the place, the duties of which required him to repair the machine, and he knew how to obviate any danger. Crutchfield's Case is cited and approved in Johnson v. R. R., 81 N. C. 453, Cowles v. R. R., 84 N. C. 309, 37 Am. Rep. 620, and Porter v. R. R., 97 N. C. 66, 2 S. E. 581, 2 Am. St. Rep. 272. The same principle is stated in Cowles' Case, decided by Smith, Ashe, and Ruffin, who succeeded the court which decided Crutchfield's Case. It is again stated with clearness by Merrimon, J., in Pleasants v. R. R., 95 N. C. 196. The same identical principle is stated by Avery, J., in Hudson v. R. R., 104 N. C. 502, 10 S. E. 669, citing and approving the previous cases which I have named. In Ausley's Case, 130 N. C. 34, 40 S. E. 819, the same principle is stated by Judge Furches: "Where an employé knows all about the machinery and its defects before entering upon the work, he assumes the risk incident thereto." This reasonable and just principle has become imbedded into the jurisprudence of this state by repeated adjudications from 1878 to 1903, made by many able judges, whose opinions all of us should respect. The decisions of the New York court are in line with those I have quoted. Mull v. Curtice (Sup.) 77 N. Y. Supp. 13; Schulz v. Rohe, 149 N. Y. 132, 43 N. E. 420; Hartwig v. Co., 118 N. Y. 664, 23 N. E. 24. So in Indiana, Salem Stone Co. v. O'Brien (Ind. App.) 40 N. E. 430, and cases there cited. Bedford v. Brown (Ind. Sup.) 42 N. E. 359, is a strong case from that court. "In a case where the servant is mature and experienced, the law never imposes the duty on the master of becoming eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes, ears, and experience to avoid danger." The Massachusetts court has rendered many decisions uniformly sustaining these views. In Ward v. Connor, 64 N. E. 968, that court says: "Further, it would seem, notwithstanding some things in the plaintiff's testimony, as though he must have been familiar with the operation of the machine, and that the risk of attempting to mend the belt in the manner in which he did was or ought to have been obvious. But, if it was not, it would at least seem that he was wanting in due care in attempting to mend the belt in the manner in which he did, without taking any precautions to see whether the machine was liable to start." Not only are the adjudicated cases in the best courts in line with these views, but so are the text-writers. Dresser, c. 8, §§ 87, 88. This writer substantially says that the servant assumes all risks from defective machinery known to him, or which ought to have been known to him, at the time he contracted to operate or repair it. Section 92. "When the servant uses machinery he knows to be defective, he is bound to use special precautions; and if he fails to do so, and is injured, he cannot recover." Bailey's Master's Liability, p. 169. The author cites cases from many states in support of his statement. To the same effect are the decisions of Illinois, Michigan, and Iowa. The same author lays down the proposition that when there is a perfectly safe method known to the servant, and he pursues one less safe for his own convenience, or from carelessness, he assumes the risk, and cannot recover for an injury received. Page 169, citing numerous cases. Thompson on Negligence states the law as Dresser and Bailey declare it to be. Section 4610. Mr. Justice Hoke, in Hicks v. Mfg. Co. (at this term) 50 S. E. 703, states his conception of the rule to be as follows: "The employé ordinarily has a right to assume that the employer has done his duty. This assumption is not absolute, however, nor held to obtain in the face of established facts; and where the defects and dangers attributable to the master's negligence have become known to the employé, and the risks appreciated under certain circumstances, these conditions may be classed with the ordinary risks which the employé does assume." The rule laid down in Sims v. Lindsay, 122 N. C. 678, 30 S. E. 19, by Clark, J., is reiterated by him in Lloyd v. Hanes, 126 N. C. 362, 35 S. E. 611, and, taken in connection with the definition given by the same learned judge in Greenlee's Case, above quoted, shows plainly that he is consistent in holding that the servant assumes the risk where (as in this case) he knew of the defective character of the machine and should have known the extra risk.

Measured by the rule laid down by either of my learned Brothers, this plaintiff ought not to recover, because he knew of the defect, and he knew of the possibility of the belt's shifting itself in consequence of such defect. He was a skilled machinist, and knew the connection between the pulleys and the travis gear, and knew his danger if the machine suddenly started. He also knew of a simple and easy method of rendering the machine absolutely safe, so far as he was concerned, notwithstanding the defect, and he negligently failed to take the proper precaution to prevent a sudden start. In the recent case of Railroad v. McDade, 191 U. S. 68, 24 Sup. Ct. 24, 48 L. Ed. 96, Mr. Justice Day, speaking for the court, after stating the general rule as to assumption of risk, says: "This rule is subject to the exception that, where a defect is known to the employé, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge, and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is plainly obvious, so that he may be presumed to know it, and continues in his master's employ without objection, he is taken to have made his election to continue in the employ of the master notwithstanding the defect.

and in such case cannot recover." This decision is in line with nearly all the cases in this court from 1878 to 1908.

The only case in our Reports which militates against the views I have attempted to express, so far as I can see, is Orr's Case, 132 N. C. 691, 44 S. E. 401. The force of that case, however, is destroyed, because in this and Hicks' Case the court repudiate the idea that the principle enforced in the Greenlee and Troxler Cases has any application to cases like this.

For the reasons I have given, I think this court should reverse the ruling of the superior court.

Since the opinion of the court and my dissenting opinion in this case were written, a concurring opinion has been filed. As the concurring opinion does not discuss the facts of the case at all, I am ignorant as to its purpose. The definition of assumption of risk formulated in the opinion of Clark, J., in Greenlee's Case is the definition I applied to the conduct of this plaintiff. I have seen no express repudiation of it by any one until now, and therefore felt at liberty to use it. I fully concur in the general principles and humane ideas so beautifully expressed in the concurring opinion of the Chief Justice. I think, however, the ordinary rule as to assumption of risk does not apply to the facts of this case. As before stated, if the plaintiff has been an operative injured, without serious fault on his part, because of the defect in the spinning machine, I should say without hesitation he should recover damages. But this is the case of a skilled machinist sent to repair this very machine, who himself states that he knew of the defect, and knew an easy method of guarding against any possible danger from the defect, and "forgot" to use it, and did not think it "worth while." To apply the ordinary rule as to assumption of risk under such circumstances is practically to make the manufacturer an insurer of the machinist whom he employs to repair the defective machine. When the machinist is engaged in repairing one defect, it is his duty to guard against injury from any defect in the same machine, especially when, as in this case, he knew of it, and knew an easy and obvious method of doing it. He should not be measured by the same yardstick as the operative running the machine in his daily occupation.

(138 N. C. 529)

WESTERN CAROLINA BANK et al. v. MOORE.

(Supreme Court of North Carolina. May 26, 1905.)

1. PROMISSORY NOTE—ACTION ON — DEFENSES —PAROL EVIDENCE VARYING WRITTEN CONTRACT.

In an action by the receiver of a bank on a note defendant alleged that he executed the same to a then director of the bank, who was indebted to it, under an agreement that the director should resign, and defendant take his place; that the director's stock in the bank should be formally assigned to defendant, who should execute his note therefor to the director, new stock to issue to defendant in place of that assigned, to be considered, however, as belonging to the director; that both note and stock were to be held by the bank, but that defendant should not be liable on the note. The note, which the jury found belonged to the bank, was reported as part of its assets. *Held*, the defense was not open to defendant, parol evidence being inadmissible to show the oral agreement.

2. SAME—JUDGMENT NOTWITHSTANDING VERDICT.

The jury having found on the first issue that plaintiff was the owner of the note, he was entitled to judgment for the amount thereof and interest, notwithstanding the verdict on the second issue that the note was executed under a parol agreement that defendant should not be liable thereon.

Appeal from Superior Court, Buncombe County; Moore, Judge.

Action by the Western Carolina Bank and W. W. Jones, receiver, against C. B. Moore. Judgment for defendant, and plaintiffs appeal. Reversed.

Civil action tried at March term, 1905, superior court of Buncombe county. W. W. Jones, receiver of the Western Carolina Bank, having found the note of defendant to the amount of $600 among the assets of the bank, instituted this action against defendant, alleging that the note sued on belonged to the bank, and was due and unpaid. The defendant answered, and denied that the note belonged to the bank, and by way of further defense averred: That on or about the 22d day of February, 1897, he was approached by one Lewis Maddox, at that time president of the Western Carolina Bank, who stated to him that J. E. Reed, who was the father-in-law of the defendant, and a director of said bank, was largely indebted to said bank, and that the bank had been criticised by the public and others interested in the affairs of the bank because of said fact—that is, because said Reed, being such debtor, was also a director of the bank. That he (Maddox) and Reed had agreed together that defendant should formally take an assignment of the stock which said Reed then held in the bank, to wit, $500 of the same, and the defendant should formally execute his note payable to Reed therefor. "That new stock should be formally issued to the defendant in place of the stock of said Reed, and that said note and said stock should be held by said bank, but that the same, the said note, should never be collected or presented for payment, and that said stock, although issued to the defendant, should be considered and remain the property of the said J. E. Reed. That said Reed should resign as such director in said bank, and that this defendant should formally become a director thereof in his place. (2) That thereupon this defendant, believing said transaction innocent in itself, and that thereby he would subserve the interest of said bank and of the said J. E. Reed, his father-in-law, he consented to make said note upon said terms, and did then and there sign the same and

deliver it to said bank through the said Maddox, its president, upon the terms and understanding stated in the first paragraph of this further defense; and the said note was held by said bank, and said receiver took the same, if he took at all, and still holds it, upon said terms above set forth. Wherefore this defendant demands judgment that the said note be delivered up for cancellation, and that he go hence without day, and recover of the plaintiffs his reasonable costs in this action in his behalf incurred." There was evidence that defendant's father-in-law, J. E. Reed, now dead, had been a stockholder and director in the bank, and had borrowed a large sum of money, which he still owed, and the management of the bank was being criticised by reason of the loan of so much money to one of its directors. It was thereupon determined, at the suggestion of the president, that Reed should sell his stock to defendant, resign as director, and defendant should become a director in his place. In pursuance of this arrangement Reed surrendered his stock, and same was canceled, and a new certificate was issued in the name of the defendant, and defendant executed the note sued on to J. E. Reed, and both note and stock certificate were left with the bank. Defendant, having thus become a stockholder, was elected director instead of Reed, and qualified as such, and served from February, 1897, to October of the same year. Then the bank suspended. The defendant took part as director in the bank management, was present at the meetings, and received pay for his services as director. This note and stock certificate were found with the assets of the bank, marked as collateral to Reed's indebtedness, and had been reported as part of the bank assets during the year defendant served as director. The defendant testified that all this was only a formal arrangement, and that it was understood and agreed at the time the note was signed by him and left with the president of the bank that payment of his note should never be enforced, and that the stock was left with the bank as the property of Reed. The president of the bank testified that there was no such arrangement, but that Reed sold his stock to defendant, who executed the note sued on, pledging the stock issued to him to secure his note, and that both note and stock were placed by Reed with the bank as collateral for Reed's indebtedness. On issues submitted the jury rendered a verdict that the bank was the owner of the note, and that it agreed at the time the note was executed that defendant should not be liable thereon, as alleged in the answer. On the rendition of the verdict the plaintiff moved for judgment for the amount of the note and interest, which was refused, and plaintiff excepted. There was judgment for defendant, and plaintiff excepted and appealed.

Charles E. Jones, for appellant. Moore & Rollins, for appellee.

HOKE, J. The court is unable to perceive anything in the allegations or testimony which shows or tends to show a valid defense to this demand. It appears from the answer and the evidence that defendant executed the note sued on to his father-in-law, J. E. Reed, for his stock in the bank, and received the consideration. By virtue of his agreement and the note, defendant became a stockholder in the bank, qualified and served as a director, taking part in the bank's management and receiving pay for his services. During that time this note was reported as part of the assets of the bank, and the jury have decided that same belonged to the bank. The only defense attempted amounts, in substance, to this: that though the defendant executed his note, and received a valuable consideration for same, there was an understanding and agreement at the time that payment should never be enforced or demanded. All the authorities are agreed that such a defense is not open to defendant. In Meekins v. Newberry, 101 N. C. 18, 7 S. E. 655, it was said by Merrimon, J.: "It is a settled rule of law that when the parties to a contract reduce the same to writing, in the absence of fraud or mutual mistake properly alleged, parol evidence cannot be heard to alter or contradict or modify it." And by Smith, C. J., in Ray v. Blackwell, 94 N. C. 10: "It is a settled rule, too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict or alter the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose." "The cases," said the chief justice, "which are apparently to the contrary, do not contravene this rule, but rest upon the idea that the writing does not contain the contract, but is part execution of it." The decisions here and elsewhere are uniformly to the same effect. Moffitt v. Maness, 102 N. C. 457, 9 S. E. 399; Nickelson v. Reeves, 94 N. C. 559; Bank v. Tisdale, 84 N. Y. 655; Hirsch v. Oliver, 91 Ga. 554, 18 S. E. 354; Forsythe v. Kimball, 91 U. S. 291, 23 L. Ed. 352. The principle is so familiar that citation of authority is not required, but the decisions are noted by reason of the marked similarity of some of them to the case before us. The jury having declared by their verdict on the first issue that plaintiff is the owner of the note sued on, and there being nothing in the further defense or the testimony which tends to establish a legitimate defense, the court is of opinion that the plaintiff is entitled to a judgment for the note and interest notwithstanding the verdict on the second issue, and his motion to that effect should have been allowed. Ward v. Phillips, 89 N. C. 215; Corp. Com. v. R. R. Co., 137 N. C. 1, 47 S. E. 229. Let this be certified, to the end that judgment be entered in favor of plaintiff for the note and interest.

Error.

(123 Ga. 49)

HILL et al. v. TERRELL.

(Supreme Court of Georgia. May 13, 1905.)

1. WILL—CONSTRUCTION—NATURE OF ESTATE.
Where a testator bequeathed property to his grandchildren, children of his daughter, and declared, "It is also my will, desire and intention, that if either of my daughter's children should depart this life after marriage, and should die without leaving any child or children, at the time of his or her death, that his or her share of all or any part of the property, or the proceeds thereof, in whatever the same may be invested, herein devised or bequeathed by this will or any clause thereof, shall revert to, and be equally divided between her surviving children and their legal representatives," this created in a grandchild of the testator an estate in fee, subject to be terminated or divested if, after marriage, such grandchild should die without leaving any child or children at the time of her death.

2. SAME—ESTATE IN REMAINDER.
A child of a grandchild of the testator took no estate in remainder under the provision of the will above quoted.

3. SAME.
Construing such provision of the will in connection with its context and with the entire will, there is nothing to change the construction just announced.

4. ESTOPPEL—MISTAKE.
No estoppel was pleaded, nor is there any distinct ruling of the trial court on that subject, nor do the facts alleged in the petition as to a mistake in the receipt given to the executor by the plaintiff as guardian for his child show that any estoppel existed.

(Syllabus by the Court.)

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action by E. B. Terrell against H. W. Hill and others. Judgment for plaintiff, and defendants bring error. Affirmed.

On the 5th day of June, 1879, Hon. Hiram Warner executed his will. After his death it was probated, in August, 1881. E. B. Terrell filed his equitable petition, making Hiram Warner Hill, as executor of the deceased, and Kittie Hill Terrell, parties defendant, and alleging, in brief, as follows: Kittie Hill was the granddaughter of the testator, being the daughter of his daughter, Mary J. Hill. On December 26, 1892, she and E. B. Terrell, the plaintiff, intermarried. On July 17, 1898, a daughter, Kittie Hill Terrell, was born to them, and shortly thereafter Mrs. Terrell died. Kittie Hill reached the age of 21 before she intermarried with the plaintiff. Her estimated share of the fund mentioned in the fifth item of the testator's will approximated $25,000. She permitted this, however, to remain in the hands of her brother, the sole acting executor, as long as she lived. A few months after the death of Mrs. Terrell this share was turned over to her husband, the plaintiff, as natural guardian for his child, Kittie Hill Terrell, and a receipt was given to the executor, in which it was stated that the minor child was entitled to the share of her mother, as remainderman, under the will of the testator, and which receipt contained the following clause: "And I, E. B. Terrell, father and guardian of Kittie Hill Terrell, as aforesaid, have received of H. W. Hill, executor of the last will and testament of Hiram Warner deceased, the following bonds and money, being all that is in his hands for distribution under said will of Hiram Warner deceased, belonging to my said ward, Kittie Hill Terrell, to wit, $23,500.00 in bonds, and $219.00, in cash." The petition proceeds: "Your petitioner avers that at the time he executed the aforesaid receipt he had no idea that he himself had any interest in the fund which his said wife had left at her death, but believed the same belonged entirely to his minor child, the said Kittie Hill Terrell; and he was induced so to believe by the unlimited confidence which he placed in the statement of the said Hiram Warner Hill, whom petitioner knew to be his friend, who was the executor of his grandfather, and was withal a very able and distinguished lawyer. Relying upon the statement of said executor, he executed the receipt aforesaid, presented to him by and in the handwriting of the executor. * * * Your petitioner has never for one moment believed that said H. W. Hill, executor as aforesaid, in the statement he made to petitioner, was guilty of any intended artifice or deception or fraudulent practice; on the contrary, he thinks the executor was honestly mistaken as to the true construction of his testator's will, relying, possibly, upon the popular opinion entertained that no one would ever enjoy any of testator's property who was not of his blood, rather than upon a critical examination of the provisions of said will." He gave a bond as guardian of his daughter, and was not aware that he had any interest in the estate until very recently, when in a conversation with a friend it was suggested to him, and, upon having the will carefully examined by counsel, he reached the conclusion that the share of his wife vested in her absolutely, and that upon her death he and their minor children inherited this share equally, instead of its passing entirely to the child. He contended that the turning over of this share to him as guardian, and the giving of the receipt above stated, resulted from a mistake; and he prayed that it be decreed that his wife, Kittie Hill Terrell, was the owner in fee of her share of the fund bequeathed by her grandfather, Hon. Hiram Warner, deceased, in the fifth item of his will, and that, she having died intestate, he and their minor child Kittie Hill Terrell, inherited such share equally, and that the receipt given to the executor be delivered up to be canceled, and that in its place two other receipts should be executed by him, one individually, and the other as natural guardian for his child, each for an undivided one-half interest. The executor in his answer insisted that, under a proper construction of the will of the testator, the share going to the testator's granddaughter, Kittie Hill (afterwards Mrs. Terrell), under the fifth and tenth items

of the will, did not pass to her absolutely or in fee, but that by those items a life estate in her was created, with a remainder to her child, and therefore her child was entitled to the estate, and her husband took no interest; and that the receipt given by the plaintiff as guardian was properly given, and should not be canceled. The defendant further alleged that the testator had but one child, Mrs. Mary J. Hill; that she married A. F. Hill, who was living at the time of the execution of the will (she living with him); and that the son-in-law was not a legatee under the will, and not mentioned in it.

The will of Hon. Hiram Warner contained 11 items. The first directed the payment of his debts and the erection of a suitable monument over his grave. The second bequeathed to his grandson Hiram Warner Hill his gold watch and library. The third bequeathed to his grandson Burwell O. Hill his horse and buggy, and such other horses, mules, wagons, and plantation tools as he might have at the time of his death. The fourth bequeathed to his daughter, Mary J. Hill, $1,000, to dispose of absolutely as she pleased. The remaining items were as follows:

Fifth. "It is my will and desire that after the payment of the specific legacies hereinbefore enumerated, and expenses of administration, including the expenses of erecting a suitable monument as specified in the first item of this will, that all money remaining on hand, if any, and all that may be due me by notes, bonds or other evidences of debt, shall be invested by my executors herein after named in bonds of the State of Georgia, or bonds of the United States, or in safe and solvent railroad bonds of this State or in mortgages upon unincumbered real estate with waiver of homestead, drawing interest for the benefit of the children of my daughter, Mary J. Hill—that is to say—the principal and the annual or semi-annual interest accruing thereon (if not already invested at the time of my death) shall be so invested for the benefit of the children my said daughter now has, or may hereafter have born, share and share alike in the following manner, that is to say, whenever any one of her children shall arrive at the age of twenty one years or marries, then he or she shall receive his or her share of said fund at that time, and the balance thereof continue to be invested drawing interest for the benefit of the others. It being my desire and intention that this fund shall be invested as before directed, with the annual and semi-annual interest accruing thereon for the benefit of all my daughter's children and that their respective shares thereof be paid to them as they shall respectively come of age or marry, each one's share to be estimated at the time of the payment thereof and in the event any of her children should die before marriage or arriving at the age of twenty one years, his or her share of said fund is to be equally divided between her surviving children or their legal representatives, to wit, her grand children, provided any of her children should die leaving children. It is also my will, desire and intention, that if either of my daughter's children should depart this life, after marriage and should die without leaving any child or children at the time of his or her death that his or her share of all or any part of the property, or the proceeds thereof, in whatever the same may be invested, herein devised or bequeathed by this will or any clause thereof, shall revert to, and be equally divided between her surviving children and their legal representatives; and my executors are hereby directed to take a receipt from each legatee to that effect."

Sixth. "I direct that the lot of land owned by me in Gilmer county and the lot of land owned by me in the 11th district of Meriwether county be sold by my executors, and the proceeds thereof be invested for the benefit of my daughter's children as herein before specified in the fifth item of this will."

Seventh. "In the execution of my will and desire, I do hereby devise and bequeath all of the residue and remainder of my estate, not otherwise disposed of by this will, to my daughter Mary Jane Hill for her sole and separate use, during her natural life and at her death to be equally divided among her children living at the time of her death and their legal representatives, the share or portion of her female children is expressly devised and bequeathed to them for their sole and separate use and benefit. It is to be expressly understood and such is my declared wish, will and intention that the life estate in my lands hereby devised to my daughter is not to be so managed or cultivated as to injure or prejudice the rights or interest of her children as remaindermen but that the same shall be cultivated and managed prudently and discreetly during her life, without waste or injury to the corpus of the property, but so far as it is possible to do so to improve it for the benefit of her children, who I intend shall have the benefit of it after her death and this devise of my land during her life is made upon that express condition. It is also my intention as to this clause of my will, that if at the time of my daughter's death any of her children shall have died leaving children that the latter shall represent their deceased father or mother and take the share or portion, which he or she would have been entitled to if living at the time of my daughter's death."

Eighth. "If at any time before my death I should advance either of my daughter's children by giving them money or property such advancement is to be deducted from his or her share of my estate on a division thereof."

Ninth. "If I should own any town or city property at the time of my death then it is my will and desire that the same shall be

sold by my executors at public sale and the proceeds thereof be invested for the benefit of my aforesaid grand-children, in the same manner and for the same purposes expressed in the 5th item of this my will."

Tenth. "It is my will and desire and I do hereby direct that the legal title to all and singular the property devised and bequeathed to my female grand children by this will or any clause thereof, shall be vested in my executors in trust for my female grand children, that is to say, my said executors are to hold and have vested in them the legal title to the corpus of the property devised and bequeathed to my female grand children as aforesaid in trust for their use and benefit and for their protection, and are to pay to them annually the interest or income of their respective shares thereof, when they shall arrive at twenty one years or marry taking their separate receipts therefor."

Eleventh. "Believing myself competent to dispose of my worldly effects by will I have done so and hope that the courts of the country will see to it, that it is executed in accordance with my expressed intentions, and not after my death be passing orders at the instance of interested parties to alter and change the directions contained in my will as is sometimes done under one pretext or another."

Lastly. "I, nominate and appoint my brother Obadiah Warner and my grand sons Burwell O. Hill and Hiram Warner Hill as executors of this my last will and testament and hereby charge them and each of them with the faithful execution thereof according to its true intent and meaning as herein before expressed. In testimony whereof I have hereunto set my hand and seal to the foregoing annexed seven written pages. This 5th day of June, 1879. (Interlined before signing with different ink.)

"Hiram Warner. [Seal.]"

The case was, by consent, submitted to the presiding judge without a jury. He held that "Kittie Hill Terrell, wife of the petitioner, E. B. Terrell, in the property referred to * * * under the fifth item of the will of her grandfather, Hiram Warner, deceased, takes an estate in fee, subject to be divested upon her dying without children. She having died, leaving one child and her husband, the petitioner herein, they are entitled to said property in equal shares as the heirs at law of the said Kittie Hill Terrell." He accordingly directed the receipt which had been given the executor to be delivered up for cancellation, and two receipts, one by E. B. Terrell individually, and the other by him as guardian of his minor child each for a half interest in the property, should be substituted therefor. The defendant excepted.

H. W. Hill, for plaintiffs in error. John W. Park, S. W. Harris and Orville A. Park, for defendant in error.

LUMPKIN, J. This case presents some unusual features. When the Supreme Court of Georgia was organized under the act of December 10, 1845 (Laws 1845, p. 18), Hon. Hiram Warner was one of the three judges first elected. The second opinion which appears in the printed reports of this court (1 Ga. 5) bears his name. For many years he was a member of the court, and for a long time presided as chief justice. He took part in the construction of many wills, and now, after his death, his own will comes before this court for construction. It is also a somewhat unusual fact that the petition states that it is based in part upon the opinion of another distinguished ex chief justice, Hon. Logan E. Bleckley.

The controversy arises over the proper construction of the fifth item of the testator's will. In it he provided that, after the payment of specific legacies, and the expenses of administration, all the remaining money in hand, or that might be due him, should be invested by his executors in bonds or mortgages "for the benefit of the children my said daughter now has, or may hereafter have born, share and share alike"; that "whenever any one of her children shall arrive at the age of twenty one years or marries, then he or she shall receive his or her share of said fund at that time, and the balance thereof continue to be invested drawing interest for the benefit of the others"; that "in the event any of her children should die before marriage or arriving at the age of twenty one years, his or her share of said fund is to be equally divided between her surviving children or their legal representatives, to wit, her grand children, provided any of her children should die leaving children." Then follow the words which especially require construction. They are as follows: "It is also my will, desire and intention, that if either of my daughter's children should depart this life, after marriage and should die without leaving any child or children at the time of his or her death that his or her share of all or any part of the property, or the proceeds thereof, in whatever the same may be invested, herein devised or bequeathed by this will or any clause thereof, shall revert to, and be equally divided between her surviving children and their legal representatives; and my executors are hereby directed to take a receipt from each legatee to that effect." The plaintiff contends that under this item of the will the granddaughter of the testator took an estate in fee, subject to be divested if she should die after marriage without leaving child or children; that, she having a child at the time of her death, the condition upon which her estate might have been divested no longer existed; and that, her estate being absolute at her death, her husband and child were entitled to share equally in the property so left by her. On the other hand, the defendant contends that un-

der this item of the will the testator created a life estate in his granddaughter, Kittie Hill, with remainder to such children as she might have at the time of her death; that, having only one child, the entire estate passed to it; and that her husband took nothing as heir of his wife.

It is clear that the estate bequeathed by the testator to his granddaughter was not expressly limited to a life estate. Neither is there any express gift or bequest to the children which she might leave. The question then is narrowed to this: Did the testator intend such a limitation or remainder to arise by implication, and did the language employed by him create such a limitation or remainder over?

Since 1821 it has been the law of this state that the word "heirs," or its equivalent, is not necessary to create an absolute estate; but every conveyance, properly executed, shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance. Civ. Code, § 3083.

Provisions in wills similar to that now under consideration have been construed a number of times by this court. In Groce v. Rittenberry, 14 Ga. 233, it was said: "Where personal property was bequeathed to S. G., and, if he should die without any child living at his death, then to the children of L. G. and J. A.; and S. G. died leaving his wife enceinte with a child, which was afterwards born, and lived for some time, but subsequently departed this life: Held, that such bequest was in the nature of an executory gift to the children of L. G. and J. A., to take effect upon the defeasance of the prior gift to S. G. Held, also, that, for the purposes of this bequest, the child en ventre sa mere was a child living at the death of its father, S. G."

In Harris, Administrator, v. Smith, 16 Ga. 545, is the following ruling: "A testator gave real and personal estate to D. F. H., with the provision that if he should 'die leaving no lawful heirs, then, in that case, it is my will that all of the said property shall be divided, share and share alike, between the children of J. C. F.' Held, that these words vested in D. F. H. an estate in fee, subject to an executory devise of the lands, and bequest of the personal property in favor of the children of J. C. F., if the said D. F. H. should die without children living at the time of his death."

In Burton v. Black, 30 Ga. 638, 644, a similar ruling is made, and the subject is fully discussed. Stephens, J., says: "An obvious restriction upon the principle of reasoning by inference is that resort to it shall be had only in the absence of expressed intention;" and he holds that a bequest to one and his heirs would not create a fee simple more effectually under our law than by being to him without the added words of inheritance, and that the only effect of providing that the estate should go to some other person if the first taker should die without children is to attach a condition to the fee simple in him which would terminate it if he should die without children. A like construction has been placed upon similar bequests in Hill v. Alford, 46 Ga. 247; Gibson v. Hardaway, 68 Ga. 370; Matthews v. Hudson, 81 Ga. 120, 7 S. E. 286, 12 Am. St. Rep. 305; Chewning v. Shumate, 106 Ga. 751, 32 S. E. 544; Davis v. Hollingsworth, 113 Ga. 210, 38 S. E. 827, 84 Am. St. Rep. 233; Sumpter v. Carter, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274. Thus this court has held with great uniformity that, unless there be something to indicate a contrary intent on the part of the testator, a devise or bequest to a named person, followed by a provision that if he shall die childless the property shall pass to some other person, conveys to him a fee, subject to be divested upon his dying childless, or, as it is sometimes called, a base or qualified fee, and does not confer upon any child which he may have any interest or estate in remainder in the property. Estates by implication are not favored. McCord v. Whitehead, 98 Ga. 385, 25 S. E. 767.

In the harmony of these decisions there is but a single note of discord. In Wetter v. The United Hydraulic Cotton Press Co., 75 Ga. 540, the words, "and should they two be survived by my said daughter, and she, my said daughter, subsequently die without issue as aforesaid, then living, then it is my will that the whole of my estate vest in and belong to my own next of kin then living and their heirs forever," when construed in connection with the entire will and the circumstances surrounding the testatrix, created a remainder in favor of the children of her daughter, and did not invest her with a fee determinable upon dying without issue. In regard to this decision, several things may properly be said. The opinion was written by Hon. Marshall J. Clarke, judge of the superior court of the Atlanta circuit, presiding instead of Jackson, C. J., who was disqualified. He based his opinion in part upon the fact that the will was drawn without regard to technical rules. He said (page 544): "It would be especially unjust to apply technical rules to an instrument manifestly drawn without reference to them. The will of Mrs. Cobb is a paper of this character." No such statement as this could be made in regard to the will of the ex chief justice of this court, which was doubtless drawn by himself, and which evinces on its face great care and particularity to express his intention and to leave nothing to implication. Moreover, the will which was under consideration in that case was probated in 1839, when the old law in regard to marital rights prevailed. That decision has been discussed and criticised in Matthews v. Hudson, 81 Ga. 126, 7 S. E. 286, 12 Am. St. Rep. 305, and, if it can stand at all, it must be on its own peculiar facts. It was also delivered in 1885, some years after the

death of Judge Warner, so that he could not have drawn his will with the ruling there made in view, or have been influenced in any respect by it.

In the case of Hill v. Alford, 46 Ga. 247, supra, Chief Justice Warner delivered the opinion of the court in 1872. The will then under consideration contained the following items:

Item 5. "It is my will, that as my children should marry or become of age, my executor shall give off to such child such portion of my estate as he may think best, for the purpose of managing and controlling and deriving the profits or income to himself; but the title to such property shall not be divested from my estate, nor such child acquire any title to the same; but said property shall belong to my estate until the youngest child shall marry or become of age, and then shall be brought into the general fund, to be divided among all my children equally, share and share alike.

Item 6. "My further will and desire is, that should all my children die, without leaving children at the time of their death, that all my property shall be made a poor school fund of, to be placed under the control of the 'Inferior Court of Putnam County,'" etc.

The testator died leaving three sons, two of whom died, leaving no children, before Andrew, the youngest, became of age or married. The following extracts from the opinion of the chief justice will show how strong and clear were his views on the subject: "There is no ambiguity on the face of the testator's will which would authorize the introduction of parol evidence to explain it, but the words thereof are to be construed according to their legal effect, and the intention of the testator must be derived from the plain, unambiguous words which he has employed in making his will. * * * The estate of Andrew in the land under the will was not contingent upon his leaving children, as has been supposed, but was a vested fee, subject to be divested in the event he died without children. * * * The fee which Andrew took in the land under the will was a qualified or base fee, because there was a qualification annexed thereto, to wit, that if he died without children it was to go over by way of executory devise to the inferior court of Putnam county. * * * If there should be any doubt whether the devise in this case took an absolute estate in the land at common law, there can be none under the provisions of the act of 1821, which declares that all devises of real property shall vest in the person to whom the same are made an absolute, unconditional fee-simple estate, unless it be otherwise expressed, and a less estate mentioned and limited in such devise. * * * It was said, on the argument, that it was the intention of the testator that his grandchildren should take his property in the event his sons died leaving children, but there are no words in the testator's will which will authorize a court to say so; for, as it was said by this court in Wright v. Hicks, 12 Ga. 156, 56 Am. Dec. 451, 'courts are not permitted to give effect to the will of a testator contrary to the plain and obvious terms used by him upon a mere conjecture as to his intention.'"

The same learned jurist who announced this opinion left his own will a few years later. An examination of it will show that it was prepared with the utmost care to express all the intention which his testamentary scheme embraced. As already stated, there is no express limitation of a life estate in his granddaughter with remainder over to her child. If there were any such remainder at all, it would arise by implication. The testator knew the danger of entering into the realm of conjecture, as indicated by his opinion above quoted. Indeed, after carefully and exhaustively dealing with his entire testamentary scheme, he uses the following striking words: "Believing myself competent to dispose of my worldly effects by will, I have done so, and I hope that the courts of the country will see to it, that it is executed in accordance with my expressed intentions, and not after my death be passing orders at the instance of interested parties to alter and change the directions contained in my will as is sometimes done under one pretext or another." In the last item of the will he again refers to his intent and meaning as "hereinbefore expressed." He was careful to ask that his will be executed in accordance with his "expressed" intentions. He evidently desired to guard against the possibility of acting upon "mere conjecture," to which he referred in his decision. He believed in expressed language rather than implication. In Carlton v. Price, 10 Ga. 497, he said: "When the intention of testators and the laws of the land are in conflict, the latter must prevail."

In view of all these facts, we do not think that this provision in the will can be construed to have a different meaning from that which the testator himself had put upon a similar provision in another will, or that an estate in remainder by implication should be raised against his declared desire that the expressed intentions of his will should be carried out. Nor do we think that other provisions of the will, or the context, alter this construction.

It will be noted that several times in the fifth item the testator uses the expression, "for the benefit of the children of my daughter," which does not indicate an intention to limit the bequest to such children to a life estate. It was also provided that, whenever one of his daughter's children should arrive at the age of 21 years or marry, he or she should receive his or her share of the fund at that time. It was declared that, in the event any of the testator's grandchildren

should die before marriage or arriving at 21 years of age, his or her share should be equally divided between the surviving grandchildren or their legal representatives (their children, if any). This, however, in no way conflicts with the fact that if one of the children arrived at 21 years of age and married, and thereupon received his or her share, it should be in fee. The testator provided for both contingencies. First, in case of death before marriage, or arriving at 21 years of age, the property should go as directed; and, secondly, in case of death after marriage, without leaving any child or children, a different disposition was made.

The use of the word "also," in the expression "it is also my will," does not create any remainder interest in favor of the children of the testator's grandchildren. This word not only has the meaning of "in like manner," or "likewise," but it has a further meaning of "in addition," "besides," "as well," "further," "too." Having made one provision in one contingency, he made an additional or further provision in another contingency.

The direction in the tenth item of the will, that the executors should hold the property devised to the testator's female grandchildren in trust for them, does not operate to limit the interest of such grandchildren to a life estate, or to create an estate in remainder for their children.

Construing the fifth item of this will alone, or in connection with the entire will, we are of the opinion that the estate created in favor of the testator's granddaughter, Kittie Hill, was an estate in fee, subject to be divested or terminated upon her dying without child or children at the time of her death, and that it did not create any estate in remainder in favor of her child. It follows that, upon Mrs. Terrell's death intestate, after marriage, leaving a child, this share passed as any other fee-simple estate left by her.

2. It does not appear that any estoppel was pleaded, and it is doubtful if that question is sufficiently made to require adjudication. But if the allegations of the petition be taken as true, the plaintiff does not appear to be estopped by reason of a mere mistake in receipting to the executor.

Judgment affirmed. All the Justices concur, except CANDLER, J., absent.

(58 W. Va. 30)

TUCKER v. COLONIAL FIRE INS. CO.

(Supreme Court of Appeals of West Virginia. May 11, 1905.)

1. INSURANCE — ACTION ON POLICY — STATEMENT OF CLAIM.

Where the plaintiff in an action on a policy of fire insurance, being required to file a more particular statement of the nature of his claim, files a statement giving notice to the defendant insurance company that it would be held liable for the full face of the policy on the specific property insured thereby, and, in addition, that it would be held liable for the amount of fixtures not insured thereby, the part of such statement giving notice that the defendant would be held liable for the amount of fixtures is immaterial, and should be treated as surplusage.

2. SAME.

Such statement is sufficient if it, in effect, gives notice to the defendant of the nature of the plaintiff's claim.

3. SAME—DEMURRER TO STATEMENT.

Such statement is not a part of the plaintiff's declaration and cannot be demurred to. If it is too vague or otherwise insufficient, the remedy is to object to the introduction of evidence under it.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1625.]

4. SAME—EVIDENCE.

Under the statement filed by the plaintiff in this case, it was proper to admit in evidence the policy sued on.

5. SAME.

In an action upon a policy of fire insurance, the plaintiff is not required to prove compliance with any clause, condition, or warranty contained therein, which the defendant does not, under section 64 of chapter 125 of the Code of 1899, by a statement filed, specify plaintiff's failure to perform.

6. SAME—CONDITIONS IN POLICY.

Clauses, conditions, or warranties contained in policies of fire insurance will be construed most strongly against the insurer, where it may fairly be done, in order to avoid a forfeiture or to permit a recovery; in case of doubt fairly arising, the doubt will be resolved against the insurer; and where a clause, condition, or warranty admits of two interpretations, equally reasonable, the one most favorable to the insured will be adopted.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 292, 295.]

7. SAME—SUBSTANTIAL COMPLIANCE.

In the absence of bad faith, the law requires of the insured only a reasonable and substantial compliance with the clauses, conditions, and warranties of a policy of fire insurance.

8. SAME—INVENTORY.

Where a policy of fire insurance provides that "the assured shall take an inventory of the stock hereby covered, at least once a year during the life of this policy," the assured has a year from the date of the policy in which to make an inventory, although the policy runs for one year only.

9. SAME—BOOKS OF ACCOUNT.

Where a clause in a policy of fire insurance provides that the assured "shall keep books of account, correctly detailing purchases and sales of said stock," and another clause in effect provides that failure to observe such condition shall work a forfeiture of all claims under the policy, such clause requiring the assured to keep books of account, etc., is a promissory warranty on his part.

10. SAME—EXAMINATION OF BOOKS.

Where a clause in a policy of fire insurance provides that the insured, "as often as required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if original be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made," and another clause in effect provides that no suit or action on the policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with the foregoing requirement, such

clause requiring the insured to produce for examination all books of account, etc., is a promissory warranty on his part, and a condition precedent to his right of recovery on the policy.

11. SAME—REASONABLE DEMAND.

The clause requiring the insured to produce for examination all books of account, etc., as often as required, at such reasonable place as may be designated by the company or its representative, means a reasonable place in the locality where the insured property was situated, in the absence of conditions rendering such place unreasonable.

12. SAME.

A demand by the insurer or its representative requiring the insured to produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if the original be lost, at a city located about 140 miles from the place where the insured goods were situated, is unreasonable as to place, and the insured is under no duty to comply with such demand; and his failure to comply therewith constitutes no breach of the clause of the policy requiring him to produce for examination all books of account, etc., at such reasonable place as may be designated by the company or its representative.

13. SAME—PROOF OF LOSS.

Proof of loss under a policy of fire insurance is not evidence of the amount of loss, but is admissible in evidence for the sole purpose of showing that proof of loss has been made as required by the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1701.]

14. OPINION EVIDENCE—VALUE.

One having sufficient knowledge of the value of property destroyed by fire to speak with intelligence on the subject may testify as to his opinion of its value, and the weight to be given to his testimony is a question for the jury.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2273.]

15. APPEAL—HARMLESS ERROR.

A verdict of a jury will not be set aside because of the admission of irrelevant and immaterial evidence where the court can see that such evidence was not prejudicial to the party complaining.

(Syllabus by the Court.)

Error to Circuit Court, Wood County.

Action by J. W. Tucker against the Colonial Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

V. B. Archer and Wm. Beard, for plaintiff in error. Merrick & Smith and D. C. Casto, for defendant in error.

COX, J. This is a writ of error by the Colonial Fire Insurance Company to a judgment of the circuit court of Wood county for $1,000 rendered against it in favor of J. W. Tucker in an action of assumpsit upon a fire insurance policy. The declaration is in statutory form. The first of the many errors assigned is the admission in evidence of the policy sued on, or, rather, a copy of the policy; the original being so charred by the fire that to have opened it would have resulted in its destruction. The objection is not on the ground that a copy was introduced, but on the ground that the copy, when produced, varied from the statement of the nature of the plaintiff's claim filed under section 62 of chapter 125 of the Code of 1899. The statement is as follows:

The Colonial Fire Insurance to J. W. Tucker, Dr.

To amount of the policy on stock of goods in the store at Burning Springs, Wirt County, West Virginia	$1,000 00
To amount of goods and fixtures in the store at Burning Springs, Wirt County, West Virginia, covered by the policy at the time of loss, to wit: On the 16th day of September, 1901	6,900 00

The policy sued on covered only the stock of merchandise, and not the fixtures. The policy is a part of the declaration, and discloses this fact. The statement filed includes more than the policy, by charging also for the fixtures. This statement was filed without objection on the part of the defendant, and the parties went to trial upon it. Statements under sections 62 and 64 of this chapter are not pleadings, but are in the nature of bills of particulars. Cappellar v. Queen Ins. Co., 21 W. Va. 576; Rosenthal v. Scottish Union Ins. Co. (W. Va.) 46 S. E. 1021. Such statements are sufficient if they, in effect, give to the party reasonable notice of the nature of his adversary's claim or defense, as the case may be. The objection here is not that the statement is too vague, but that it includes too much. It is apparent that the defendant by this statement was notified that the plaintiff would claim, to the extent of the face of the policy, the amount of the stock of merchandise covered by the policy, and in addition the amount of the fixtures not covered by the policy. The defendant being notified that it would be held for everything covered by the policy, it was entirely proper to admit the policy in evidence, and no variance resulted. The addition of the words "and fixtures" should be considered immaterial and treated as surplusage.

The defendant filed a plea denying liability, and also a statement under section 64 of chapter 125 of the Code of 1899, specifying that plaintiff had failed to perform certain clauses of the policy, whereby defendant claimed that plaintiff had forfeited all claims under the policy, and was barred from recovering. The statements and specifications of defense are as follows:

"The defense in the above cause being, with other things, that the action cannot be maintained because of the failure to perform, and comply with, and for the violation of, certain clauses, conditions and warranties, provisions and stipulations, in the policy sued on. The defendant here specifies the particular clauses, conditions, warranties, specifications, and stipulations in respect to which such failure or violation is claimed to have occurred, which are as follows:

"First. 'It is expressly stipulated that the assured shall take an inventory of the stock

hereby covered, at least once a year, during the life of this policy, and shall keep books of account correctly detailing purchases and sales of said stock, and shall keep said inventory and books securely locked in an iron safe, or away from building and at a safe distance during the hours that said store is closed for business. Failure to observe these conditions, shall work a forfeiture of all claims under this policy.' It is contended (a) that no inventory of stock covered by said policy was taken during the life of said policy; and (b) that no books of account, correctly detailing purchases and sales of said stock, were kept by the plaintiff, as required by such policy.

"Second. 'The insured as often as required, shall exhibit to any person designated by this company all the remains of any property herein described, and submit to examination, under oath, by any person named by this company, and subscribe the same, and as often as required shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if the original be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.' It is claimed by the defendant that on, to wit, November 23, 1902, Chas. W. Blair, a person designated by the defendant company, within the meaning of said provision of said policy, by letter dated Huntington, West Virginia, November 23, 1902, required the plaintiff to comply with the foregoing provision of said policy, and to submit to the said Chas. W. Blair for examination, at the Florentine, Huntington, West Virginia, all books of account, bills, invoices, and other vouchers, and certified copies of the same if originals be lost, in order to ascertain the exact amount of stock on hand at the time of fire, which place so mentioned was a reasonable place and town, and it will be shown that said plaintiff, J. W. Tucker, failed to comply with said requirement, in this; that he failed to produce the bills, invoices, and other vouchers, or certified copies of the same where originals were claimed to be lost, and failed to produce books of account which showed the exact amount of stock on hand at the time of said fire, so that the liability of this company under the provision of said policy could be ascertained.

"Third. 'No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity, until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire.' It will be claimed on the trial of said cause that said plaintiff, by this provision of the policy, is not entitled to maintain this suit thereon, for the reason that he has failed in the particulars mentioned in the first and second above specifications."

To this statement and these specifications of defense the plaintiff filed a statement of matters relied upon by him in waiver or estoppel on the part of defendant. These statements and specifications limited the extent of the issue in this case. The plaintiff was not put upon proof of compliance with any clause, condition, or warranty of the policy which the defendant had not specified plaintiff's failure to perform. Rosenthal v. Scottish Union Ins. Co., supra. It will be observed that the whole of the "iron-safe clause" was quoted in the statement, but the only parts of it which defendant specified that plaintiff had failed to perform, were two: (a) That no inventory of stock covered by said policy was taken during the life of said policy; and (b) that no books of account, correctly detailing purchases and sales of said stock, were kept by the plaintiff as required by such policy.

We desire first to notice the specification as to the failure to take an inventory. This policy bears date the 15th day of June, 1901. The fire occurred on the 16th day of September, 1901—three months and one day from the date of the policy. The inventory, by the terms of the policy, was required to be taken at least once a year. Shall we say that plaintiff did not have a whole year to take an inventory? Clauses, conditions, and warranties contained in a policy of fire insurance will be construed most strongly against the insurer, where it may fairly be done, in order to avoid a forfeiture or to permit a recovery; in case of doubt fairly arising, the doubt will be resolved against the insurer; and where a clause, condition, or warranty admits of two interpretations, equally reasonable, the one most favorable to the insured will be adopted. Liverpool & London & Globe Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460; National Bank v. Ins. Co., 95 U. S. 673, 678, 679, 24 L. Ed. 563; Moulor v. Am. Life Ins. Co., 111 U. S. 335–341, 4 Sup. Ct. 466, 28 L. Ed. 447; 16 Am. & Eng. Enc. Law, 863, and the authorities cited in notes 2 and 3. In the case of Liverpool, etc., Ins. Co. v. Kearney, Justice Harlan, in delivering the opinion of the court, says: "To the general rule there is an apparent exception in the case of contracts of insurance, namely, that, where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company's attorneys, officers, or agents prepared the policy, and it is its language which must be interpreted." Not only do the words in question give to the plaintiff a year in which to take an inventory, but, if there were a doubt fairly arising, it would be resolved in favor of the insured. Clauses similar to the one in controversy were passed on in the cases of McCollum v. Niagara Fire Ins. Co., 61 Mo. App. 352; Forehand v. Niagara Ins. Co., 58 Ill. App. 161; and Citizens' Ins. Co. v.

Sprague, 8 Ind. App. 275, 35 N. E. 720. These cases expressly hold that the insured is entitled to a full year from the date of the policy within which to take an inventory, notwithstanding the policy runs for one year only. It seems clear to us that the insured had a full year from the date of the policy within which to take an inventory, although the policy ran for one year only.

We will now notice the specification that no books of account, correctly detailing purchases and sales of stock, were kept by plaintiff as required by the policy. Some weeks after the fire which consumed plaintiff's store at Burning Springs, C. W. Blair, the adjuster for the defendant and the other companies which had issued policies on the same stock of merchandise, called upon plaintiff, and, after securing the execution of a nonwaiver agreement, proceeded to investigate the amount of the loss. The plaintiff turned over all of his books of account and inventories and all duplicate bills he had then received to Blair, the adjuster. The books consisted of a journal, two ledgers, and two inventories. Certain bills of purchases had not been entered on the books at the time of the fire, and were burned. It does not appear that there had been any unreasonable delay in entering these bills on the books. Two pencil blotters also were burned. The books, etc., turned over, were examined by Blair at Parkersburg, and then taken by him to Huntington, and there kept several days, until plaintiff went to Huntington, and, after having a conference with Blair, brought the books, etc., back with him. In the meantime plaintiff had sent to Blair more duplicate bills. No settlement having been made, plaintiff made proof of loss under the policy. After proof of loss was made, Blair, the adjuster, by letter dated November 23, 1901, to plaintiff, took exceptions to the proof of loss, and demanded that plaintiff submit to him for examination at the Florentine Hotel, Huntington, W. Va., all books of accounts, bills, invoices, and other vouchers, or certified copies of same if originals be lost. Later the plaintiff went to Huntington with all his books and papers, including duplicate bills for nearly all of the purchases not entered on the books. Some of them—in fact, nearly all of them—were not certified; but no objection was made by Blair because of that fact, and no further demands were made for certified bills. A long consultation between plaintiff and Blair, the adjuster, took place on this occasion at Huntington, in the presence of Casto, attorney for plaintiff. At this last meeting at Huntington a statement of the wholesale bills not entered, and which were destroyed by fire, was present, and a footing thereof was made by Blair. No settlement was made. About 700 pages of this massive record is taken up with the books and papers of the plaintiff. There is practically no conflict in the evidence as to what books were kept by the plaintiff, or as to what they disclosed. The question is whether or not these books, in legal effect, constituted a compliance with the clause of the policy requiring plaintiff to keep books of account, etc. In the absence of bad faith, the law requires of the insured only a reasonable and substantial compliance with the clauses, conditions, and warranties of a policy of fire insurance. Liverpool & London & Globe Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460; McNutt v. Va. Fire & Marine Ins. Co. (Tenn.) 45 S. W. 61; Am. Central Ins. Co. v. Ware, 65 Ark. 386, 46 S. W. 129; Meyer Bros. v. Ins. Co., 73 Mo. App. 166; Standard Fire Ins. Co. v. Willock (Tex. Civ. App.) 29 S. W. 218; Liverpool, etc., Ins. Co. v. Sheffy, 71 Miss. 919, 16 South. 307; Liverpool, etc., Ins. Co. v. Ellington, 94 Ga. 785, 21 S. E. 1006; Western Assurance Co. v. McGlathery, 115 Ala. 213, 22 South. 104, 67 Am. St. Rep. 26; Morris v. Imperial Ins. Co., 103 Ga. 567, 29 S. E. 927; Jones v. Southern Ins. Co. (C. C.) 38 Fed. 19; Sun Ins. Co. v. Jones, 54 Ark. 376, 15 S. W. 1034; Brown v. Pallatine Ins. Co., 89 Tex. 590, 35 S. W. 1060; Pa. Fire Ins. Co. v. Brown (Tex. Civ. App.) 36 S. W. 590; E. Tex. Fire Ins. Co. v. Harris (Tex. Civ. App.) 25 S. W. 720; Home Ins. Co. v. Cohen, 20 Grat. 312. We are aware that there are some authorities holding that a literal compliance is necessary, but the decided weight of authority is the other way.

In the case of Liverpool, etc., v. Kearney, supra, Justice Harlan says: "The covenant and agreement to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business, should not be interpreted to mean such books as would be kept by an expert bookkeeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly show to a man of ordinary intelligence all purchases and sales, both for cash and credit." In the case of McNutt v. Va. Fire & Marine Ins. Co. a part of the syllabus is as follows: "In a suit on such policy it appeared that complainant had, in good faith, kept books showing all his accounts; the main defect being that the cash account contained entries of money received on collections and on deposit, as well as for sales of goods. Complainant had also taken an inventory, which it had been his habit to keep in his safe. On the day before the fire he had been engaged in taking a new inventory in the same book, which was not completed; and it had been inadvertently left out of the safe, and, together with his current invoices, destroyed. Complainant supplied all deficiencies in the proofs by producing duplicate invoices, and showing beyond question the true status of his accounts and of the stock destroyed. Held, that complainant was entitled to recover on the ground that he had shown a substantial compliance with

every reasonable requirement of such policy." In the case of Liverpool, etc., Ins. Co. v. Ellington, 94 Ga. 785, 21 S. E. 1006, it was held that where the policy required that the assured should keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, "it was not indispensable that the set of books kept should embrace what is usually termed a 'cashbook,' or that the book should be kept on any particular system, or in a manner to render it easy, rather than slow and difficult, to ascertain the amount of purchases and sales, and distinguished cash transactions from those of credit. It was enough that these matters would be ascertainable from the books with the assistance of those who kept them, or who understood the system on which they were kept." In the case of Western Assurance Co. v. Redding, 68 Fed. 708, 15 C. C. A. 619, the first point of the syllabus is as follows: "Plaintiff, the keeper of a country store, held a policy of insurance on his stock of goods, issued by the defendant company, which contained a clause providing that it was one of the conditions of the policy that plaintiff should keep a set of books showing a complete record of his business, purchases and sales, take an itemized inventory at least once a year, keep such books and inventory in a fireproof safe, and produce the same in case of loss, and that failure to comply with such conditions should avoid the policy. Plaintiff's store and stock were destroyed by fire, and, in an action subsequently brought against the insurance company, it appeared that he kept a set of books in a primitive and unskillful manner, which books were all in the safe, and were produced, except a cash sales book covering 21 days before the fire, which had been inadvertently left out of the safe and burned; and such books showed plaintiff's purchases and credit sales, and some of his cash sales, as well as the result of an inventory taken a short time before the fire. Held, that the promissory warranty contained in the safe clause aforesaid was a condition subsequent only, and that the facts shown were sufficient to justify a finding of compliance therewith." In the case of Home Ins. Co. v. Cohen, 20 Grat. 312, it was held that, "in an action on a policy of insurance against fire, all that can be required of the plaintiff is a reasonable and substantial compliance with the conditions of the policy." This case was approved by this court in the case of Bryan v. Insurance Co., 8 W. Va. 605. Judge Moore delivered the opinion in the following language: "As held in Home Ins. Co. v. Cohen, 20 Grat. 312, a reasonable and substantial compliance with the terms of the policy is all that is required."

The clause of the policy under consideration constituted a promissory warranty on the part of the plaintiff, and a reasonable and substantial compliance therewith in good faith is shown by the practically uncontradicted and uncontroverted evidence in this record. The authorities we have cited meet every objection to the books of account kept by the plaintiff. These books were produced on the trial, and were copied in the record. A full statement was made of the wholesale bills not entered. The plaintiff testified that from these books and papers he could and did ascertain the purchases and sales. The adjuster, Blair, testified that "it is not difficult to take books of this kind and arrive at a conclusion, because they were simply single-entry books—simply a debit and a credit." A statement of the wholesale bills not entered, amounting to about $1,300, was produced, and duplicates of nearly all of said bills were also produced. Adjuster Blair testified that he made up a statement from these books and papers of the amount of goods on hand at the time of the fire. Plaintiff and Blair arrived at different conclusions, but Blair rejected items which the plaintiff included.

We will now consider the specification that plaintiff failed to produce at Huntington, W. Va., pursuant to the letter of November 23, 1901, all books of accounts, bills, invoices, and other vouchers, or certified copies of same if originals be lost. Defendant had a right to demand the production, for examination, of all books of account, etc., but in so doing it must be prompt and reasonable in its demands. Kerr on Ins. 543, and cases cited in note 309. The provision of the policy requiring the insured to produce for examination all books of account, etc., was a promissory warranty on his part, and a condition precedent to his right to recover on the policy. In the case of Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323, a clause almost identical with the one under consideration was construed, and it was there held that "the provision of an insurance policy requiring the insured to produce his books, etc., for examination when required, at a reasonable place, means a reasonable place in the locality or town where the insured property is situated." To the same effect are the cases of Am., etc., Ins. Co. v. Simpson, 43 Ill. App. 98; Fleisch v. Ins. Co., 58 Mo. App. 598. See, also, Elliott on Insurance, § 313. This seems to be the only reasonable construction of this clause, in the absence of conditions rendering a place in the locality where the insured goods were situated unreasonable, and we hold it to be the law. In the case at bar the demand was made to produce for examination all books of account, etc., at the city of Huntington, 140 miles or more from the place where the insured property was situated. The city of Huntington was not a reasonable place, within the meaning of this clause of the policy sued on; and the plaintiff was under no duty to produce such books, etc.,

at that place, and can be charged with no violation of this clause because he did not do so.

It is ovious that there was no failure of the plaintiff to comply reasonably and substantially with the clauses specified by the defendant. In our judgment, it would have been the duty of the court, upon motion, under the rule laid down in case of Ketterman v. Dry Fork R. Co., 48 W. Va. 606, 37 S. E. 683, and other cases decided by this court, to have directed a verdict for the plaintiff, and an assessment of damages by the jury. If a verdict had been rendered for defendant, it would have been contrary to the law and evidence. This being true, the question of waiver and the evidence and instructions in relation thereto were eliminated and were wholly immaterial. The single question remaining for the jury, and as to which there was a conflict in the evidence, was the quantum of damages to be assessed to the plaintiff, or, in other words, the amount of loss and damage.

The defendant complains of the refusal of the court to give a number of instructions asked for by it; but there being no failure to comply with the provisions of the policy by the plaintiff, as specified by the defendant, most of these instructions were not applicable, and defendant was not prejudiced by the refusal to give any of them. Some of them were offered on the theory that it was the duty of plaintiff to show compliance with the clause requiring the books, etc., to be kept in an iron safe; but, as we have already said, the defendant did not specify such failure, and could not have the benefit thereof. Defendant also complains that improper instructions were given for the plaintiff. The instructions complained of were wholly immaterial, and had no bearing on the question of the amount of loss and damage with which the defendant should have been assessed. The rule is that the court will not reverse a judgment merely because the trial court misinstructed the jury, when all the facts in the case are in the record, and it appears thereby that the appellant could not have been injured by the misinstruction. Clay v. Robinson, 7 W. Va. 348; Corder v. Talbot, 14 W. Va. 277; Taylor v. Boughner, 16 W. Va. 327; Edgell v. Conaway, 24 W. Va. 747; Beaty v. B. & O. R. Co., 6 W. Va. 388; Carrico v. W. V. C. & P. Ry. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50. The instructions complained of were not prejudicial to the defendant upon the question of the ascertainment of the amount of loss and damage.

Defendant also complains of the admission of certain evidence on the trial over its objection. The proof of loss made by the plaintiff under the policy was admitted, but, as the record shows, only for the purpose of proving that it had been made as required by the policy. A copy of the proof of loss is admissible to show compliance with the policy, but not to prove loss. Mays on Ins. § 579, note 7. See, also, Schwarzbach v. Protective Union, 25 W. Va. 622, 52 Am. Rep. 227. As we have seen, there was no issue involving this matter, but, for the purpose for which the proof of loss was admitted, it was harmless, and did not prejudice the defendant. Evidence tending to prove defendant's refusal to appraise as provided by the policy was admitted. This evidence was likewise immaterial upon the question of loss and damage, and was not prejudicial. The statement of the wholesale bills not entered was admitted, which was proper in connection with plaintiff's evidence, whether the statement had ever been presented to adjuster Blair or not. The evidence of Casto, in rebuttal to Blair's testimony, as to amount ascertained by Blair to be the loss and damage, was proper. The evidence of Van Alstine, Owens, O'Brien, and Depue as to the value of the stock of merchandise consumed by the fire was proper. Three of these witnesses had been clerks in plaintiff's store, and the other a merchant. These witnesses showed sufficient knowledge on the subject to enable them to testify intelligently upon the question of value, and the weight to be given to their testimony was for the jury. Mr. Elliott, in his work on Evidence, § 685, says: "Witnesses who are not strictly experts, as well as expert witnesses, may testify as to the value of property, real or personal, or as to the value of services, in a proper case. They must, however, have some knowledge on which to base their opinion. If they have such knowledge, the fact that it is slight will go to the weight of their testimony, rather than to its competency." See, also, section 676. Bearing, directly upon the competency of the testimony of these witnesses, see the following authorities: Buckley v. U. S., 4 How. (U. S.) 251, 11 L. Ed. 961; Enos v. St. Paul F. & M. Ins. Co. (S. D.) 57 N. W. 919, 46 Am. St. Rep. 796; Sirrine v. Briggs, 31 Mich. 443; Walker v. Collins, 50 Fed. 737, 1 C. C. A. 642. We do not find that defendant was prejudiced by the admission of improper testimony, although much testimony was admitted which was immaterial to the question of the amount of loss and damage. Mr. Barton, in 2 Barton's Practice, 735, says, in relation to setting aside a verdict of a jury on the ground of the admission of improper testimony, that "the court will not grant a new trial, although there has been an error in the admission or rejection of evidence or in the direction of the judge, if it appear to the court, on the whole matter, that the verdict ought to be confirmed." See, also, 2 Tucker's Com. 302; 4 Minor, Ins. 937; Taylor v. R. R. Co., 33 W. Va. 39, 10 S. E. 29; Hall v. Lyons, 29 W. Va. 410, 1 S. E. 582; State v. Hall, 45 W. Va. 767, 32 S. E. 240; Jones v. Singer Mfg. Co., 38 W. Va. 147, 18

S. E. 478; Flowers v. Fletcher, 40 W. Va. 103, 20 S. E. 870; State v. Yates, 21 W. Va. 761.

The evidence on the question of the amount of loss and damage, while somewhat conflicting, was sufficient to support the verdict.

We find no reversible error in this record. Therefore the judgment of the circuit court is affirmed.

(71 S. C. 317)

GREEN v. CANNADY et al.

(Supreme Court of South Carolina. April 6, 1905.)

1. TENANCY IN COMMON — ADVERSE POSSESSION.

A tenant in common cannot set up adverse possession against his co-tenants until actual ouster.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, § 43.]

2. SAME.

Ten years' adverse possession after ouster gives tenant in common good title against his co-tenants.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, § 45.]

3. EXECUTORS AND ADMINISTRATORS—SALE OF DECEDENT'S LAND—IMPEACHMENT.

Where land is sold by order of the probate court in aid of assets of the decedent, it cannot be impeached by proof of payment or tender of part of the indebtedness of the estate, and where no notice of tender was given at the sale the purchaser takes title unaffected by it.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1552.]

Appeal from Common Pleas Circuit Court of Laurens County; Frank B. Gary, Special Judge.

Action by Mary Elizabeth Nora Green against Thos. W. Cannady and Wm. A. Cannady, executors of Thos. Cannady, W. L. Gray, and others. From circuit decree Thos. W. Cannady appeals. Affirmed.

Thos. W. Cannady, in pro. per. Ferguson & Featherstone and F. P. McGowan, for respondent.

WOODS, J. This was an action for partition of a tract of 88 acres of land. Plaintiff alleged in her complaint that she and the defendant W. L. Gray each owned one-fourth of the tract, and that the defendants T. W. Cannady and Nancy E. Rhodes each owned one-sixth. The defendant W. L. Gray, in his answer, admitted the allegations of the complaint, and joined in the prayer for partition. The defendant T. W. Cannady, who had acquired the interests of the other two defendants, answered, setting up a general denial, and title in himself to the whole tract based upon adverse possession. Joel Maddox, under whose will all the parties claimed, in 1880 devised the 88 acres of land in dispute to his daughter, Martha Jane Cannady, wife of Thomas Cannady, who died intestate, leaving as her heirs at law her husband, two sisters, and a brother; and therefore, under the statute of distributions, the husband took one-half, and the sisters and brother each one-sixth, of the land. The brother dying, his one-sixth interest came to his two sisters, thus making each of them the owner of one-fourth of the 88 acres. Elizabeth C. Maddox, one of the sisters, at her death, devised her interest to Nancy M. Maddox, the other sister, and Thomas Cannady, jointly, for their lives, with remainder "to Mary Elizabeth Nora Welch (now Green) and her bodily heirs." Nancy M. Maddox, dying on October 21, 1900, devised her one-fourth of the land in fee to Thomas Cannady, whom she made executor of her will. At his death on August 6, 1901, Thomas Cannady left a will, by which he bequeathed his personal property to his nephew T. W. Cannady, the appellant, and devised his real estate to his nephews T. W. and W. A. Cannady, and their sister, Nancy E. Rhodes, equally. T. W. and W. A. Cannady were appointed his executors.

The estate of Nancy M. Maddox not having been fully administered by Thomas Cannady before his death, on September 28, 1901, Dr. M. C. Cox was appointed her administrator de bonis non cum testamento annexo. Dr. Cox, as administrator, then instituted suit in the probate court against T. W. and W. A. Cannady, as executors of Thomas Cannady, for an accounting of the assets of the estate of Nancy M. Maddox coming into the hands of their testator as her executor, and also for the purpose of selling realty in aid of personalty to pay debts. Mrs. Mary E. N. Green was also made a party defendant in this action. The cause was heard by the probate judge, who found a balance of $68.23 due to the estate of Nancy M. Maddox by the executors of Thomas Cannady, which he decreed should be paid, and that the indebtedness of the estate of Nancy M. Maddox over and above this balance remaining unpaid was $239.91, in order to settle which he held it would be necessary to sell the real estate. The probate judge therefore ordered her real estate sold, including that which had been devised to Thomas Cannady. From this judgment of the probate court no appeal was taken, and under it the one-fourth interest of Nancy M. Maddox in the 88-acre tract was sold, W. L. Gray becoming the purchaser for a consideration of $71, and receiving a deed therefor from O. G. Thompson, judge of probate. Briefly stated, then, at the time of the commencement of this action Elizabeth C. Maddox's share of the 88-acre tract had fallen to Mrs. Green, the remainderman, and Nancy M. Maddox's share, which she had devised to Thomas Cannady in fee, had been sold under judgment of the probate court and purchased by the defend ant Gray.

Under this state of facts the cause came on to be heard at the July, 1904, term of court for Laurens county, before Special Judge Frank B. Gary, upon the legal issue of

title. By consent the following issues were submitted to a jury: "(1) Has the plaintiff, Mary Elizabeth Nora Green, any title to the land, and, if so, to what extent? (2) Has the defendant W. L. Gray any interest in the land in dispute, and, if so, how much?" The defendant, T. W. Cannady, failed to make out title by adverse possession to the whole tract, the evidence clearly showing that Elizabeth C. Maddox, Nancy M. Maddox, and Thomas Cannady held it as tenants in common. He also attempted to avoid the effect of the judgment of the probate court directing a sale of the land by offering testimony to prove that he had tendered to the probate judge, before the sale, $180, which he claims was the amount of the entire indebtedness of the estate of Nancy M. Maddox. The circuit judge held that the judgment could not be attacked in this way, and refused to admit the evidence on the ground of irrelevancy. The jury answered both of the questions submitted in the affirmative, finding a verdict for the plaintiff; whereupon the presiding judge passed an order adopting their verdict and transferring the cause to calendar 2. The cause having been transferred to the equity docket, it was then heard by the presiding judge, who rendered a decree adjudging that "the plaintiff owns one undivided fourth interest in fee in the said premises, the defendant W. L. Gray owns one undivided fourth interest in fee in the said premises, and the defendant Thomas W. Cannady owns one undivided half interest in fee in the said premises" as tenants in common, and ordered that the land be partitioned according to their respective interests. It was further ordered that the cause be referred to a referee to ascertain and report to the court the amount of rents and profits for which Thomas W. Cannady should account to the others in excess of his one-half interest of the premises, he having been in exclusive possession of the entire premises since 1901. A receiver of the premises was also appointed by the decree. From this decree the defendant T. W. Cannady appeals.

The exceptions are as follows: "(1) Because his honor erred in entertaining a case that the statute debarred by the statute of limitations of six years. (2) Because there was no estate of M. J. Cannady, née Maddox, it having passed into the ownership of Thomas Cannady. (3) Because his honor erred in suppressing material testimony of the defendants. (4) Because his honor allowed a witness for the plaintiff to go on the stand and reverse his first testimony. (5) Because his honor erred in not demanding the full cause brought as the original demanded. (6) Because his honor erred in charging the jury that twenty years was the limit, when the act of 1878 makes the limit ten years. (7) That his honor allowed two cases to be united when the plaintiff had no interest in but one."

The statute of limitations does not run in support of a title set up by a tenant in common against his co-tenants until actual ouster. The circuit judge charged the jury fully on this point, and stated the law to be that 10 years' adverse possession after ouster would give good title.

W. L. Gray bought the interest of Nancy M. Maddox at a judicial sale made by order of the probate court to pay the debts of her estate, adjudged to amount to $239.91. The effort was made to prove that the appellant had tendered to the probate judge, before the sale, $180 as payment of the entire indebtedness of Nancy M. Maddox. The record does not show any effort to prove payment or tender of the entire indebtedness, and of course payment or tender of a part could not affect the validity of the sale. But, aside from this, though the appellant was present at the sale, and gave notice that the estate of Nancy M. Maddox had no interest in the land, yet he said nothing of tender of payment. Therefore, even if tender of the whole amount had been made, it would not affect the title of the purchaser, who bought on the faith of a judicial decree without notice of the tender. Iseman v. McMillan, 36 S. C. 27, 15 S. E. 336. The evidence, therefore, was irrelevant. The exceptions are not clear, but, as the appellant was without counsel, we have endeavored to consider all of the questions both of law and fact suggested in the argument or indicated by the record.

The judgment of this court is that the judgment of the circuit court be affirmed.

(71 S. C. 275)

REEVES et al. v. COOK.

(Supreme Court of South Carolina. March 31, 1905.)

DEED—CONSTRUCTION—ESTATE CONVEYED.

Deeds conveying land to A. "and the heirs of her body which she has or may have by B.," her husband, and to A. and the heirs of her body which "she has now or may have by B., my son," convey a fee simple to A. and her children by B. as tenants in common.

Appeal from Common Pleas Circuit Court of Lancaster County; Watts, Judge.

Action by Mary M. Reeves and others against George R. Cook. Decree for defendant, and plaintiffs appeal. Reversed.

The following are the deeds in question:

"Know all men by these presents that I, William Gardner of the State and county aforesaid, for the love and affection which I have for Gilly Ann Gardner, my daughter-in-law, bargain, sell and release a certain tract of land in said county on the waters of Dry Creek (description here) 250 acres, more or less, together with all and singular the rights, members, hereditaments, to have and to hold the same. I, William Gardner do give and grant unto the said Gilly Ann Gardner and the heirs of her body which she has or may have by M. L. Gardner, her

husband, against myself, my heirs, executors, administrators or assigns, unto Gilly Ann Gardner and the heirs of her body as above named. I do now warrant and forever defend the same against myself, my heirs, executors, administrators and assigns or any other person or persons lawfully claiming same or any part thereof.

"In testimony whereof I have hereunto set my hand and seal this February 26th, 1868.

his
"William X Gardner. [L. S.]"
mark.

"Know all men by these presents that I, William Gardner, of the State and county aforesaid, do this day for and in consideration of the sum of six hundred to me in hand paid by Gilly Ann Gardner, of the same State and county; and also she is to care for me and my wife in old age, bargain, sell and release, and by these presents have granted, bargained, sold, released and conveyed unto the said Gilly Ann Gardner and her heirs, that she has now or may have by M. L. Gardner, my son, a certain tract, piece or parcel of land, (description here), 147 acres more or less; together with all and singular the hereditaments, appurtenances and premises above mentioned unto Gilly Ann Gardner and her heirs that she has now or may have by M. L. Gardner, my son; against myself, my heirs, executors, administrators or assigns.

"I warrant and forever defend the same against myself, or any other person or persons lawfully claiming the same or any part thereof. In testimony whereof I have hereunto set and affixed my hand and seal this May 29th, in the year of our Lord, A. D. 1875.

"Signed, sealed and delivered in the presence of us.

his
"William X Gardner. [L. S.]"
mark.

Green & Hines, for appellant. T. Y. Williams, for respondent.

WOODS, J. William Gardner, on February 26, 1868, executed a deed conveying a tract of land containing 250 acres to "Gilly Ann Gardner and the heirs of her body which she has or may have by M. L. Gardner, her husband, against myself, my heirs, executors, administrators or assigns, unto Gilly Ann Gardner and the heirs of her body as above named." On May 29, 1875, William Gardner conveyed another tract of land containing 147 acres to "Gilly Ann Gardner and her heirs that she has now or may have by M. L. Gardner, my son, * * * together with all and singular the hereditaments, appurtenances, and premises above mentioned unto Gilly Ann Gardner and her heirs that she has now or may have by M. L. Gardner, my son." Gilly Ann Gardner had children by her husband, M. L. Gardner, when these deeds were executed, and other children were born afterward. M. L. Gardner, the father, William Gardner, the grandfather, and eight of the children, died after the execution of the deeds, the children dying without issue and unmarried. The plaintiffs are the surviving children of Gilly Ann Gardner and M. L. Gardner, and the only heirs of their grandfather, William Gardner. On January 22, 1878, Gilly Ann Gardner, M. L. Gardner, and William Gardner undertook to convey 167 acres of the land in fee simple to the defendant, who is now in possession; and on February 22, 1878, Gilly Ann Gardner and M. L. Gardner undertook to convey 153 acres in fee simple to D. L. Blackwell, and defendant is now in possession of this land also under a deed from Blackwell's grantee. The plaintiffs brought this action for partition, claiming that under the terms of the deeds from William Gardner above recited they took the land as tenants in common with their mother. The referee, to whom the cause was by consent referred, dismissed the complaint, holding that Gilly Ann Gardner took a fee conditional, and consequently her conveyance after issue born to her and M. L. Gardner defeated all claims of the plaintiffs. The circuit court took the same view, and overruled the exceptions to the report.

In two old English cases—Gossage v. Taylor, Stiles' Rep. 325, and Robinson v. Wharrey, 2 W. Bl. 728—it was held, where the limitation is to the wife for life, with remainder to the heirs to be begotten on the body of the wife by the husband, no estate tail was created, and the heirs took as purchasers. These cases are cited in 2 Jarman on Wills, *341, without dissent; but the authority of Gossage v. Taylor seems to be questioned in Fearne on Remainders, 38, and, so far as we can discover, its doctrine has not been followed. The true rule is thus stated in 2 Blackstone, *114: "Tenant in tail special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways. I shall instance in only one; as where lands and tenements are given to a man and the heirs of his body on Mary, his wife, now to be begotten. Here no issue can inherit but such special issue as is engendered between them two; not such as the husband may have by another wife; and therefore it is called special tail. And here we may observe that the words of inheritance ('to him and his heirs') give him an estate in fee; but, they being heirs to be by him begotten, this makes it a fee tail; and, the person being also limited, on whom such heirs shall be begotten (viz., Mary, his present wife), this makes it a fee tail special." Sheppard's Touchstone, 422; 8 Jarman on Wills (5th Am. Ed.) 90; 1 Washburn on Real Property, *75; Lehndorf v. Cope (Ill.) 13 N. E. 505; Pierson v. Lane (Iowa) 14 N. W. 90; Reed v. Lane (Mo. Sup.) 26 S. W. 957. If, therefore, the deeds

here under consideration had been made to Gilly Ann Gardner for life, and at her death to the heirs of her body to be begotten by her husband, M. L. Gardner, she would have taken a fee conditional, and, having had issue by M. L. Gardner, her conveyance would have conferred a fee-simple title on her grantee. In such cases the devise or grant to A. for life and at her death to the heirs of her body, or the issue of her body to be begotten by her husband, B., is held to refer to an indefinite succession of heirs of the body—the issue of a particular marriage. The terms of the deed under consideration, however, are not so general. The conveyance is not to Gilly Ann Gardner for life, and then to her heirs, general or special, but in one deed to her and "the heirs of her body which she has or may have," in the other to her and "her heirs that she has now or may have" by the grantor's son, her husband. This manifestly was a grant not to issue or heirs of the body in indefinite succession, but to issue already born of her in actual existence at that time, or to be afterward born of her, the fruit of the marriage with the grantor's son, M. L. Gardner. Clearly, therefore, the words must be limited to mean children. A grant or devise direct to the "heirs" of a living person has been often held to mean the children of such person, as distinguished from heirs generally or heirs of the body in indefinite succession. Holeman v. Fort, 3 Strob. Eq. 66, 51 Am. Dec. 665; Bailey v. Patterson, 3 Rich. Eq. 156; Lott v. Thompson, 36 S. C. 38, 15 S. E. 278; Shaw v. Robinson, 42 S. C. 342, 20 S. E. 161. Here the grant was not only to the heirs of a living person without any intervening life estate, but the word "heirs" was so qualified as to leave no possible room to doubt that it was intended to mean children. The intention to limit the meaning is even more clearly expressed than in the deed construed in Duckett v. Butler, 67 S. C. 130, 45 S. E. 187, which was held not to convey a fee conditional. This case seems conclusive of the question here under consideration. See, also, Sullivan v. McLaughlin (Ala.) 11 South. 447. It follows that the deeds from William Gardner did not convey a fee conditional, but under them Gilly Ann Gardner and her children, including those born afterward, took as tenants in common. Mellichamp v. Mellichamp, 28 S. C. 125, 5 S. E. 333; Sease v. Sease, 64 S. C. 216, 41 S. E. 898.

The judgment of this court is that the judgment of the circuit court be reversed.

(71 S. C. 237)

WALL v. ATLANTIC COAST LINE R. R.

(Supreme Court of South Carolina. April 8, 1905.)

CARRIERS—BAGGAGE—DELAY IN DELIVERY.

In an action for loss of baggage, defendant denied any liability except for a certain amount, and on the day of trial produced the baggage in question, which it tendered to plaintiff, who refused to accept it. *Held*, that the measure of damage was any reasonable loss and expense occasioned by the delay, together with the value of the goods at the time and place they should have been delivered, less their value according to their condition at the time and place of tender.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1568.]

Appeal from Common Pleas Circuit Court of Darlington County; Watts, Judge.

Action by Lula Wall against the Atlantic Coast Line Railroad. From a judgment for plaintiff, both parties appeal. Affirmed.

Miller & Lawson, for plaintiff. P. A. Willcox and W. F. Dargan, for defendant.

POPE, C. J. This is a controversy by an action begun in the magistrate court by the plaintiff against the defendant because of the alleged loss of a valise, for which she held the check of the railroad, which contained her wearing apparel. The defendant denied any liability, except to offer to allow her the sum of $10, and on the day of trial produced the valise in question; claiming that it had been, through misadventure, carried past Hartsville to the city of Sumter. It tendered the valise to the plaintiff, which she declined to accept. The magistrate gave a judgment against the defendant for $75. Upon exceptions taken by both plaintiff and defendant, the appeal was heard by Judge Watts, presiding judge of the circuit court, who in his judgment reduced the plaintiff's judgment from $75 to $55; but, of the $55 adjudged the plaintiff, he subtracted $5, the costs of the defendant, which left her with a net judgment of $50. She has appealed from that judgment, and, in consequence of her appeal, defendant also appealed.

This belongs to that class of cases (being on the law side) in which this court is powerless to interfere with the findings of fact of the court below. At one time it seemed to us that the judgment of the circuit judge should have been reduced by the amount purchased by the plaintiff of wearing apparel, of $29.65, in excess of the value of the articles which plaintiff alleged she lost, being contained in her valise; but the plaintiff also claimed that she had been subjected to a great deal of pain and annoyance, and some cost, at the failure of defendant to deliver her valise promptly, and it is likely that the circuit judge made some allowance to the plaintiff from this vexatious delay of the defendant, which delay was occasioned by the negligence of their agent in the town of Marion in issuing a check to the plaintiff in these words: "From Marion to Hartsville," while on the check attached to the valise itself, he placed the words, "From Marion via Hartsville to Sumter, S. C." This unfortunate mistake on the part of the agent of the defendant was the cause of this trouble. These matters are discussed and the rule laid down in regard thereto in the

case of Nettles v. Railroad Company, 7 Rich. Law, 190, 62 Am. Dec. 409; also Dill v. Railroad Company, 7 Rich. Law, 158, 62 Am. Dec. 407. In the first case cited supra the court said: "In such cases the measure of damages would seem to be any reasonable loss and expenses which has been occasioned by the delay, together with the value of the goods at the time and place they should have been delivered, taking therefrom the value according to their condition at the time and place of actual delivery or tender." The second case (Dill v. Railroad Company, supra) is to the same extent.

Our great trouble in this case is that Judge Watts has ordered the valise returned to the plaintiff, and from this part of his judgment neither the plaintiff nor the defendant has appealed. It must therefore stand. Under these circumstances, with some hesitation, we have decided to affirm the judgment in its entirety.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(71 S. C. 287)

RUBERG v. BROWN et al.

(Supreme Court of South Carolina. April 8, 1905.)

1. GUARANTY—ACTION TO ENFORCE.
Where a guaranty of an obligation of another is secured by an assignment of a mortgage, one action can be brought on the guaranty and to foreclose the mortgage.

2. SAME—CONSTRUCTION—ACCEPTANCE.
Where defendants agreed to guaranty the payment of any balance due on the contract of another at a certain time, based on the dissolution of an attachment, it is an absolute guaranty, requiring neither notice of acceptance nor of default before action against the guarantor.

3. SAME — MORTGAGE TO SECURE — FORECLOSURE.
Where a guaranty is secured by an assignment of a mortgage, and an action is brought against the guarantor, the mortgage may be foreclosed, and attorney's fees included in the judgment, and the guaranty paid out of the proceeds of the foreclosure.

4. SAME—SATISFACTION OF MORTGAGE.
Where a mortgage had been assigned as collateral to a guaranty, the satisfaction of the mortgage before the guaranty is due, on consideration of a deed by the mortgagor to the wife of the mortgagee, does not release the mortgage lien.

5. SAME—INTEREST.
Where the whole amount secured by guaranty and interest is collected, the guarantee is not entitled to interest as a bonus on the mortgage assigned as collateral thereto from the date of assignment to foreclosure.

Appeal from Common Pleas Circuit Court of Bamberg County; Dantzler, Judge.

Action by Theodore Ruberg against Simon Brown and Pena Brown. Judgment for plaintiff, and defendants appeal. Affirmed.

The following indorsement appears on a contract between Elizabeth Ruberg and the Brown Mercantile & Banking Company: "For value received I hereby assign the within agreement and the money secured thereby and all my right, title and interest in the same to Theodore Ruberg. Witness my hand and seal this 8 day of July, 1902. Elizabeth H. Ruberg. [L. S.]"

The following is the indorsement on the bond secured by the Zorn mortgage: "For and in consideration of a certain written agreement this day entered into by and between myself and Theodore, Elizabeth and Lillian Ruberg, I hereby transfer, set over and assign all my right, title and interest in and to the within mortgage and bond secured thereby in order to secure the payment of two certain notes as set forth in said agreement, said assignment being solely for the purpose of securing the same, and with the distinct understanding that the said bond and mortgage shall not be assigned or hypothecated, except as accompanied by said notes, and when said notes are paid the said bond and mortgage shall be returned to me, and all interest therein of Theodore Ruberg, Elizabeth Ruberg and Lillian Ruberg, shall cease and determine. Theo. Ruberg, Mrs. Elizabeth Ruberg, Lilly Ruberg, S. Brown, P. Brown. Witnesses: Herman Brown, A. Kirsch, Mrs. Elizabeth Ruberg."

Izlar Bros., for appellants. Bates & Simms and Jno. R. Bellinger, for respondent.

POPE, C. J. The plaintiff seeks a recovery of a judgment for $776.57, with interest on $100 from the 24th of March, 1891, and on the balance from December 1, 1898, and costs, and against both defendants, that they may be foreclosed of all interests in the Zorn premises; that said premises may be sold, and the proceeds of sale applied to the payment of the expenses of said sale, the costs of this action, and the plaintiff's debt, together with interest on $1,800, the mortgage debt of J. B. Zorn, at 8 per cent. per annum, payable annually, as provided by the agreement of the 28th day of April, 1898, and such other relief, etc. To understand this contention of plaintiff, the following statement is necessary: On the 22d of March, 1898, one Simon Brown, of Bamberg county, in this state, made and delivered his two promissory notes, each for $1,250, indorsed by H. Brown and others, one due and payable on December 1, 1898, and the other due and payable on March 22, 1899, unto Theodore Ruberg. Theodore Ruberg indorsed both notes payable to his wife, Mrs. Elizabeth Ruberg. Two days after the date of said notes, the Brown Mercantile Company discounted the note for $1,250 under the following agreement: "The Brown Mercantile and Banking Co. agrees to discount for Mrs. Elizabeth Ruberg a note she holds on Simon Brown, indorsed by H. Brown, I. Brown and P. Brown, for $1,250, charging her $100 discount, the net amount of $1,150 to be placed to her credit on the books of the Brown Mercantile and Banking Co., $300 of said amount to be paid in cash, balance to remain to her credit and be traded out as she sees fit, at

cash prices, any amount remaining to her credit at maturity of note discounted, which is December 1st, 1898, we agree to pay her in cash." The sum of $200 in cash, and the further sum of $173.43 in goods, wares, and merchandise, were paid to Mrs. Elizabeth Ruberg by the Brown Mercantile & Banking Company, leaving still due the balance of $776.57 on the 1st of December, 1898. Application to the Brown Mercantile & Banking Company about the 1st day of December, 1898, was made by Mrs. Elizabeth Ruberg, and the reply of Mr. Mike Brown, who was president of the Brown Mercantile & Banking Company, was to the effect that his company was not in funds to pay said balance. Then application was made upon Mr. Simon Brown for the balance still due, to wit, the sum of $776.57, on the 1st of December, 1898, which he did not pay. But it is unnecessary to state that on the 28th day of April, 1898, Simon Brown was induced to change his attitude towards the balance due on the note discounted by Mrs. Elizabeth Ruberg at the Brown Mercantile & Banking Company. It has been previously stated that Simon Brown made and delivered a note for $1,250, dated March 22, 1898, and to become due March 22, 1899. An attachment was levied upon certain property of Simon Brown in the city of Chicago, in the state of Illinois, by a member of the Ruberg family, in the month of April, 1898, because of this $1,250 note. Then it was that Mr. Simon Brown wished a release of his Chicago property from the attachment. He was told by the Rubergs: "Make us safe on this note, and also the balance due by the Brown Mercantile & Banking Company. All must be in writing." So, accordingly, this agreement was signed: "It is hereby agreed and understood by and between the parties hereto, to wit: Pena Brown, Simon Brown, Mike Brown and F. S. Mordaunt, and Theodore Ruberg, Elizabeth Ruberg and Lillian Ruberg, that Simon Brown shall deposit on behalf of himself and Pena Brown, Mike Brown and F. S. Mordaunt, with Theodore Ruberg, acting on behalf of himself, Elizabeth Ruberg, his wife, and Lillian Ruberg, his daughter, a certain mortgage for $1,800, covering the place known and described as the J. B. Zorn place, on George's Creek, County of Bamberg, S. C. It being distinctly understood by and between Simon Brown and said Theodore, Elizabeth and Lillian Ruberg, that the mortgage is placed in trust with Theodore Ruberg for the purpose of securing two certain notes given by said Simon Brown to Theodore Ruberg for $1,250 each. One of the said notes having been negotiated to the Brown Mercantile and Banking Co.; it is the intention of the parties hereunto to secure the faithful performance of the terms of the said obligation and to save Ruberg harmless from loss on the said note and to guarantee the payment of any balance due Ruberg from the Brown Mercantile and Banking Co. when due. Also to secure the payment of the other said note from Simon Brown to Theodore Ruberg in the sum of $1,250, as herein mentioned. * * *" The attachment proceedings in Chicago were withdrawn. The bond and mortgage referred to were duly assigned to Theodore Ruberg, which he still holds. As before remarked, Simon Brown did not pay the balance due Ruberg by the Brown Mercantile & Banking Company on December 1, 1898. Simon Brown, notwithstanding his transfer of the bond and mortgage to Ruberg, has attempted to release said bond and mortgage, and has, through his wife, taken possession of the lands mortgaged. The complaint sets forth all these facts. The answer seeks to avoid them. By agreement, a reference to the master was made to take the testimony and report on all the issues of law and fact. The master's report was in favor of the plaintiff, except that he refused to hold Simon Brown liable to pay Ruberg any interest on the bond assigned to him by Brown on April 28, 1898. The case came on to be heard by his honor Judge Dantzler, who by his decree sustained the master's report. Thereupon Simon Brown and Mrs. P. Brown, his wife, have appealed on the following grounds:

"(1) Because his honor erred in his statement of the cause of action herein in saying that 'this is an action to foreclose a mortgage given by one J. B. Zorn, Jr., to the defendant Simon Brown, and by him assigned to the plaintiff as collateral security to a guaranty by the said defendant, as set out in the complaint;' whereas he should have stated that the action was one purely and simply upon the guaranty of the defendant Simon Brown of the balance due by the Brown Mercantile & Banking Company to Elizabeth Ruberg, the wife of the plaintiff, on the 1st of December, 1898, by the Brown Mercantile & Banking Company, and which debt so due Elizabeth Ruberg by the Brown Mercantile & Banking Company the said Simon Brown, defendant, afterwards, to wit, on the 28th day of April, 1898, guarantied." We agree with the circuit judge that this is an action to foreclose the mortgage assigned by Simon Brown to Theodore Ruberg on the 28th day of April, 1898. While it is true that the balance due on the claim of Ruberg against the Brown Mercantile & Banking Company on December 1, 1898, of the sum of $776.57, and interest thereon at 7 per cent. from that date, is the indebtedness which Simon Brown agreed to guaranty, and by the assignment of the bonded mortgage intended to secure, yet the sum is the basis of the plaintiff's right to have the mortgage foreclosed for its payment. This exception is overruled.

"(2) Because his honor erred in holding and treating the action set forth in the complaint as an action to foreclose a mortgage of real estate, also as an action on the guaranty of Simon Brown, defendant, and in rendering judgment against the defendant Si-

mon Brown on the alleged guaranty, and against the defendants for foreclosure and sale of premises described in the Zorn bond and mortgage." It is very evident that the same reasoning used to upset the first ground of appeal is directly applicable to this ground of appeal. It is overruled.

"(3) Because his honor erred in holding that the alleged guaranty of Simon Brown, defendant, entered into on the 28th day of April, 1898, was an absolute, unconditional guaranty by him of the payment by the Brown Mercantile & Banking Company of such sum as might be due to Ruberg by it on December 1, 1898, whereas he should have held that said guaranty was only a contingent guaranty, and that the liability of Simon Brown, defendant, thereon, was not primary, but only secondary, and, being contingent, the said guarantor was under no obligation or duty to see that the sum guarantied was paid until the contingent guaranty had been made certain by notice stating the sum due by the Brown Mercantile & Banking Company on 1st December, 1898, and, being secondary, necessarily involved the conditions of due diligence of the principal debtor, and notice to the guarantor of the default of the Brown Mercantile & Banking Company, and, there being no proof as to these facts, there was then no fixed liability of the defendant Simon Brown on his said guaranty." We cannot take the view suggested by the appellants in their third ground of appeal, because we think the circuit judge made no mistake when he held that Simon Brown made an absolute and unconditional guaranty of the payment of the Brown Mercantile & Banking Company to Theodore Ruberg of such sum as might be due on December 1, 1898. The definition of "guaranty" is "a promise to answer for the payment of some debt or the performance of sume duty in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance." 14 A. & E. Ency. of Law, p. 1128. This definition was accepted by our court in the case of Carroll Savings Bank v. Strother, 22 S. C. 555. It is admitted there must be some consideration for the agreement by the guarantor, and, when Theodore Ruberg released the attachment he had taken on Simon Brown's property in the city of Chicago, that was the consideration wooing Simon Brown to enter into his contract of guaranty. Besides, his contract was under seal, which imports a consideration. Its very terms—for they are in writing—were an absolute guaranty and an unconditional promise of payment on default of the principal. In such case, to bind the guarantor, it is not necessary that there should be notice of acceptance of the guaranty, or notice of the default of the principal, or that any steps should be taken to enforce the contract guaranty against the principal. "The guarantee may proceed at once against the guarantor on default of the principal. The guarantor's liability is dependent upon the same rules of law by which the liability of one who has broken his contract is determined. * * * As already shown, it is an absolute promise to pay the debt at maturity, if not paid by the principal debtor, and the guarantee may bring an action on default of payment at the date named against the guarantor." See pages 1141, 1142, 14 A. & E. Ency. of Law. Of course, the basic principle of guaranty is that the guarantor agrees to pay if his principal does not pay. In this instance demand was made certainly on the 2d of December, 1898, upon the president of the Brown Mercantile & Banking Company, which was refused, and immediately thereafter a demand was made upon Simon Brown. The case of the guarantor and surety are quite distinct as to demands for payment and notice of nonpayment. This exception is overruled.

"(4) Because his honor erred in overruling the exceptions to the master's report, and in confirming the said report; said exceptions being as follows:

" 'First. (a) Because the said master erred in finding that, under the written agreement entered into between the plaintiff and the defendant, the said Simon Brown must save Ruberg harmless from loss on the said note by paying to him the balance of $776.57 due on the agreement made with the Brown Mercantile & Banking Company, and guarantied by said defendant, together with interest at seven per cent. on $100 thereof from the 24th day of March, 1898, and on the balance from the 1st day of December, 1898; the said finding being contrary to the law and the testimony.

" 'Second. (b) Because the said master erred in finding as follows: "That a certain bond and mortgage of J. B. Zorn to Simon Brown for $1,800 were deposited as security for any balance that might remain unpaid on the said notes, or on the agreement of the Brown Mercantile & Banking Company guarantied by said Simon Brown, as set out in the complaint, and that the premises described in said mortgage should be sold to satisfy the balance due to said Theodore Ruberg, as reported herein, together with ten per cent. thereof as attorney's fees, as provided by said bond and mortgage, and the costs of this action." Said finding being unwarranted by the pleadings, contrary to the evidence in the cause and the law applicable to the case.

" 'Third. (c) Because the master erred in his findings of both law and fact, and in adjudging that the defendant was indebted to the plaintiff in any sum whatsoever, on any agreement or guaranty—no agreement or guaranty having been entered into between the plaintiff and the defendant alone—for any balance due the plaintiff on account of the Brown Mercantile & Banking Company.

" 'Fourth. (d) Because the master erred in finding that the premises described in the bond and mortgage of J. B. Zorn should be

sold to pay the amount of principal and interest due and owing to the plaintiff by the defendant, as found by the said master's report, together with the attorney's fees of ten per cent., as in and by the said bond and mortgage mentioned.

"'Fifth. (e) Because the master erred in finding as follows, "That the facts stated in the complaint are true," whereas he should have found from all the evidence in the cause just the contrary, and in not stating his findings of law and fact separately in his report, and not jumbling them together therein as shown by said report.

"'Sixth. (f) Because the master erred in finding, without the testimony to support the same, that the Ruberg mentioned in the agreement entered into on the 28th day of April, 1898, was the plaintiff in the action, Theodore Ruberg, and not his wife, Elizabeth Ruberg, to whom the said promissory note had been duly transferred, and who had discounted the same with the Brown Mercantile & Banking Company, and who was to be saved harmless from loss on said note—the said Theodore Ruberg then having no interest whatsoever in the said promissory note, and the proof showing none—and consequently the said guaranty as to the plaintiff was without consideration and was null and void.

"'Seventh. (g) Because the master erred in finding the defendant Simon Brown should pay to the plaintiff, Theodore Ruberg, $776.57, on the agreement made with the Brown Mercantile & Banking Company, and guaranteed by him, together with interest at seven per cent. on $100 thereof from the 24th day of March, 1898, and on the balance from the 1st day of December, 1898; the said finding being without testimony to support the same, and contrary to the evidence and the law.'"

(a) We do not find that the master made any error in his finding of fact as herein indicated.

(b) Nor was there error in the finding of fact as here complained of.

(c) We find the facts the same as those found by the master and circuit judge.

(d) We find that the master did not err that the premises known as the Zorn mortgaged premises should be sold to pay the amount of the principal and interest due the plaintiff by the defendant. Simon Brown pledged these mortgaged premises to the payment herein indicated, and it would be unjust to allow him or his wife to avoid their just liability to the plaintiff by having a deed made to them of such mortgaged premises, and a cancellation of the mortgage. This is a proceeding in equity, and, in equity and good conscience, Simon Brown and his wife should be required to have the mortgaged premises sold, and apply the proceeds to the extinguishment of this debt.

(e) We do not find that the master erred as herein complained of.

(f) We do not find an error in the finding of fact as here complained of.

(g) Nor do we find that the master erred in requiring Simon Brown to pay to the plaintiff $776.57, with interest thereon. This was the debt he guarantied, and he should be required to make the payment, or, in default thereof, that the land be sold, and the proceeds of sale be applied to the payment thereof. This exception is overruled, and also its subdivisions.

"(5) Because his honor erred in holding that: 'It is clear that the Brown Mercantile & Banking Company owed Ruberg on the date mentioned the sum found by the master, and which has never been paid. Brown obligated himself to pay this sum absolutely if the principal debtor did not. He knew that he would have to pay his discounted note, when due, in the hands of any indorsee who might hold it. He knew, too, that he was liable on his guaranty to the plaintiff, and it was his misfortune that he did not protect himself against loss by reason of that guaranty. He did not do so, and cannot now complain.' Whereas, from the evidence and circumstances, he should have found and held and concluded just the reverse. That it was and is not clear from the testimony that the Brown Mercantile & Banking Company owed Ruberg on the 1st of December, 1898, the sum found by the master; that the same never has been paid; that Simon Brown, defendant, obligated himself to pay this sum absolutely if the Brown Mercantile & Banking Company, the principal debtor, did not; that he knew he would have to pay his discounted note, when due, in the hands of any indorsee who might hold it; that he knew, too, that he was liable on his guaranty to the plaintiff; and that it was his misfortune that he did not protect himself against loss by reason of that guaranty, as the debt alleged to have been guarantied was not definite in amount. At that time there had been no default of the Brown Mercantile & Banking Company, the principal debtor. No notice of its default when the debt became due had been given to said Simon Brown, defendant. No demand was ever made on him for this balance, if any, and the Brown Mercantile & Banking Company had not been first exhausted. Under these circumstances, there was no liability on the part of the defendant Simon Brown, and no judgment could have been rendered against him by reason of this alleged guaranty." We find and hold that the circuit judge made no error in this decree, as here attempted to be pointed out by the appellant. This exception is overruled.

"(6) Because his honor erred in holding that 'the mortgaged premises were conveyed to the defendant Pena Brown upon no other consideration than the satisfaction of said bond and mortgage,' and that 'that satisfaction as against the assignee is void, and that the land in the possession of Pena Brown is

subject still to the lien of the mortgage, whose assignment carried to the assignee every right under it held by the mortgagee,' whereas he should have found and held that the title deed, if any, of J. B. Zorn, Jr., to Pena Brown of the mortgaged premises not being in evidence, it was impossible to know the true and real consideration therein mentioned; that against the assignee thereof said satisfaction was not void; that the lands described in the mortgage and in possession of Pena Brown were no longer subject to the lien of said mortgage, and could not in this action be sold to satisfy any judgment rendered against the said Simon Brown, defendant, on any guaranty made by him as to the debt due by the Brown Mercantile & Banking Company to Mrs. Elizabeth Ruberg on the 1st December, 1898, and then carried on its books, by reason of the discounting of the said promissory note transferred to her by her husband, and by her transferred to and negotiated by said corporation." We find his honor made no mistake as here pointed out by the appellant. A careful scrutiny has convinced us that his finding of facts and conclusion of law, as here referred to, are entirely correct.

"(7) Because his honor erred in ordering and adjudging 'that the plaintiff have judgment against the defendant Simon Brown for $988.35, and ten per cent. thereof, or $98.83, as attorney's fee, amounting in the aggregate to $1,087.18, and costs'; the guarantor, even if the guaranty was valid, not having had notice of the default of the principal, said guaranty being only contingent, and his liability only secondary, and the principal debtor never having been called upon or exhausted, and the parties all being of lawful age to contract as to attorney's fee, even if said defendant was liable therefor." We find his honor did not err as here attempted to be pointed out. The guarantor did have notice of the default of the principal, and the principal debtor was called upon for payment in the first instance, and averred his inability to do so. This exception is overruled.

"(8) Because his honor erred in rendering judgment for foreclosure and sale of the premises described in the mortgage assigned in trust by Simon Brown to Theodore Ruberg as collateral to his alleged guaranty against the defendants in this action, and under the existing facts and circumstances, and the law was necessarily applicable in such cases." We find no error in the judgment of the circuit judge as pointed out in this exception. This exception is therefore overruled.

"(9) Because his honor erred in ordering and adjudging that the proceeds arising from a sale of the mortgaged premises by the master should be applied by him to the payment of taxes, costs, attorney's fee, and the amount due the plaintiff, and to hold the surplus subject to the further order of the court; such application of the proceeds being, even if the said guaranty be valid, and the foreclosure and sale of the lands described in the mortgage assigned as aforesaid be justifiable, unwarranted, contrary to law, and therefore erroneous." Nor did his honor commit any error in the administrative part of his decree as here complained of. This exception is therefore overruled.

"(10) Because his honor erred in holding that the guaranty of Simon Brown was and is an absolute, unconditional guaranty, whereas he should have held that the said guaranty only warranted the solvency of the Brown Mercantile & Banking Company, and that Simon Brown's liability to pay the debt of the said banking company to the plaintiff did not arise until after due diligence shown on the part of the plaintiff to collect the same from the principal debtor." We agree with the circuit judge that the guaranty of Simon Brown was and is an absolute, unconditional guaranty, and that Simon Brown's liability to pay the debt to the plaintiff has arisen, and that due diligence was shown on the part of the plaintiff to collect the same from the principal debtor.

"(11) That his honor erred in failing to draw the distinction between the legal liability of a guarantor and a surety, and, after holding that Simon Brown was and is a guarantor, applied the law of suretyship to his obligation." His honor did not fail to draw the distinction between the legal liability of the guarantor and a surety. The distinction is palpable, and existed in this case. This exception is overruled.

"(12) That his honor erred in holding paper signed by Simon Brown 'absolute, unconditional guaranty,' whereas he should have held that the writing was only a proposal to guaranty, and was void for want of notice of acceptance, as the amount of the debt was at that time unascertained and unascertainable, and there is no evidence whatever of notice of acceptance." His honor did not err in holding the paper of Simon Brown an absolute, unconditional guaranty. It was not a proposal to guaranty, and was not void for want of notice of acceptance, as claimed by the appellant. This exception is overruled.

"(13) That his honor erred in decreeing judgment against the defendant Simon Brown for the amount due the plaintiff by the Brown Mercantile & Banking Company, or for any amount upon the guaranty, whereas he should have held and decreed that the said defendant was discharged and relieved from all liability under and by reason of said guaranty by the lack of due diligence on the part of the plaintiff to collect the debt out of the principal debtor; the great preponderance of the evidence showing failure to exercise due diligence on the part of the plaintiff to collect the debt from the principal." His honor made no mistake in decreeing judgment against the defendant Simon Brown, as herein complained of. He could not have held that the said defendant

was discharged and relieved from all liability under and by reason of said guaranty for the plaintiff to use all proper diligence to collect his debt out of the principal debtor. He made the demands in time, and gave Simon Brown notice thereof in time; but the Brown Mercantile & Banking Company failed and went out of business on the 6th day of December, 1898, before Simon Brown's attorney, Mr. Izlar, sought to get copies of the papers to sue said company. This exception is overruled.

"(14) That his honor erred in holding and decreeing that the assignment of the bond and mortgage executed by Zorn to Simon Brown was intended to secure the payment of the debt due the plaintiff by the Brown Mercantile & Banking Company, whereas he should have held and decreed that the assignment of the said bond and mortgage was intended solely for the purpose of securing the payment of two promissory notes made by Simon Brown, and that upon the payment of these notes the object of the assignment had been met, and the bond and mortgage should have been returned to Simon Brown in accordance with the plain terms of assignment indorsed upon the said bond and mortgage." His honor did not err in decreeing that the assignment of the bond and mortgage executed by Zorn to Simon Brown was intended to secure the payment of the debt due the plaintiff by the Brown Mercantile & Banking Company. This exception is overruled.

"(15) That his honor erred in construing the assignment and the guaranty agreement as constituting one contract, whereas he should have held that these writings constitute separate and distinct contracts, and should have construed each contract as speaking for itself, and relating to two separate and distinct transactions, having no connection with each other." The circuit judge did not err in construing the assignment and guaranty agreement as constituting one contract. The language of both instruments showed the purpose of the parties to be as held by the circuit judge. This exception is overruled.

"(16) That his honor erred in decreeing foreclosure of the Zorn mortgage, and sale of the lands covered thereby, and ordering proceeds arising from said sale to be applied to the payment of a debt for which the said mortgage was a lien upon the lands, whereas he should have held that the mortgage could only be foreclosed to pay the debt evidenced by the bond mentioned in the mortgage, and that the complaint did not seek to establish that debt, or to ascertain the amount thereof, and therefore have dismissed the complaint." His honor did not err in decreeing a foreclosure of the Zorn mortgage, and a sale of the land covered thereby, and ordering the proceeds to be applied to the payment of the debt due the plaintiff by reason of the failure of the Brown Mercantile & Banking Company to pay, as provided, on the 1st day of December, 1898. This exception is overruled.

"(17) That his honor erred in decreeing for the attorney's fee in this action, when it is expressly stipulated that the said fee should be collected as a part of the mortgage debt in case the same should have to be collected by legal process or by an attorney, whereas in this action there is no attempt made to collect the mortgage debt, or effort made to ascertain and establish the amount of the same." His honor did not err as herein attempted to be pointed out. It is expressly stipulated that, if the mortgage had to be foreclosed, the attorney's fee should be as therein provided. This exception is overruled.

Thus we have disposed of the defendant's grounds of appeal. It remains to dispose of the appeal suggested by the plaintiff: "Plaintiff also appeals upon the ground that the circuit judge erred in not allowing plaintiff the interest on the Zorn bond and mortgage as a bonus, to be held by him independently of the debt due by the Brown Mercantile & Banking Company, and in not decreeing foreclosure for same, as well as for the sums found due by the master." We do not think that any liability was created by Brown under his agreement of April 28, 1898, to pay Ruberg the interest accruing on the Zorn bond. There would be no ground, in justice or equity, to require this payment to Theodore Ruberg. Both the master and circuit judge took this view of the matter, and we refuse to disturb their joint conclusion. This ground of appeal is therefore overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed, and the action is returned to the circuit court to enforce its decree in the premises.

GARY, A. J., did not sit in this case, because of illness.

(71 S. C. 322)

LOVE v. TURNER.

(Supreme Court of South Carolina. April 6, 1905.)

1. TRESPASS TO LAND—VERDICT.
In an action for trespass on real estate, where the verdict was for the possession of the land and $1 damages, the verdict as to possession was surplusage.

2. EJECTMENT—COMPLAINT.
Where a complaint alleges facts showing dominion of defendant over the land in question, it makes out a cause of action for possession of the land.

3. SAME—TITLE TO MAINTAIN.
Plaintiff in an action to possess land must show title against the world or from a common source, and, where he claims title from the state, defendant may show an older grant.

4. SAME—CONFLICTING GRANTS — PRESUMPTION.
An instruction that, if the state had granted land, and it appeared that it had issued an older grant, the presumption would be that it had reacquired title, is not cured by an instruc-

tion that, if it had no title when it issued the junior grant, plaintiff must show title by adverse possession.

5. TRIAL—INSTRUCTIONS—HARMLESS ERROR.
Where the judges properly charged that 20 years' possession raised a presumption of grant, a new trial would not be granted for inadvertence in subsequently stating that 10 years' possession raises such presumption, where the attention of the court was not called to the mistake.

6. EJECTMENT—PRESUMPTION OF POSSESSION.
In order for defendant to recover where plaintiff shows legal title to land, defendant must rebut the presumption of possession for 10 years by proof of adverse possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 653, 661–668.]

7. SAME—ADVERSE POSSESSION.
Where a party has held adverse possession of land for 10 years, his purchaser may set up the same against the legal title without himself having held for 10 years.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 218.]

8. SAME—NOTICE.
Notorious adverse possession sufficiently establishes actual notice to holder of legal title.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 131.]

9. FOREIGN WILL—COLOR OF TITLE.
Where a will of a foreign state was executed before two witnesses only, though insufficient to pass title to land, it is available as color of title.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 458.]

10. ESTOPPEL.
Defendant is estopped to insist that plaintiff, having set out his claim of title in the complaint, cannot rely on adverse possession, where he requests the judge to charge as to what was necessary to give plaintiff title by adverse possession.

Appeal from Common Pleas Circuit Court of Cherokee County; Gage, Judge.

Action by W. P. Love against M. J. Turner. Judgment for plaintiff, and defendant appeals. Reversed.

Hall & Willis, for appellant. Stanyarne Wilson and J. O. Jeffries, for respondent.

WOODS, J. The contest in this case is over a tract of land of 100 acres situated in Cherokee county, and known as the "Holloway Tract." The exact nature of the action is in dispute. Plaintiff claims it is for the recovery of possession of real property. This is denied by defendant, who contends that the only cause of action stated in the complaint is for trespass upon the land. The circuit judge held it was an action for the recovery of real property, and as such the cause was tried.

Plaintiff claimed under the following chain of title set out in his complaint: (1) Grant to G. B. Palmer, January 18, 1858, the survey dated December 15, 1857, being attached. (2) Warranty deeds from all the heirs of G. B. Palmer, except Mrs. Love, conveying to plaintiff all their rights and interests in the Palmer Gold Mine tract of land, of which the Holloway tract was a part. (3) Will of Mrs. Susan L. Love, executed in the presence of two witnesses in North Carolina, purporting to devise to her husband, the plaintiff, all of her property. Plaintiff also introduced tax receipts showing that one of the Palmers paid taxes on the gold mine tract in 1842, 1846, 1850, 1857, 1861, 1862, 1863, 1870, 1871, and 1873, and that plaintiff himself paid taxes on the same tract from 1872 to 1898, inclusive, with the exception of 1873, 1878, and 1891. The land was returned as 484 acres in 1874, from 1880 to 1885, and from 1893 to 1898; all the other years as 576 acres, the number named in the Palmer grant. Plaintiff testified that this difference in acreage was without his knowledge or consent.

Defendant, in her answer, denies plaintiff's title, setting up title in herself, and also pleads the statute of limitations, adverse possession, estoppel, and the pendency of another suit on the same cause of action. Defendant's documentary and record proof was as follows: (1) Sheriff's sale book, showing the sale of the land in dispute by the sheriff under tax execution, May, 1868. (2) Sheriff's sale book, showing the sale of the same land in May, 1871, under the judgment in the case of Elizabeth Littlejohn v. A. P. Turner, the land being bid in by A. L. Casey and A. W. Cummings, who assigned their bids to A. C. Merrick. (3) Deed of the Holloway tract from the sheriff to A. C. Merrick, dated October 11, 1879. (4) Deed from A. C. Merrick to Geo. S. Turner, conveying the whole tract in dispute, June 17, 1886. (5) Deed from Geo. S. Turner to Duncan & Sanders, conveying one-half interest in the land, November 24, 1888. (6) Deed from Duncan & Sanders to R. B. Powell, conveying the same one-half interest, September 3, 1894, Powell giving a mortgage to secure the purchase money. (7) Sale of this one-half interest by the mortgagees, Duncan & Sanders, under power in the mortgage, and conveyance of Powell by the mortgagees, as his attorneys in fact, to themselves, April, 1896. (8) Deed of their one-half interest from Duncan & Sanders to W. N. Turner, defendant's husband, March 15, 1899. (9) Partition suit between W. N. Turner and the heirs of Geo. S. Turner, under the decree in which the entire Holloway tract was sold by the clerk of court, and bid in by Mrs. M. J. Turner, she receiving a deed therefor from J. Ebb Jefferies, clerk of court, December 5, 1899. Defendant offered in evidence a grant, with survey attached, to Mose Waters, dated August 6, 1817, which purported to convey the Holloway tract. She did not attempt to connect herself with this grant, however, but introduced it merely to show that the state had already parted with its title at the time of the Palmer grant in 1858.

Evidence was offered tending to prove that G. B. Palmer continued in possession under his grant until 1865, when he died intestate, and his two sons and the plaintiff administered upon his estate. His son, T. W. Palm-

er, who seems to have represented the estate as to this land, having failed for several years to pay the taxes, it was sold for taxes in 1868, and bid in by A. P. Turner, but it appears that he failed to comply with his bid. There was also evidence to the effect that plaintiff was in possession of the land prior to 1886, but that George S. Turner entered under color of title in that year; and defendant offered much testimony for the purpose of showing that George S. Turner and his heirs, under whom she claimed, had held it adversely for the statutory period. The jury found for the plaintiff the possession of the land in dispute, and $1 damages, and defendant made a motion for a new trial, which was refused. An order was then made by the court adjudging that plaintiff recover possession of the land, and enjoining the defendant from trespassing upon or interfering with it. From this judgment the defendant appealed. The effort will be made to discuss the questions involved in the appeal without special mention of each of the 28 exceptions, covering 12 pages of the record.

The defendant first insists the action was for trespass on land, and not for the recovery of its possession, and therefore the circuit judge erred in charging that the jury might find "for the plaintiff the land in dispute and so many dollars." Even if defendant's view of the nature of the action were correct, he would not be entitled to a new trial for error in the form of the verdict; the finding for the recovery of the land would be rejected as surplusage, not being responsive to the pleadings. 22 Ency. P. & P. 977; Massey v. Duren, 7 S. C. 310. The verdict for damages would be decisive of the title. Sims v. Davis, 70 S. C. 362, 49 S. E. 872.

But the defendant introduced a grant from the state to a third party, not for the purpose of supporting her own title—for she did not pretend to connect herself with it—but for the sole purpose of showing that there was a title outstanding older and better than the title under which the plaintiff claimed. In an action to recover possession of real estate or of trespass to try title, the plaintiff must establish his title against the world, or show that he has title from a common source, and the defendant, therefore, may defeat the plaintiff's claim by showing title in a third party; but in an action of trespass quare clausum fregit, the plaintiff has to establish possession only, and the burden is on the defendant to show title to himself, or that he entered upon the land under a license from the true owner. That is, in the latter action, if he relies upon the title of a third party, it is necessary for him not only to prove such title, but that he rightfully entered under it. Connor v. Johnson, 59 S. C. 131, 37 S. E. 240.

To determine, therefore, whether the defendant could avail himself of the older grant to a stranger to defeat the action, it is necessary to decide whether, under the pleadings, the action is for the recovery of land or in the nature of trespass quare clausum fregit. It is essential to an action of the former class that the plaintiff must allege and prove a trespass continued down to the time the action is brought. Anderson v. Lynch, 37 S. C. 575, 16 S. E. 773. It is not necessary, however, to allege and prove actual occupancy by the defendant; any continued subjection of the property to the will or dominion of the defendant is sufficient. "Acts by which a claim to the possession hostile to the true owner is asserted and maintained, and by which he is excluded from the enjoyment of the property, fairly subject the party committing them to the action." 7 Ency. P. & P. 302, note. The complaint here comes within the rule as stated in these authorities, for, after setting out the source of her own title, the plaintiff alleges: "That defendant claims to be in possession of said property, and denies plaintiff's title thereto and right to possession thereof." Following the narrative of a number of separate acts of trespass is the further allegation: "That the said defendant continues to assert her claim of title against this plaintiff to said premises, to deny plaintiff's right therein, and asserts her determination to prevent the use and enjoyment of said premises by plaintiff, or persons holding under plaintiff, and to continue to use and occupy it for her own benefit; rendering it necessary for plaintiff to apply to this court for relief and for the protection of his title." The circuit court, therefore, properly held the action to be for the recovery of possession of the land described in the complaint.

From this conclusion it follows the plaintiff was obliged to prove title against the world, or from a source common to herself and the defendant, and that defendant could defeat plaintiff's claim of title by showing title in a stranger. For this purpose, the defendant introduced a grant to Waters, dated August 6, 1817, to show that the state had no title when the Palmer grant, under which plaintiff claimed, was issued in 1858. As to the issue thus made, the circuit judge charged, at defendant's request: "If the jury believe from the testimony that the state had once parted with the title to the land in dispute before the Palmer grant was executed, it is necessary for plaintiff to show that the state had regained title to this land by escheat or otherwise at the time the Palmer grant was executed;" and then added: "If the plaintiff produces in court what purports to be a grant in question, the presumption would arise—I might call it the presumption of law—that the state had the title, and he who presents an older grant must show that the older grant did embrace the land in question, and connect himself with the grant." There is no presumption from the mere fact of the state issuing a second grant to land that it had reacquired

title to land already granted away. Where the same land is covered by two separate grants from the state, the second grant is a nullity. Steedman v. Hilliard, 3 Rich. Law, 101. It is said in Nichols v. Hubbard, 5 Rich. Law, 267, 272: "Most persons do understand, and all should, that a grant of land is the act of the grantee, rather than of the state; that it is obtained by any one who will comply with certain requisites and pay certain fees; and that, where the land can be shown to have been previously granted, it is a grant merely void, carrying nothing, and, as color of title or evidence of the extent of a possession, is no more effective than would be a deed or mere survey accompanied by claim." State v. Evans, 33 S. C. 184, 11 S. E. 697. It is true, the court did charge, at defendant's request, if the state had no title to give when it made the Palmer grant, the plaintiff would have to establish title by adverse possession, and that the plaintiff, in order to recover, must establish a good title against the world; but, clearly, this did not remedy the error which had already been committed in giving the instruction that there was a presumption that the state had reacquired title after the first grant before it made the second grant, under which plaintiff claimed. The third, fourth, and eighth exceptions are therefore sustained.

By inadvertence, no doubt, the circuit judge seemed to indicate that the possession under claim of title for 10 years would be sufficient to presume a grant. The correction to 20 years would have been made if his attention had been called to it, as he had just before said that it would take 20 years for such a presumption to ripen; and a new trial would not be granted for an error which could have been so easily corrected by appellant.

The defendant insists there was error in refusing to charge: "If neither the plaintiff nor any one under whom he claims title to the land in dispute has been seised or possessed of the land in question within 10 years before the alleged acts of trespass were committed, then the plaintiff cannot recover." If plaintiff had the legal title, he was presumed to be possessed of the land within the 10 years, and it was necessary to rebut this presumption by proof of continuous adverse possession of some other person for 10 years. Code Civ. Proc. 1902, §§ 99, 101; Garrett v. Weinberg, 48 S. C. 28, 26 S. E. 3. The request embodying the foregoing proposition was therefore properly refused.

The defendant next insists the charge limited the right of the defendant to hold by adverse possession to her own claim of possession from 1899 to 1903, when this action was commenced; whereas, she asserted title had been acquired by George S. Turner and his heirs by their adverse possession for 10 years before the plaintiff acquired their title in 1899; and on this point the appeal must be sustained. It is true, the court had charged defendant's request to the effect that adverse possession for 10 years of any one under whom defendant claimed would give her a good title, but this was of no avail to her when the claim of adverse possession available to defendant was subsequently limited by the court to begin in 1899, the date when her own individual claim of possession began.

As to the point that the court gave a too restricted definition of adverse possession, it is only necessary to say that while it was said in the charge to the jury that such possession must be notorious, and that " 'notoriously' means so public and open that he who runs may see," it was also clearly indicated to the jury that the requirement of notoriety of the adverse holding is to establish general notice to all, which is only equivalent to and takes the place of direct proof of actual notice to the true owner.

The defendant objected to the introduction of the will of Susan L. Love, admitted to probate in North Carolina, November, 1896, by which she devised all her property, which included, as plaintiff alleges, an undivided interest in the land in dispute, to the plaintiff, her husband. The will was attested by only two witnesses, and therefore the plaintiff could not take land in this state under it, but such a paper may be available as color of title. The circuit judge, in response to the objection to its introduction, no doubt to enlighten himself as to its bearing on the case, directed the will to be read. The record does not show that the objection was further pressed, or that the court passed upon its admissibility. The exceptions on this point, therefore, cannot be sustained.

The plaintiff having set forth in detail in his complaint the title under which he claimed, it may be true he would be restricted to the title alleged, and could not recover on adverse possession; but the defendant's exceptions to the charge on this point cannot avail her, because by her eleventh request she herself asked for an instruction as to what was necessary to give plaintiff title by adverse possession.

For the errors above indicated, the judgment of the circuit court is reversed, and the cause remanded for a new trial.

(138 N. C. 476)

WHITAKER et al. v. JENKINS et al.

(Supreme Court of North Carolina. May 23, 1905.)

1. PARTITION — ANSWER — ADVERSE POSSESSION.

Where land was devised to defendant and his two brothers, their mother to be maintained therefrom, and the heirs of the brothers brought partition proceedings against him, his answer that he took actual and sole seisin and possession of the land, and has been in open, notorious, and adverse possession of the same, without any demand or claim of any other claimant to rents, profits, or possession, for more than 20 years; that his brothers, being

unwilling to assume the burden of supporting the mother, abandoned the premises to defendant, who ever since held possession; and the defendants were never seised or in possession —was not demurrable.

2. SAME.

The answer substantially alleged that defendant, while in possession, claimed the land as his own, and it was not bad for failure to make such allegation.

3. WILLS—DEVISE—NATURE OF ESTATE.

A devise of land to testator's wife for life, or until her three sons were of age, at which time all the land was to belong to them, the wife, if then living, "to have her maintenance of the land," did not give to the wife an interest or estate in the land preventing the running of limitations in favor of a son in adverse possession.

4. PLEADING—ANSWER.

The examination of a defendant, taken before trial, pursuant to Code, § 581, is not to be taken as part of his answer for the purposes of passing on a demurrer.

Appeal from Superior Court, Buncombe County; Shaw, Judge.

Partition by J. L. Whitaker and others against Russell Jenkins and others. From a judgment overruling a demurrer to the answer, plaintiffs appeal. No error.

This is a proceeding for partition. Josiah Jenkins, who owned the land, devised it as follows: "I will and devise to my wife Martha all the land which I now own with the full benefit of all the buildings and farm as her own right and property during her life or until her three sons, Thomas Erwin, Joshua and Russell shall come to the full age of 21 years, at which time all the land to belong to them, but if my wife should live longer than the time of their coming to age she is to have her maintenance of the land." The three sons arrived at full age, and their mother, who survived them, died in May, 1900. Thomas and Joshua died intestate, and without children, leaving as their heirs a brother and a sister, who are defendants in this proceeding. By an order in the cause some of the defendants were made plaintiffs. The defendant Russell Jenkins denies the tenancy in common and pleads sole seisin. Plaintiff demurred. The first question raised is as to the sufficiency of the plea. In his answer he avers that after he and his brothers were of age "he took actual and sole seisin and possession of the land, and has been in open, notorious, and adverse possession of the same, without any demand or claim of any other claimant to rents, profits, or possession, for more than 20 years." He alleges that his two brothers, being unwilling to assume the burden of supporting their mother, abandoned the land more than 20 years before this proceeding was commenced, and left him in the sole and exclusive possession thereof. It is further alleged that "he is and has been for more than 20 years in the sole and exclusive use and possession of the land under known and visible lines and boundaries, without demand or claim of the alleged tenants in common or those under whom they claim, or any of them, and adversely to all persons," and that neither the petitioners nor those under whom they claim have been seised or possessed of the premises within 20 years before the commencement of this proceeding. He avers that he has supported and maintained his mother from the time the title vested in the three sons of Josiah Jenkins. The court overruled the demurrer, and the plaintiffs appealed.

F. W. Thomas, for appellants. Tucker & Murphy, for appellees.

WALKER, J. (after stating the facts). In actions to recover land, wherein the plaintiff alleges title and right to the possession, it is generally sufficient for the defendant to make a simple denial, and introduce evidence of his possession for 20 years, or of his possession under color for 7 years, in support of his denial. It is not necessary to plead the statute specially. Farrior v. Houston, 95 N. C. 578; Mfg. Co. v. Brooks, 106 N. C. 107, 11 S. E. 456; Cheatham v. Young, 113 N. C. 161, 18 S. E. 92, 37 Am. St. Rep. 617. Whether this familiar principle applies to an action between tenants in common, we need not stop to inquire, as we are convinced that the right of the plaintiffs to partition is fully denied, and the defendant's sole seisin arising out of his adverse and exclusive possession for 20 years is well pleaded. In Covington v. Stewart, 77 N. C. 148, the court, by Bynum, J., thus describes the kind of possession by one tenant of the common property which will toll the entry of his co-tenant and bar his recovery in ejectment: "The possession of one tenant in common is the possession in law of all; but if one have the sole possession for 20 years without any acknowledgment on his part of title in his co-tenant, and without any demand or claim on the part of such co-tenant to rents, profits, or possession, he being under no disability during the time, the law in such cases raises a presumption that such sole possession is rightful, and will protect it. In such cases, where the tenant who has been out of possession brings ejectment, it has been held that his entry is tolled, and that he cannot recover." The averments of the answer of the defendant are as full and explicit as is the statement of the doctrine in the case just cited. We had occasion to discuss the question as to the nature of the possession of one tenant in common, which the law requires to bar the right of his co-tenant, in Bullin v. Hancock (at this term) 50 S. E. 621. It was suggested that the defendant does not allege that while in the possession of the land he claimed it as his own; nor does he in so many words, but we think it is substantially alleged. He avers that his two brothers abandoned the land to him, and he thereupon took sole and exclusive possession, and that he has held the possession openly, notoriously, and adversely ever since. This would seem to be sufficient to

imply, at least, that he had held the land under a claim of ownership.

But the plaintiffs contend that, if the defendant's alleged sole seisin is properly pleaded, it appears on the face of his answer that it is based solely upon his possession of the land, and that there could be no adverse possession as to the plaintiffs until the death of Josiah Jenkins' widow in 1900, because she acquired a life estate by the terms of the devise. We cannot assent to the correctness of this proposition. The provision is that the land shall belong to her during her life, or until the sons should be of full age, at which time it should belong to them; his wife to have her maintenance out of the land if she survived that event. The intention of the devisor is most clearly expressed. We cannot infer that he intended his wife to have an estate, or even an interest, in the land, when he had expressly said that it should belong to his sons, and that she should only have a maintenance. It would be straining the words of the devise to give them any such meaning. Besides, we think language similar to that used in this will, though not so clear in expressing the intention of the devisor, has been construed by this court as giving no interest or estate in the land to the person for whose support provision is made. There has apparently been some difference in the cases with respect to the nature of the provision for maintenance—whether it constitutes a charge upon the land, so that the latter can be subjected to sale for its payment, or whether it creates merely a charge upon the rents and profits. In this respect we think the cases can be reconciled, but it is not necessary that it should be done at this time, as in neither view would the widow acquire any interest or estate in the land. The sons would have the title and the right of possession, and certainly so long as the duty to maintain her was performed. In Gray v. West, 93 N. C. 442, 53 Am. Rep. 462, the provision was, "Arey Gray is to have her support out of the land," and it was held that it only gave her a right to be supported out of the rents and profits, and that she had no interest in the land, and no lien thereon. To the same effect are Misenheimer v. Sifford, 94 N. C. 592; Wall v. Wall, 126 N. C. 405, 35 S. E. 811; Helms v. Helms, 135 N. C. 164, 47 S. E. 415. See, also, McNeely v. McNeely, 82 N. C. 183. The provision for maintenance did not operate as a condition precedent to the vesting of the estate, nor even as a condition subsequent. It was at most only a charge in favor of the beneficiary (Tilley v. King, 109 N. C. 461, 13 S. E. 936), and could not affect the right of the sons, or any one of them, to the possession. Consequently the possession of the defendant Russell Jenkins had the legal effect of barring the right of his co-tenants, provided it was of the character and continued the length of time required by the law for that purpose. Whether the defendant has in fact held possession of the land adversely and continuously for 20 years is a question to be decided by the jury upon the proof and under proper instructions from the court. We only decide now that the answer, taken as a whole, and without special reference to any particular one of its averments, is sufficient to raise an issue as to the defendant's sole seisin.

The defendant further contended that the examination of the defendant, taken pursuant to section 581 of the Code, and filed in the record, should be taken as part of the answer for the purpose of passing upon the demurrer. We cannot think so. The examination is not intended by the law to be a part of a pleading, but is in its very nature simply evidence, which can be used by the plaintiff in support of his allegations, and which may be rebutted by the defendant. A demurrer is directed against the pleading itself, and admits the truth of its averments for the purpose of testing its sufficiency, and it is perfectly clear to us that it will not lie to evidence taken upon an examination of a defendant under section 581 of the Code, as it cannot be considered as a part of his answer. The plaintiffs moved to strike out the answer as sham. Their motion was overruled, and they excepted and appealed, but did not perfect their appeal. This exception of the plaintiffs is not noticed in their assignment of errors in this case. Assuming that it is before us, we do not think it should be sustained, and for the reasons, among others, we have already given in passing upon the demurrer. As substantially said by this court in Buie v. Brown, 104 N. C. 337, 10 S. E. 465, when discussing a similar motion for judgment, it may be that the answer is false, but, treating it as a pleading, it is so framed as to raise an important issue of fact, and it discloses a substantial ground of defense. We find no error in the rulings of the court below.

No error.

(138 N. C. 546)

JONES v. AMERICAN WAREHOUSE CO.

(Supreme Court of North Carolina. May 26, 1905.)

1. APPEAL—VERDICT—CONCLUSIVENESS.

The Supreme Court on appeal has no power to set aside a verdict as against the weight of the evidence, unless it clearly appears that there was no evidence to sustain the finding.

2. MASTER AND SERVANT — ASSUMPTION OF RISK.

An employé does not assume the risk in undertaking to perform a dangerous work, unless the act itself is obviously so dangerous that in its careful performance the inherent probability of injury is greater than that of safety, or unless it is a danger ordinarily incident to the employment, or unless obvious or one which the servant may discover by the exercise of ordinary care.

[Ed. Note.—For cases in point, see vol. 34 Cent. Dig. Master and Servant, §§ 538, 550, 610–624.]

3. NEGLIGENCE—DEFINITION.
Negligence was properly defined as a want of ordinary care and failure to exercise that care which a man of ordinary prudence would have exercised under the circumstances, or a failure to perform some duty imposed by law.
[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 1.]

4. SAME.
Negligence is a mixed question of law and fact.
[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 280.]

5. ASSUMPTION OF RISK—QUESTION FOR JURY.
On a change being made in the method of operating machinery after employment has been accepted, as where an employé was directed to place a belt on a pulley while in motion, where his practice had been to stop the pulley and place the belt thereon, the question whether the increased hazard was so obvious that a man of ordinary prudence, under like conditions, would know and appreciate the danger which extended to continued employment, was for the jury.

On rehearing. Petition for rehearing dismissed.

For original opinion, see 49 S. E. 355.

Lindsay Patterson, R. D. Reid, Pou & Fuller, Watson, Buxton & Watson, and Winston & Bryant, for petitioner. Manly & Hendren, opposed.

CONNOR, J. In view of the large amount involved, and the number of exceptions in the record presenting many interesting questions, we were willing to rehear this case. It was ably argued by counsel upon full and exhaustive briefs, and we have, with the aid thereof, carefully re-examined the entire record. To the argument pressed upon us, that the plaintiff was not injured in the manner testified to by being caught in the belt of the machine and thrown against a post, we can only say, in the light of the testimony and the charge of the court, the jury have found in accordance with his allegation. He swears positively that he was injured in that way. Two witnesses, Burgess and Wilson, testified that they saw him as, and immediately after, he was injured. The credibility of the witnesses was entirely for the jury. The learned and careful judge who tried the case and heard the entire evidence did not think it his duty to set the verdict aside as being against the weight of the evidence. We have no power to consider the question, unless it clearly appears to us that there was no evidence to sustain the finding. Taking the fact to be as found by the jury in this respect, we have this case: Plaintiff alleges that he was employed eight weeks before the accident by defendant company, and that about four weeks before the accident he was put to work at a machine called the "napper." That attached to the machine was a pulley, run by the belt connected with the shafting overhead. On the inner or lower side of the machine was a small pulley, which drove a fan and was run by a small belt. That the belt on this small pulley would sometimes slip off, making it necessary to replace it. He was in the habit of stopping the machine to replace the belt. Some three or four days before the injury, the superintendent told him to replace the belt while the machine was in motion. That on one occasion, the machine being stopped to replace the belt, Mr. Krantz, superintendent, said with some emphasis, "Do not stop that machine to put the belt on." He walked up, took hold of the shifter, put the idle belt on the pulley, and started the machine up. Plaintiff told him that it seemed dangerous to do that. He said, "There is no danger in it at all." Plaintiff did that way the next time it came off; did it two or three times. On the 2d July at about 4 o'clock in the morning, plaintiff being at work at the machine, the belt came off, and he undertook to put it on while the machine was in motion. As he did so, his finger was about to be caught. He jerked his hand away, and the large driving belt that went overhead caught his arm, his sleeve, and jerked him around over the pulley and hurled him against the post; struck the smaller part of his back. That he was putting the small belt on in that way by the command of the superintendent; that, if he had stopped the machine to put on the belt as he had been accustomed to do before the superintendent instructed him otherwise, there would have been no danger whatever. He says that he could see the pulley, and understood the location and operation thereof. He further says that it was perfectly plain to him that if he caught his hand under that belt he would be hurt, and that he was always careful to keep his sleeve from going under it, because he could see that it was dangerous—knew that it was dangerous. There was other testimony on behalf of the plaintiff of the same character. There was a great deal of testimony directed to the controversy in regard to the allegation of the defendant that plaintiff was injured by falling from a truck. In the light of the finding by the jury, this becomes immaterial.

It is conceded by the plaintiff, and was so stated by his honor, that the machine which was being operated was standard in make and quality, and had no defect. We attach no importance to the suggestion that the small pulley should have been grooved. The controversy was narrowed down to the single question whether the defendant had imposed upon the plaintiff the duty of operating the machine in a dangerous manner, and, if so, whether he had assumed the risk incident to such danger, or was guilty of contributory negligence. The question is thus stated by defendant's counsel: "If plaintiff was injured by the belt accident, does his own testimony show that the injury was caused by his own negligence, and not by any negligence of the defendant? or that it was caused by the danger incident to his employment? Of course, he had knowledge

of such danger, and of which he assumed the risk. All other questions are incident and subordinate to this." His honor instructed the jury as follows: "The act upon which the plaintiff relies, and which he alleges was negligence, is that the defendant, through its officers, required him to do certain work in a manner which was not reasonably safe, and that in consequence thereof, while endeavoring to follow the requirements of the defendant, he was caught by a belt and injured. It therefore becomes material to inquire what is negligence. Negligence is a want of ordinary care, a failure to exercise that care which a man of ordinary prudence would have exercised under the circumstances. It is a failure to perform some duty imposed by law. The law imposes upon the master the duty of using ordinary care to provide for the servant reasonably sound and safe appliances and machinery, and a reasonably safe place and method to do his work, and on entering into employment the servant has a right to assume that these duties have been performed, and may, without blame, act upon this assumption until some defect becomes so apparent that it may be discovered by the exercise of ordinary care. The master is not required to furnish the best machinery and appliances, nor is he required to provide the safest place or methods, but such as are reasonably safe. The law also requires the servant to exercise ordinary care for his own safety. It is also a part of the contract of employment that the servant assumes the ordinary risk of his employment, and also the risk incident to dangerous work or dangerous methods of work, if they are obvious." He properly instructed the jury in regard to the burden of proof and proximate cause. Upon the third issue his honor instructed the jury as follows: "The burden upon this issue is upon the defendant to satisfy you by the greater weight of the evidence that the plaintiff assumed the risk of his injury. It becomes material, then, to inquire what is meant by assumption of risk. It is a doctrine that grows out of the relationship of master and servant, and is based upon the contract between them. As I have before stated, the law imposes certain duties upon the master and certain duties upon the servant; and, in addition to those mentioned, it becomes a part of the contract of employment that the servant will assume the risk of those dangers and injuries ordinarily incident to the employment, and also those dangers not ordinarily incident to the employment, but which are obvious or which could be discovered by the exercise of ordinary care. If the risk is not ordinarily incident to the employment, or is not obvious or could not be discovered by the exercise of ordinary care, it is not one of those risks which enter into the contract and which the servant assumes. In passing upon the nature of the risk, you would consider the intelligence of the plaintiff, his opportunities to discover the risk, the information he had as to the danger, and all the circumstances. [The court here fully stated the contentions of the plaintiff and the defendant upon this issue.] If you find from the evidence that the plaintiff had worked at this napper machine for four weeks, and that the danger of being injured if he was caught in the driving belt and pulley attached to it was open and obvious and known to him, and that after such knowledge he continued to work at said machine, you will answer the third issue 'Yes.' If you find from the evidence that the plaintiff knew of the danger of attempting to replace the belt on the pulley while the machine was in operation, and appreciated the danger and continued to work at said machine, and attempted to replace the belt when it slipped off of the pulley, then the plaintiff assumed the risk, and you would answer the third issue 'Yes.' Assumption of risk does not mean that in all cases where the plaintiff has knowledge of the defects of dangerous machinery and goes on with the work that he assumes the risk, but the law is that, where the defendant fails to perform its duty and furnish the plaintiff with safe and suitable methods of doing the work, the plaintiff will not be held to assume the risk in undertaking to perform a dangerous work, unless the act itself is obviously so dangerous that in its careful performance the inherent probability of the injury is greater than those of safety, or unless it is a danger ordinarily incident to the employment, or unless obvious, or one which the servant may discover by the exercise of ordinary care." There were a number of special requests on behalf of the defendant, all based upon the theory that, if certain facts were found, his honor should instruct the jury, as a matter of law, that plaintiff could not recover, either by reason of the failure to show any negligence on part of the defendant, or assumption of risk on his part. We are of the opinion that his honor properly presented to the jury the principles by which they were to be guided in arriving at a correct verdict. His honor properly said to the jury, after stating to them the duty which defendant owed the plaintiff: "Negligence is a want of ordinary care, and failure to exercise that care which a man of ordinary prudence would have exercised under the circumstances. It is a failure to perform some duty imposed by law." This definition is in strict accordance with the best approved formula found in the text-books and adopted by the courts.

The answer to the allegation that there was such negligence is to be arrived at, first, by finding the facts, and, secondly, by drawing such inferences therefrom as are reasonable and natural. This is so where there is any controversy, and is peculiarly a matter for the jury. This court has long since abandoned the theory that negligence is a ques-

tion of law, and adopted the only rational and workable theory—that it is a mixed question of law and fact. It is impracticable, if not impossible, for the court, as a matter of law, to say whether or not there is negligence, except where the facts are admitted and no reasonable controversy can arise in regard to the inferences to be drawn therefrom. We have so frequently repeated this proposition that it is unnecessary to cite authority. We think that his honor correctly instructed the jury in this respect. To replace the belt while the machine is standing still is undoubtedly safe. To replace it while it is in motion is to some extent unsafe; whether to such an extent that an ideal prudent man under similar circumstances would direct his employé to do so, is peculiarly a question to be decided by the jury. We also think that his honor correctly instructed the jury upon the third issue, as he properly said to them, if they found that the danger was open and obvious and known to him, that he appreciated the danger, and continued to work at machine and replace the belt, when it slipped off the pulley while in motion, they would answer the third issue "Yes." This we think in strict accord with the definition of assumption of risk. He further said to the jury that, where "the defendant failed to perform its duty and furnish the plaintiff with safe and suitable methods of doing the work, plaintiff will not be held to assume the risk in undertaking to perform a dangerous work, unless the act itself is so obviously dangerous that in its careful performance the inherent probability of the injury is greater than that of safety." As we said in Marks v. Cotton Mills (at this term) 50 S. E. 769, the same measure of duty is imposed upon the plaintiff as upon the defendant. Both must exercise that degree of care under the circumstances and in the condition in which they are found which the ideal prudent man would do. If the defendant fails to do so in the light of the standard which the law sets to define his duty, and such failure is the proximate cause of the injury, he is liable to an action. On the other hand, if the plaintiff fails to exercise the same degree of care under the same circumstances and with the same light before him, and his failure is the proximate cause of his injury, the law attributes the injury to such failure, and he cannot recover. The standard of duty in each case is ordinary care; that is, such care as a man of ordinary prudence, under similar circumstances, would exercise. This we understand to be the conclusion to which, after long and anxious thought, the courts have come in administering the law in such cases.

There was undoubtedly testimony in this case which would have fully justified the jury in answering the issues in favor of the defendant. They have, however, accepted the view of the plaintiff's testimony, and, under the instruction of a very learned and careful judge, have found a verdict which we cannot disturb. What the rights may have been, if at the time of entering upon the service the method of replacing the belt had been known to him and the service accepted with full knowledge thereof, we are not called upon to say. As we said in Marks v. Cotton Mills, it is not to be required that employés in operating dangerous machinery shall immediately surrender their employment upon a change being made in the method of operating or cleaning machinery adopted after the employment has been accepted. Such changes must be made after reasonable notice to the employés, and with an opportunity on their part to fully understand them and appreciate the danger incident thereto. It is always a question for the jury whether in such cases the increased hazard is so obvious that a man of ordinary prudence, under like conditions, would know and appreciate the danger which extends to the continued employment.

We have also examined the other exceptions in regard to the expert evidence, and while, as conceded by plaintiff's counsel, the questions are not so accurately framed as might be desired, we do not think that the form in which they are put was calculated to mislead the jury to the prejudice of the defendant.

Upon a full re-examination of the entire case, we find no such error as to justify a reversal of our former decision. As stated by counsel, the case is a singular one in many aspects. The plaintiff was seriously and permanently injured. It may be in the manner contended by defendants; the jury have found otherwise, and that, so far as the duty and power of this court are concerned, must be assumed to be correct. Let the petition be dismissed.

Petition dismissed.

(138 N. C. 520)

DUCKWORTH v. JORDAN et al.

(Supreme Court of North Carolina. May 25, 1905.)

1. WILLS—LAPSED DEVISE — EFFECT — STATUTE.

Where testator devised his home lands to his wife, and after her death to a nephew, and directed that after the death of testator's wife all the residue of his estate should be sold, and the proceeds equally divided among the children of testator's brother, and the nephew predeceased the testator, the lapsed devise to the nephew passed under the residuary clause, in view of Code 1883, § 2141, providing that wills must speak and take effect as if executed immediately before the testator's death unless a contrary intention appears by the will, and section 2142, providing that, unless a contrary intention appears, property which is the subject of a lapsed devise shall be included in the residuary clause, if any, contained in the will; there being nothing in the will tending to show an intent contrary to the statute.

2. SAME—EQUITABLE CONVERSION.

Where testator devised his real estate to his wife for life, with remainder to a nephew, who predeceased testator, so that there was a

lapse of the devise to the nephew into the residuary clause of the will, providing that after the death of testator's wife all the rest of his estate should be sold, and the proceeds equally divided and paid over to the children of testator's brother, there was an equitable conversion of the real estate into personalty for the purpose of devolution.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Conversion, §§ 40–51.]

3. SAME—RECONVERSION.

Where no actual change has taken place as to real property converted by a will into personalty for the purpose of devolution, the beneficiaries are entitled by unanimous election to countermand the conversion, and take the land by way of reconversion.

4. SAME—ELECTION.

The right of election of several beneficiaries to take real estate by reconversion is properly exercised partly by deed and partly by answer.

5. SAME—INFANTS.

An election to take real estate under a will by reconversion cannot be exercised by infant beneficiaries except by sanction and order of the court after due inquiry.

6. SAME—HUSBAND AND WIFE—DESCENT AND DISTRIBUTION.

Under the statute giving the husband the right to administer on his deceased's wife estate, and making him sole distributee, the husband takes, subject to the payment of the wife's debts, the sole beneficial interest in real estate under a will directing sale of the land and a division of its proceeds to the wife among other beneficiaries, and hence he is entitled to exercise the right of reconversion as applicable to his deceased wife's interest.

7. SAME—EXECUTORS—POWER OF SALE.

Where testator directed that his land be sold by his executors, and the proceeds divided between certain beneficiaries, the exercise by all of the beneficiaries of the right to take the land by reconversion prevented the exercise of the power of sale by the executors.

Appeal from Superior Court, Transylvania County; Neal, Judge.

Suit by J. E. Duckworth, administrator with the will annexed of Thomas P. Jordan, deceased, against W. B. Jordan and others, for construction of decedent's will. From the decree, defendants appeal. Reversed.

On the 28th day of August, 1879, Thomas P. Jordan made and published his will as follows:

"First. That my beloved wife Nancy C. Jordan shall provide for my body a decent burial and pay all funeral expenses, together with my just debts, howsoever and to whomsoever owing, out of the money that may first come into her hands as a part or parcel of my estate.

"Second. I give and bequeath to my beloved wife Nancy C. Jordan all the lands whereon I now live and all the personal property that I may be in possession of, together with all monies, notes and accounts, all the crop of every description on the plantation whereon I now live, and all the provision and stock on hand at the time of my death to have and to hold to her own use, the said Nancy C. Jordan for and during her natural life.

"Third. After the death of my beloved wife Nancy C. Jordan, I give and bequeath unto my nephew Thomas P. Jordan all of the tract of land whereon we now live to have and to hold to him and to his heirs in fee simple forever.

"Fourth. My will and desire is that all the residue of my estate, after the death of my beloved wife Nancy C. Jordan, shall be sold, and the debts owing shall be collected, and to be equally divided and paid over to my brother, S. D. Jordan's children to each and every one of them, their executors, administrators and assigns forever.

"Fifth. And lastly I do hereby constitute and appoint my brother, S. D. Jordan, and friend James M. Davis, my lawful executors to all intents and purposes to execute this my last will and testament according to the true intent and meaning thereof."

The testator died in 1896. Thomas P. Jordan, his nephew, the devisee mentioned in the third paragraph of the will, died before the testator, on the ——— day of ———. Nancy C. Jordan, the wife of the testator, survived her husband, and died on the ——— day of ———, 1898. The executors mentioned in the will refused to qualify as such, and the plaintiff was appointed administrator of the testator with the will annexed. The children of S. D. Jordan, the brother of the testator mentioned in the fourth paragraph of the will, living at the date of the death of the testator, were the defendants William B. Jordan, Sallie B. Chumbley, wife of Robert Chumbley, Mary P. Parks, wife of O. A. Parks, and J. P. Jordan, and Hannah Patterson, wife of ——— Patterson, who died on the ——— day of ———, leaving surviving her husband, ——— Patterson, and Nettie Patterson, Neta Patterson, Nellie Patterson, Joseph Patterson, E. M. Patterson, and W. H. Patterson, her children. The husband of Hannah Patterson and all of her children are parties defendant hereto. The last four named are minors, and are represented herein by their guardian, G. W. Wilson. The husband of Hannah Patterson was made a defendant on the trial, and adopted the answer of his codefendants then on file. All of the children of S. D. Jordan, the brother of the testator, except Hannah Patterson, conveyed their interests in the land devised in the second and third paragraphs of the will by the deed on the ——— day of ———, 190–, to the defendants W. B. Duckworth and W. P. Whitmire, and the children of Hannah Patterson who were of age joined with them in the deed. The plaintiff brought this action to have the "court to construe said will, and every part thereof, in so far as the same applies to the rights, powers, and duties of the plaintiff, as administrator with the will annexed, and that the court give the plaintiff such instructions, directions, and orders as may be necessary to enable him to fully discharge his rights, powers, and duties under said will." etc. The defendants admit that Thomas P. Jordan made the will, that he is dead, and that the plaintiff is his administrator as alleged. They also admit that Thomas P. Jordan, his

nephew, died before the death of the testator, and that the children of S. D. Jordan are correctly named; that all of said children, except Hannah Patterson, conveyed their interests in the land contained in the lapsed devise to the nephew to the defendants Duckworth and Whitmire; and that all of the children of Hannah Patterson who are of age had joined in said deed. The defendants set up in their answer, among other things, that they had elected to take the said lands, instead of the proceeds thereof, by way of reconversion thereof, to prevent the exercise of the power claimed by the plaintiff to sell the same. The court held that the lapsed devise to the nephew did not fall into, and was not included in, the residuary clause (item 4 of the will). Defendants excepted and appealed.

Moore & Rollins, for appellants. Merrimon & Merrimon, for appellee.

HOKE, J. (after stating the facts). From the foregoing statement it appears that the testator devised his home lands to his wife, and after her death to his nephew Thomas C. Jordan. Under the fourth item of the will it is directed that after the death of the wife all the residue of the testator's estate shall be sold, and the proceeds equally divided among the children of S. D. Jordan; that Thomas P. Jordan died before the testator, and after the testator's death the wife died, and no sale of the land has yet taken place; that all of the children of S. D. Jordan have conveyed their interest in the land of the testator to the defendants W. B. Duckworth and W. P. Whitmire, except Hannah Patterson, who has died, leaving, her surviving, a husband and six children, four of whom are minors; that the adult children of Hannah Patterson, deceased, have joined in the said conveyance to Duckworth and Whitmire; that all of them, and also the husband of Hannah Patterson, are parties defendant—the infants being duly represented by guardian—and all answer stating that they elect to take the land by way of reconversion. On these facts the questions presented are: (1) Whether the devise in the second item of the will of Thomas P. Jordan, which lapsed by the death of the devisee before the testator, passed under the residuary clause to the children of S. D. Jordan. (2) In case the lapsed devise does pass under the residuary clause, have the beneficiaries under said clause the right to hold the same as land, or must it be sold by the plaintiff, as administrator, and the proceeds distributed as directed by item 4 of the will?

On the first question the court is of opinion that the property the subject of the lapsed devise passed under the residuary clause of the will, and must be disposed of as therein directed. Section 2141 of the Code of 1883 provides that the will must speak and take effect as if executed immediately before the testator's death, unless a contrary intention appears by the will. Section 2142 provides that, unless a contrary intention appears by the will, such property the subject of a lapsed devise shall be included in the residuary clause (if any) contained in the will. There is nothing in this will which shows or tends to show an intent contrary to this statute, and in the absence of any such intent in the will the provisions of the statute must prevail. The case on this point is controlled by the decision in Saunders v. Saunders, 108 N. C. 327, 12 S. E. 909. There is nothing in Holton v. Jones, 133 N. C. 399, 45 S. E. 765, which conflicts with the position here declared. The opinion in Holton v. Jones expressly recognizes the operative effect of the sections of the Code cited where the same apply, and rests the decision on the ground that a contrary intention appeared in the will.

On the second question, under item 4 of the will there was for certain purposes an equitable conversion of the property. In Bispham's Principles of Equity, c. 5, § 307, the author defines this to be "a change of property from real into personal and from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity." And, quoting a decision of Sir Thomas Sewell, M. R., to this effect, the author continues: "By this and other similar declarations the judges do not mean to assert a solemn piece of legal juggling without any foundation of common sense, but simply to lay down the practical doctrine that for certain purposes of devolution and transfer, and in order that the rights of parties may be enforced and preserved, it is sometimes necessary to regard property as subject to the rules applicable to it in its changed form, and not in its original state, although the change may not have actually taken place." The doctrine has been applied in several decisions in this state, and very generally in other jurisdictions. Brothers v. Cartwright, 55 N. C. 113, 64 Am. Dec. 563; Benbow v. Moore, 114 N. C. 263, 19 S. E. 156; Ford v. Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117, and note at 147; Bank v. Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; Pomeroy, Eq. §§ 1175, 1176. And it is equally well established that before any actual change in the property has taken place there may be a reconversion, which occurs, says Mr. Bispham, where the direction to convert is countermanded by the parties entitled to the property. This reconversion can be effected where all the parties beneficially interested in the property by some explicit and binding action direct that no actual conversion shall take place, and elect to take the property in its original form. Pom. Eq. supra; Bispham, § 332 et seq.; Craig v. Leslie, 3 Wheat. 563, 4 L. Ed. 460; Ford v. Ford, supra, note. There can be no doubt that, if a sale is to

be had under the provisions of the will, the plaintiffs are entitled to execute the power of sale. Code 1883, § 1493; Laws 1889, p. 441, c. 461; Saunders v. Saunders, supra. But, if the election has been properly made, then the power of sale under the will is extinguished, and the beneficiaries and their grantees are entitled to hold the property as it is, and without the expense or disadvantage of a sale. In devises of the kind we are now considering, where land is directed to be sold, and the proceeds divided, in order to a valid election all the interests must concur, and all must be bound. If the beneficiaries are all sui juris, such election can be made by deed in which all join, or by answer expressly stating that the parties desire to hold the land as it is, or this may be done partly by deed and partly by answer (and there are other methods), but all must concur by some action that will bind them. In case some of the beneficiaries are infants, an election cannot be made either by or for them, except by sanction and order of the court after due inquiry. The four infant children of Hannah Patterson who are made parties defendant have made no deed, and it would not bind them if they had. Nor can they elect by answer, simply, even though duly represented by guardian. To bind them, an inquiry would have to be made in the cause, and an order signed by the court only when such inquiry disclosed that it would be for the benefit of the infants that a reconversion should be had. This might be done, if it were necessary, in the present case, and the matter so determined; but in the view taken by the court this is not necessary here, for the reason that all the interest in the property which would have gone by the will to Hannah Patterson is now vested in her husband, who is a party defendant of record, and has filed an answer, stating expressly that he desires and elects to hold his interest by way of reconversion. As heretofore stated, at the time a sale was directed by the will to be made, there was an equitable conversion of the property, and for the purposes of devolution and transfer this land was considered as money. The share of Hannah Patterson would go to her as personalty, and, she having died without action concerning it, such interest devolved on her husband. Under our statute he has the right to administer on his wife's estate, and is made her sole distributee; and in the absence of any suggestion or claim of indebtedness the husband has the sole beneficial interest in the property, so far as his wife's share is concerned; and while the land, on its reconversion, goes to him as it was under the will, so as to be bound, perhaps, by intervening liens, in another sense he takes the property by reason of his election as a new acquisition. Being the sole beneficial owner of his wife's share, he alone is required to make the election as to that share; and when made, and all concur, on reconversion he is the owner of that interest in the land in his own right.

As the case goes back for further orders, we deem it proper to say that, if there is any suggestion of debts against the wife's estate, it may be well to direct that the husband qualify as her administrator, as he has the right to do under the statute; so that the creditors, if there be such, may have some one whom they can hold responsible for their claims to the extent of the wife's interest. The principles here stated will be found approved and sustained by authority. Procter v. Ferebee, 36 N. C. 143, 36 Am. Dec. 34; Benbow v. Moore, supra; Ford v. Ford, supra; Craig v. Leslie, supra; Finley v. Bent, 95 N. Y. 364; Hannah v. Swarner, 3 Watts & S. 223, 38 Am. Dec. 755, and note; Burr v. Sim, 1 Whart. 252, 29 Am. Dec. 48; 1 White & T. Leading C. Eq. part 2, p. 1170. And on questions of similar import, see Conigland v. Smith, 79 N. C. 303; Davis v. Railroad, 136 N. C. 115, 48 S. E. 591. This being true, then the defendants, in their answer, have presented a case of reconversion by election, valid and binding on all the parties having a beneficial interest in the property, and by which the power of sale under the will is extinguished. The adult children of S. D. Jordan have conveyed their shares to the defendants Duckworth and Whitmire; and the husband of Hannah Patterson, who alone represents that share, has in his answer, signified his desire that a reconversion be had. It will be noted that we speak here throughout of a sale under and by virtue of the will, and on the idea that there are no debts outstanding against the estate of the testator requiring a sale of the realty. If the plaintiffs establish debts, and their right to sell the land to pay the same by order of the court, such power might arise to them under the statute providing for the sale of realty to pay debts; but this question is not presented in the appeal. It is the opinion of the court that the land, the subject of this controversy, is included in the residuary clause; that the answer, if established, presents a case of reconversion, which extinguishes the power of sale under the will, and gives the defendants the right to hold the land in specie, unless the same be required to pay the debts of the testator.

Judgment reversed.

(71 S. C. 391)

LYLES et al. v. LYLES.

(Supreme Court of South Carolina. April 15, 1905.)

MORTGAGE—LIEN—DURATION.

Civ. Code 1902, § 2449, provides that no mortgage, judgment, or decree shall constitute a lien on any real estate after the lapse of 20 years, but, if the holder of any such lien shall during its continuance file a note of some payment on account or some written acknowledgment of the debt, the lien shall be continued for 20 years from the date of the record of such payment. *Held*, that under such Code the lien of a mortgage is good for 20 years after the note secured thereby becomes due, though the mortgage itself is more than 20 years old from the date of its execution.

Woods and Jones, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Fairfield County; Gary, Judge.

Suit by William H. Lyles and Thomas Lyles, executors of Thomas M. Lyles, against Belton E. Lyles. Decree for plaintiffs, and defendant appeals. Affirmed.

Ragsdale & Dixon, for appellant. J. E. McDonald, for respondents.

POPE, C. J. This was an action to foreclose a mortgage of real estate commenced on the 25th day of November, 1901. The mortgage on 240 acres of land was executed on the 19th day of February, 1881, and duly recorded in the office of the register of mesne conveyances of Fairfield county, in said state, on the 7th day of March, 1881. The mortgage was executed to better secure the payment of a bond in fact executed on the 19th day of February, 1881, the same day of the execution of the mortgage, which bond was in the penal sum of $1,078.31, conditioned for the payment of the full and just sum of $539.15 on the 1st day of December, 1881, without interest; until the maturity of said bond, by the defendant, Belton E. Lyles. Originally the bond and mortgage were executed to one Thomas W. Traylor and his assigns. The bond was next assigned, for valuable consideration, on the 1st day of February, 1882, to T. D. Feaster, and thereafter, on the 13th day of December, 1887, for a valuable consideration, the said bond and mortgage were assigned and transferred by the said T. D. Feaster to one Thomas M. Lyles, which said Thomas M. Lyles was adjudged to be a person non compos mentis; and on the 31st day of January, 1899, one Amos E. Davis was duly appointed by the court of probate of Fairfield county the guardian of the person and estate of the said Thomas M. Lyles, and as such became the holder of the aforesaid bond and mortgage; and the said Amos E. Davis began this action for the foreclosure of this mortgage on the 25th day of November, 1901, but subsequently, on the death of the said Thomas M. Lyles, the present plaintiffs, William H. Lyles and Thomas Lyles, as executors of the last will of Thomas M. Lyles, deceased, were substituted, by the order of Judge James Aldrich, the plaintiffs herein, instead of Amos E. David, they being the lawful holders of said bond and mortgage of their testator.

It is admitted by the defendant, Belton E. Lyles, that the plaintiffs, as executors as aforesaid, are entitled to a judgment against the defendant for the amount due upon the bond hereinbefore recited, but the defendant denies that the mortgage hereinbefore referred to is a valid and subsisting lien upon his 240 acres of land, because he says that under the laws of this state said mortgage ceased to be a lien on said lands after the 19th day of February, 1901, more than 20 years having expired since the creation of the lien of said mortgage, there being no note of payment on account or written acknowledgment of the debt upon the record of the mortgage. The cause came on to be heard by his honor, Ernest Gary, circuit judge, who rendered his decree on the 17th day of June, 1904, which held that the plaintiffs were entitled to a judgment in foreclosure of the mortgage of land sued upon herein. The following extract from the decree we deem sufficient to put before us the issues passed upon by him:

"Counsel for the defendant contends that under the provisions of section 2449 of volume 1 of the Civil Code of 1902 the lien of the mortgage sought to be foreclosed is extinguished, as more than twenty years have elapsed since it was executed. The language of the Code is: 'No mortgage, or deed having the effect of a mortgage, no judgment, decree or other lien on real estate, shall constitute a lien upon any real estate after the lapse of twenty years from the date of the creation of the same.' While it is true that since the execution of the mortgage and the commencement of the suit a period of twenty years, nine months, and four days has elapsed, yet I am of the opinion that the lien of the mortgage is still of force. The bond secured by this mortgage became due and payable, not from the date of its execution, but on the 1st day of December, 1881. So we find that since the bond became due and payable, there is a lapse of nineteen years, eleven months, and twenty-four days. So the question is narrowed down to when the statute begins to run—from the execution of the mortgage or from the breach of the condition of the bond. My conclusion is that it runs from the breach of the bond. The words of the statute are 'from the date of the creation of the same.' When was the lien created? Certainly not from the execution of the mortgage. The plaintiff could not have brought his suit to foreclose at that time, for the reason that there was no breach of the condition of the bond, and consequently no lien that could have been enforced. True it is that the lien of the mortgage would be referred back to the date of its execution to preserve an equity, but no such

lien as the statute contemplated at the date of its execution as would give currency to the statute. For the foregoing reasons I think the lien of the mortgage was not barred at the commencement of this action. It is therefore ordered that the same be foreclosed. It is further ordered that plaintiffs have leave to apply at the foot of this decree for such order as may be necessary to carry into effect this decree, as I have not before me sufficient of the records to render a complete judgment."

And from this decree the defendant, Belton E. Lyles, has appealed upon the following grounds: "(1) Because his honor erred in that he should have held that, as more than twenty years had elapsed from the time of the execution of the mortgage described in the complaint to the time of the commencement of this action, that the said mortgage had lost its lien under and pursuant to the provisions of section 2449 of the Civil Code of Laws of 1902, and he should have declined to order any foreclosure of the same in this action. (2) Because, having found as matter of fact that more than twenty years had elapsed from the date of the mortgage to the commencement of this action, his honor erred in holding 'that the lien of the mortgage is still of force.' (3) Because his honor erred in holding as follows: 'When was the lien created? Certainly not from the execution of the mortgage. The plaintiff could not have brought his suit to foreclose at that time, for the reason that there was no breach of the condition of the bond, and consequently no lien that could have been enforced.' The error being (1) that lien of the mortgage was created ex necessitate rei at the date of the execution of the mortgage; (2) that the lien is confounded with the cause of action, which, in legal contemplation is entirely distinct therefrom. (4) Because his honor erred in holding that 'the statute [section 2449 of the Civil Code of Laws of 1902] begins to run from the breach of the bond;' such construction being contrary to the express words of the statute, which has no reference whatever to the bond."

It is unnecessary to incumber this opinion with any reference to the issues herein involved except the lien of the mortgage. Section 2449 of the Civil Code of Laws of 1902 reads as follows: "No mortgage, or deed having the effect of a mortgage, no judgment, decree or other lien on real estate, shall constitute a lien upon any real estate after the lapse of twenty years from the date of the creation of the same: provided, that if the holder of any such lien or liens as aforesaid shall, at any time during the continuance of such lien, cause to be recorded upon the record of such mortgage, or deed having the effect of a mortgage, or shall file with the record of said judgment, decree or other lien, a note of some payment on account, or some written acknowledgment of the debt secured thereby, with the date of such payment or acknowledgment, such mortgage, deed having the effect of a mortgage, judgment, decree or other lien, shall be and continue to be a lien for twenty years from the date of the record of any such payment on account or acknowledgment: provided, further, that nothing herein contained shall be construed to affect the duration of the liens of judgments as prescribed by section 309 of the Code of Procedure: provided, further, that on and after the first day of January, 1902, the provisions of this act shall apply to all mortgages; those executed prior to the 24th day of December, 1879, as well as to those executed since that date." This provision of the law was enacted by the General Assembly of this state in the year 1879, which was anterior to the creation of this debt and the mortgage given to secure it. While the force of the reasoning of the appellant's attorneys is admitted to be strong, because it is based upon the language itself of section 2449, already quoted, and that there is no ambiguity in the language used by the Legislature, which requires that the act shall be construed as it is written (Potter's Dwarris on Statutes, pages 143 and 144); and the fact that the General Assembly of this state has, by the act of 1903 (24 St. at Large, p. 87), so amended section 2449 of the Civil Code, supra, as to exclude the mortgages on real or personal property by railroads from said section, relating, as the section does, to the date of the creation of the lien; and the further fact that by the decisions of this court bonds, notes, and mortgages on real estate, given to secure the same, have been held to be so essentially distinct as that the bar of the statutes, which applies to the bond or note, will not be allowed to shut off a recovery upon the mortgage itself given to secure the same (Cleveland v. Cohrs, 10 S. C. 224; Nichols v. Briggs, 18 S. C. 474)—yet, in accordance with the dictates of natural justice and a recent adjudication of our own court, as we hope to show, we have changed the adverse view to which we were at first inclined, and are now led to support the judgment of the circuit judge. It is suggested that the act of 1879 (17 St. at Large, p. 167), which is now section 2449 of our Civil Code, was but a new rule of evidence, whereby the bar of the statute of 20 years was to give place to an evidence of the nonpayment of the debt secured by the mortgage, by providing that a note of payment on account, or some written acknowledgment of the debt, if recorded on the record of the mortgage, would give a fresh start to the statute of 20 years from the date of such entries on the record. In the case at bar the defendant (appellant) admits that the debt secured by the mortgage is a valid and subsisting obligation, which he consents may be so adjudged by this court, both the bond and the mortgage being admitted to fall within the provisions of chapter 3 of our Code of Civil Procedure, which gives

20 years as the time within which suit may be brought. It seems to us that the decision of this court in the case of Ewbank v. Ewbank, 64 S. C. 434, 42 S. E. 194, is conclusive of this matter. There Mr. Justice Jones, as the organ of this court, declared: "No mere change in form of the debt secured by mortgage will impair the lien of the mortgage. Gibbes v. R. R. Co., 13 S. C. 253; Burton v. Pressly, Cheves, Eq. p. 1. While we have found no case in this state directly deciding the point in controversy, upon principle, we think it must be held, with reference to the statute of limitations, and *as between the original parties*, that the lien of a mortgage exists and is enforceable. The authorities in other jurisdictions sustain this view. Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; Bottles v. Miller (Ind. Sup.) 14 N. E. 732; Murray v. Emery (Ill.) 58 N. E. 328; Harper v. Edwards (N. C.) 20 S. E. 393; Kenaston v. Lorig (Minn.) 84 N. W. 323; Johnson v. Johnson, 81 Mo. 331. See, also, 19 Am. & Eng. Law (2d Ed.) 289." (Italics ours.) If this be sound law—and this court has so decided—we do not see how we can escape the conclusion of the circuit judge.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, A. J. (concurring). This is an action to foreclose a mortgage of real estate executed to secure the payment of a bond payable on or before the 1st of December, 1881. The mortgage bears date the 19th of February, 1881, and was recorded on the 7th of March, 1881. This action was commenced on the 25th of November, 1901. His honor the circuit judge ruled that the action was not defeated by reason of the fact that there was a failure to comply with the provisions of the act of 1879 (17 St. at Large, p. 167), which is set out in the opinion of Mr. Chief Justice POPE. We base our concurrence in that opinion on two propositions that are fully supported by the authorities in this state: First, that the statute was not intended to limit the duration of a lien created by judgment or mortgage, nor to affect any previously existing right, but its sole intention was to declare a rule of evidence to rebut the presumption of payment; second, that the presumption of payment does not arise until there is a right of action on the debt secured by the mortgage.

Our first proposition is sustained by the case of Henry v. Henry, 31 S. C. 7, 9 S. E. 726, in which the court says: "We must ascertain the old law which this act was designed to amend. Conceding that under that law there was no limit to the duration of the lien of a judgment or mortgage, yet it was well-settled that after the lapse of 20 years the debts secured by such liens were presumed paid, and thus the liens were extinguished, but still such presumption could be rebutted by proof of some payment on account, or some such positive acknowledgment as would imply a promise to pay. This being the state of law it seems to me that the object of the act was not to limit the duration of such liens, but simply to declare (and it is noticeable that such was the word used in the title), what should be the evidence of such payment or new promise as would be sufficient to rebut the presumption of payment. Under the old law neither a judgment nor a mortgage after the lapse of twenty years constituted a lien, because of the presumption of payment, which, though susceptible of being rebutted by evidence, the nature and kind of such evidence was not distinctly defined, and the object and effect of the act was to declare what should be, after the passage of the act, the kind of evidence necessary to rebut the presumption of payment. The act in substance declares that no judgment or mortgage shall constitute a lien after the lapse of twenty years, unless some note of payment on account of some written acknowledgment of the debt is recorded on the record of the mortgage or filed with the record of the judgment; the only alteration being in the rules of evidence, not in any wise affecting the previously existing right." The principles of the case last mentioned are affirmed in Wood v. Milling, 32 S. C. 378, 10 S. E. 1081.

In support of our second proposition, we quote from the case of Brown v. McCall, 3 Hill, 335, as follows: "In general, after a lapse of twenty years, the law will presume that to have been done which should have been. But when does the time begin to run? If a man enter into a bond with a condition to pay money, or to perform any other act, presently, after twenty years the presumption of payment will arise. But if the condition be that he will pay the money or do the act at the expiration of ten or twenty years, then I apprehend the presumption does not arise until twenty years after the time stipulated for performance." To the same effect is Wood on Lim. of Actions (section 172), in which it is said: "It must be borne in mind that, unless the instrument or obligation creates a present right of action, the presumption like the statute only attaches from the time when the right of action accrued." In the case of Suber v. Chandler, 18 S. C. 526, it was held that the statute of limitations is inert and inoperative until a right of action arises, and very properly overruled McGowan v. Hitt, 16 S. C. 602, 42 Am. Rep. 650. The same rule applies to presumptions. In the case of Curtis v. Renneker, 34 S. C. 468, 491, 13 S. E. 664, the mortgage was executed on the 27th of March, 1867, to secure a bond payable in six, nine, and twelve months after date. The action to foreclose the mortgage was commenced on the 15th of March, 1888. Among other things, the circuit judge ruled that the failure to comply with the requirements of the statute defeated the right of action on the mortgage. This court said: "If the

view taken by the circuit judge should prevail, then it would be possible, and perhaps not improbable, that a mortgage might lose its lien before any right of action to enforce it could arise. If a mortgage debt should be made payable more than twenty years after the date of the mortgage—as is known to be the case with mortgages on railroads—then the lien would be lost before any right of action could arise, unless, perhaps, there had been default in the payment of interest in the meantime." Suppose, then, a mortgage was executed to secure payment of a bond that was not to mature until the expiration of 20 years. The right of action, of course, would not arise until the bond became payable. Yet we would have the anomalous condition of a mortgage being defeated by the presumption of payment before its maturity, and before a right of action arose thereon, unless it is held that the presumption does not commence to run until maturity. To hold otherwise we must necessarily conclude that the statute was not merely intended to declare a rule of evidence to rebut the presumption of payment, but also to affect the rights of parties by creating a new presumption, which the case of Henry v. Henry, supra, shows was not the intention of the statute.

The foregoing construction of the statute leaves sections 94 and 111 of the Code of Civil Procedure in full force, by which it is provided that a mortgagee has the right to foreclose his mortgage at any time within 20 years after the debt becomes payable.

For these reasons we concur in the opinion of Mr. Chief Justice POPE.

WOODS, J. (dissenting). I dissent. Section 2449 of the Civil Code of 1902, quoted in the opinion of the Chief Justice, provides that the lien of a mortgage shall cease at the expiration of 20 years from its date, unless the holder shall, while the lien is in existence, cause to be recorded on the record of the mortgage a note of some payment on account, or some written acknowledgment of the debt secured thereby, with the date of such payment or acknowledgment. The question is what effect, if any, does this act have upon sections 111 and 94 of the Code of Civil Procedure of 1902, which provide, in substance, that an action may be brought upon a mortgage, which is "a sealed instrument other than a sealed note and personal bond for the payment of money only" at any time within twenty years after its maturity? If this question as to the effect of section 2449 of the Civil Code could be regarded an open one, I should be inclined to hold that the memorandum of payment and the written acknowledgment required by the act "to be recorded upon the record of such mortgage" was intended for the protection of subsequent creditors and purchasers, and not to impair the lien of the mortgage as to other persons so long as the debt was not barred under the terms of sections 94 and 111 of the Code of Civil Procedure. The limitation of the application of the act to cases where the rights of subsequent creditors and purchasers arose I venture to think would be supported by the cases of Loyns v. Tedder, 7 S. C. 69; Fowke v. Woodward, Speers, Eq. 233; Gibbes v. Cobb, 7 Rich. Eq. 54. In the last two cases it was decided that a marriage contract was good between the parties, and lack of record only affected the rights of subsequent creditors and purchasers, although the act of 1823 made no reference to the protection of third parties, and provided: "That no marriage settlement shall be valid until recorded in the office of the Secretary of State, and in the office of the register of mesne conveyances of the district where the parties reside: provided, that the parties shall have three months to record the same, and if not recorded within three months, the same shall be null and void." 6 St. at Large, p. 213. This view of section 2449 would also avoid any inconsistency between that section and section 111 of the Code of Civil Procedure, and not require that section 111 should be considered amended by section 2449. The court, however, took a different view of section 2449 in Henry v. Henry, 31 S. C. 1, 8, 9 S. E. 726, and used this language: "Under the old law neither a judgment nor a mortgage after the lapse of twenty years constituted a lien, because of the presumption of payment, which, though susceptible of being rebutted by evidence, the nature and kind of such evidence was not distinctly defined, and the object and effect of the act was to declare what should be, after the passage of the act, the kind of evidence necessary to rebut the presumption of payment. The act, in substance, declares that no judgment or mortgage shall constitute a lien after the lapse of twenty years unless some note of payment on account or some written acknowledgment of the debt is recorded on the record of the mortgage, or filed with the record of the judgment; the only alteration being in the rules of evidence, not in any wise affecting the previously existing right." See, also, Wood v. Milling, 32 S. C. 378, 10 S. E. 1061. It is true that these cases involved the consideration of judgments entered before the adoption of the Code of Procedure, and it is also true that, in general, as to an ordinary mortgage, there is no presumption of payment, because it falls under the terms of the statute of limitations. Nevertheless, in them it was held that full effect is to be given to section 2449, even when the rights of subsequent creditors and purchasers without notice are not involved, and that the only means by which the lien of the mortgage can be preserved after 20 years from its date is that indicated by the statute. It is manifest, however, that the act does not change the statute of limitations prescribed by section 111 of the Code of Civil Procedure as to the debt represented by a mortgage, but only

as to the lien securing such debt. The provisions of section 2449 do not prevent the recovery of an ordinary money judgment for the mortgage debt, unless it is barred under section 111 of the Code of Civil Procedure, but it does prevent foreclosure of the mortgage 20 years after its date unless the mortgagee shall "cause to be recorded upon the record of such mortgage * * * a note of some payment on account, or some written acknowledgment of the debt secured thereby, with the date of such payment or acknowledgment," because after that time there is no lien to foreclose. A suit may therefore be brought on a mortgage at any time within 20 years after its maturity, under sections 94 and 111 of the Code of Civil Procedure, to recover the debt evidenced by it, but after 20 years from the date of the mortgage the debt cannot be enforced by foreclosure of the lien, unless kept alive in the manner provided in section 2449, because under that section the lien would then be gone.

The case of Ewbank v. Ewbank, 64 S. C. 434, 42 S. E. 194, relied on in the opinion of the Chief Justice, seems to me to have no application whatever, for the reason that it does not appear from the report of the case that the action was commenced more than 20 years after the execution of the equitable mortgage there under consideration, and the effect of section 2449 was therefore not discussed by counsel nor considered in the opinion of the court. The general principle announced in that case is that a payment on a note secured by an equitable mortgage renews the note and revives the equitable mortgage as between the original parties; in other words, that the mortgage lien will not be barred so long as the debt is in existence. But the Legislature has seen fit to modify that rule by providing in the act here under consideration that the lien of the mortgage shall cease 20 years after its date, unless kept in force in the manner therein provided. More than 20 years in this case had elapsed from the date of the mortgage, its lien had not been kept in force in the manner required by the statute, and the plaintiff was therefore not entitled to a judgment of foreclosure and sale.

For these reasons, I think the decree of the circuit court should have been that the plaintiff be allowed to enter judgment for the debt, but without foreclosure and sale to enforce its payment.

JONES, J., concurs in this opinion.

(71 S. C. 303)

BONNER v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. April 5, 1905.)

1. APPEAL—NOTICE—SUPERSEDEAS.
Where plaintiff's complaint stated two causes of action, one for actual damages and the other for punitive damages, and defendant sought to strike out the allegations of the complaint as to punitive damages, and on refusal gave notice of appeal, such notice did not act as a supersedeas.

2. TELEGRAM — FAILURE TO DELIVER — EVIDENCE.
In an action to recover for failure to deliver a telegram, the evidence showed that the company had reasonable office hours, during which it delivered messages at a particular office. *Held*, that a message received at such office after office hours, and delivered within an hour after opening the office, was delivered with due diligence.

3. SAME—DAMAGES—MENTAL SUFFERING.
In a complaint in an action for delay in delivery of telegram, an allegation that plaintiff was grieved, disappointed, and distressed in mind, and caused to suffer from great mental anguish, should not be stricken out.

Appeal from Common Pleas Circuit Court of Barnwell County; George E. Prince, Special Judge.

Action by L. F. Bonner against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

The sixth exception is as follows: "Sixth. In that his honor erred in refusing to strike out, after due notice and before answering, the following words in the complaint, to wit: 'The plaintiff, L. F. Bonner, was grieved, disappointed, and distressed in mind, and caused to suffer from great mental anguish, to his damage $1,995.' The error being that said words were irrelevant to the cause of action for actual damages set up in the complaint, and the damages alleged were of a character not allowed by law."

Evans & Finley, for appellant. Izlar Bros. & Atkinson, for respondent.

POPE, C. J. The plaintiff sought to recover a judgment for $1,995 from the defendant because he alleged that it failed to deliver a telegram announcing the serious sickness of plaintiff's sister, and desire for his presence on the Atlantic Coast Line Railroad. The defendant denied any liability, alleging that the dispatch was received after office hours, which fact was well known to the sender, but the message was sent during the office hours the next morning. The cause came on for trial before Special Judge George E. Prince and a jury, who rendered a verdict in favor of the plaintiff for $500. After entry of judgment thereon, defendant has appealed, and in his grounds of appeal he insists:

"First. Because the circuit judge erred in ordering the case to trial over the objection of defendant's counsel; the error being that a motion affecting the merits of the case, to wit, to strike out certain portions of the complaint, after due notice, having been made and overruled, and due notice of appeal from said order having been served upon plaintiff's counsel, the court was without jurisdiction; the notice of appeal in such cases acting as a supersedeas." Since the passage of

the act of 1898, it seems that a plaintiff may state in his complaint for damages one or more causes of action, and that he is entitled to be heard thereunder, no matter how such causes of action are jumbled. In the case at bar the plaintiff has two causes of action—one for actual damages, and the other for punitive. The defendant has sought by his motion to expunge from the record so much of the allegations of the plaintiff as referred to the actions for punitive damages. It is very certain that striking from the complaint the language covered by the motion would not defeat plaintiff's right of action. This court, in the case of Proctor v. Railroad Company, 64 S. C. 491, 42 S. E. 427, held that the statute of 1898 permits the jumbling together in one statement of all acts of negligence and other wrongs. To the same effect is the judgment of this court in the case of Lynch v. Spartan Mills, 66 S. C. 16, 44 S. E. 93. We do not think there was error in the circuit judge's refusing to stop the trial of the cause, in view of the notice of appeal referred to.

"Second. Because the circuit judge erred in refusing to charge without modification the following request to charge on the part of the defendant, to wit: 'Telegraph messages are accepted for transmission subject to the reasonable rules and regulations of the telegraph company, and, if the evidence shows that the defendant company had reasonable office hours during which it delivered telegraph messages in the town of Blackville, it was not by law compelled to deliver messages outside of said hours.' The error being that the modification was not a sound proposition of law, in that it imposed upon the company the duty of making a reasonable effort to deliver a telegram received after office hours, thereby destroying the effect of defendant's request to charge. The following is the modification: 'I charge you that, with the modification I made—that if the defendant company kept its office open and made it the duty of its agents to receive messages, and the message, on its face, shows it was an urgent one, the company had the duty imposed upon it by law to make such effort to deliver it as would be reasonable in the circumstances. If it had been delivered in office hours, the duty would be to have messenger boys there to take it and deliver it. After reasonable office hours, it is for you to say—you have heard the testimony—what it would be reasonable for the agent to have done in those circumstances, and whether or not he did what was reasonable. If he did what was reasonable, the defendant company is not liable, and there is not as high a duty to deliver the message received out of office hours as it is to deliver a message received within office hours. I mean, the degree of diligence required of the defendant company in the delivery of messages received out of office hours is not as great as that required to deliver messages received within office hours.'" We think the request made by the defendant was a reasonable one, and correctly stated the law. We do not, therefore, sustain the modification made by the circuit judge. In 27 A. & E. Ency. of Law, at page 1037, it is said: "Like other corporations or individuals engaged in a public business, a telegraph company has the right to provide rules and regulations, with which all persons desiring to engage its services must comply." Hewlett v. Western Union Telegraph Company (C. C.) 28 Fed. 181; True v. International American Telegraph Company, 60 Me. 9, 11 Am. Rep. 156; and other cases cited in note 1. "This right, however, is subject to the limitation that the regulations must be reasonable, and may not operate to relieve the company of any obligation imposed by law or public policy, and they must be reasonably applied under the special circumstances of any particular cases. The company has the right to provide reasonable regulations as to the hours during which its office shall be open for the transmission and delivery of messages. The reasonableness of the regulations with respect to any particular office must depend largely upon the character of the locality of that office, and is therefore a mixed question of law and fact. It is not necessary that all offices shall have the same hours. The practical effect of a contrary rule would be to destroy the right of regulations." Now, in the case at bar the only testimony offered was that the hours from 8 a. m. to 8 p. m. were those adopted both at the office of the sender and also that of the sendee. There was no testimony to the contrary. It was virtually admitted that such a regulation was in existence, and that it was reasonable; hence we say that the request should have been granted as made, and that the circuit judge was in error in his proposed modification. This ground of appeal is sustained.

"Third. Because the circuit judge erred in refusing to charge without modification the fifth request to charge of defendant, as follows: 'If the jury find that the message was promptly transmitted from Ellenton to Blackville, and arrived at Blackville after the regular and reasonable hours at that place, and that the message was delivered with due diligence after the opening hour of said office, then they must find for the defendant.' The error being that said request properly stated the duty and liabilities of the company, and the modification destroyed its effect, and imposed upon the defendant a duty not required by law, to wit, 'I charge you that, with the same modification made on the other. If, by the use of diligence in the circumstances, it could have been delivered that night, why, he ought to have delivered it. It is not for me to say just how that could have been done, but, if the circumstances of the duties devolved upon the agent at that time, it could have been done with the use of due diligence, why, then, it ought to have been done. Remember, I say they would not be required

to exercise the same degree of diligence in delivering it that would have been required if it had been received in office hours.'" We hold that if the company could be protected from failure to deliver a message except in office hours, which was received by the defendant after its office hours, and such hours were reasonable, as they were established to be in this case by the only testimony offered, it would not be proper to put other conditions upon the defendant company; and, inasmuch as the charge of the circuit judge here complained of sought to place other restrictions, we hold that he was in error. This exception is sustained.

"Fourth. Because the circuit judge erred in refusing to charge without modification the sixth request of defendant, to wit, 'that the occasional delivery of messages after office hours does not have the effect of abrogating the established reasonable office hours of the defendant, or of making it obligatory on them at other times to deliver messages outside of office hours.' The error being that the request properly stated the law, and the modification nullified the request, and imposed an additional duty upon the defendant than that required by law, to wit, 'I charge you that, except those they can deliver by the use of such diligence as would be reasonable in the circumstances.'" We hold that the request of the defendant was proper, and should not have been modified as attempted by the circuit judge. As stated in 27 A. & E. Ency. of Law, p. 1038: "It is within the apparent scope of the agent's authority to extend the hours fixed for his office, particularly where the notice of the established hours is not brought home to the person. * * * If the hours established by an office are reasonable, the company is under no duty to transmit messages except during such hours, and a message offered for transmission after the close of such hours at the office of destination may be transmitted within a reasonable time after the office is opened next morning. The failure of the agent to observe the office hours, when habitual, may be shown in evidence as indicating that no rule on the subject prevails or was enforced; but proof merely of the occasional transmission or delivery after office hours will not be sufficient to establish a waiver of the regulations." Western Union Telegraph Company v. Crider, 107 Ky. 600, 54 S. W. 963; Western Union Telegraph Company v. McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592. We think the exception should be sustained.

"Fifth. Because the circuit judge erred in charging the jury that, 'if they found that the message was received at Blackville after reasonable office hours, that nevertheless the defendant was under legal obligations to use reasonable diligence, considering all the circumstances, to deliver the message before the opening hour of the office, and that the degree of diligence was dependent upon the apparent importance of the message.' The error being that it imposed a duty upon the defendant company not required by law." This court holds that the circuit judge was in error in this charge. This exception is sustained.

The sixth exception has already been considered, and is not sustained.

"Seventh. Because his honor erred in refusing to grant a new trial. The error being (a) that there was no evidence to support the verdict, beyond the nominal amount alleged in the complaint; (b) for the reason stated in the first exception; (c) because the jury did not properly or legally express in writing their verdict; (d) because, admitting all the evidence in the case to be true, the defendant was not legally liable for the claim of the plaintiff, and the verdict should have been for the defendant." Inasmuch as our findings on the grounds of appeal 2, 3, 4, and 5 necessitate a reversal of the judgment and a new trial, we prefer not to pass upon the facts here referred to in the seventh ground of appeal.

It is the judgment of this court that the judgment of the circuit court be reversed, and the action be recommitted to the circuit court for the purpose of a new trial in accordance with the principles herein announced.

JONES, J. I concur in the result. I assent to the main proposition that a telegraph company, in the conduct of its business, may make regulations not opposed to law or public policy, and which are reasonable. This, of course, includes the power to establish reasonable office hours. From which it follows that it is not the duty of a telegraph company to receive, transmit, or deliver a message out of reasonable office hours, in the absence of circumstances showing an agreement to the contrary or showing a waiver of the regulation.

WOODS, J., concurs in the main opinion and that of JONES, J. GARY, A. J., did not sit in this case, because of illness.

(71 S. C. 386)

HARRISON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. April 14, 1905.)

1. TELEGRAM — FAILURE TO DELIVER — COMPLAINT.

In an action for failure to deliver a telegram announcing a death and burial, plaintiff need not allege that, if the message had been delivered in time, he would have attended the funeral.

2. SAME—CONTRACT—EVIDENCE.

It is some evidence of a contract to deliver a telegram that it was delivered to the company and transmitted to the office designated.

3. SAME—RIGHT OF ACTION.

An action for mental suffering caused by failure to deliver a telegram in South Carolina,

sent from Virginia, is ex delicto, and is maintainable in South Carolina, though the doctrine as to mental suffering does not pertain in Virginia.

4. SAME—DILIGENCE IN DELIVERY.

Where a telegram is received outside of reasonable office hours by one not the operator, and not connected with the company, who chanced to be in the office, and committed to writing, and left on the operator's desk, and delivered immediately after opening the office on the next day, due diligence is shown.

Appeal from Common Pleas Circuit Court of Aiken County; Gary, Judge.

Action by P. B. Harrison against the Western Union Telegraph Company. From judgment for plaintiff, defendant appeals. Reversed.

Wm. H. Barrett, J. Wm. Thurmond, and Evans & Finley, for appellant. Sheppard Bros. and S. McG. Simpkins, for respondent.

GARY, A. J. This is an action for damages by reason of the failure on the part of the defendant to deliver the following telegram:

"Columbia, Va., 18. P. B. Harrison, Johnston, S. C.: Father died to-day, two-thirty. Funeral Monday eleven. Kate Harrison."

The defendant denied all except the formal allegations of the complaint, and set up the following defense:

"This defendant alleges, on information and belief, that the telegram referred to in the complaint was transmitted to and received at Johnston, S. C., at 8:10 o'clock p. m. on April 18, 1903, after the said telegraph office at Johnston, S. C., had been closed for the day, in accordance with the hours fixed for its being closed by the rules and regulations of this defendant. The hour fixed for the closing of the said telegraph office at Johnston, S. C., was 8 o'clock p. m. on week days, which was a reasonable hour. On Sundays the hours fixed for opening the office were from 9 to 10 o'clock a. m., and from 8 to 7 o'clock p. m., which also were reasonable. At the time of the receipt of said telegram, on the evening of April 18, 1903, the said office had been closed in accordance with the rules and regulations of this defendant. One A. E. Norris, who was not at the time employed in any way by this defendant, nor was its agent or officer, nor authorized to act for it, but who was familiar with telegraphing, chanced to be in the telegraph office at Johnston, S. C., after 8 o'clock p. m. on the said April 18, 1903, and, hearing Augusta calling for said office, took the message, and left it on the desk of the operator. The operator in charge of said office for this defendant had left the office at 8 o'clock on the evening of April 18, 1903, and did not return to the office until 9 o'clock a. m., on April 19, 1903. Promptly after entering said office, and seeing said telegram, he delivered the same to the plaintiff at 9:15 o'clock a. m. It is thus shown that not only was this defendant not guilty of any willfulness, wantonness, recklessness, or intentional negligence or wrong, but was free from negligence of any kind whatsoever, and said telegram was transmitted and delivered with all proper diligence and care in the premises." It also set up as a defense that the plaintiff's failure to attend the funeral was due to his own negligence. It likewise set up as a defense that the contract is governed by the laws of Virginia, and that under its laws the damages alleged in the complaint are not recoverable.

The jury rendered a verdict in favor of the plaintiff and the defendant appealed upon numerous exceptions, which it will not be necessary to consider in detail.

The first question for consideration is whether his honor the presiding judge erred in overruling the demurrer to the complaint on the ground that it failed to state that the plaintiff would have attended the funeral if the message had been received in time. Whatever effect such fact might have in determining the amount of damages, it certainly formed no part of the plaintiff's cause of action.

The defendant also made a motion for a nonsuit on the grounds (1) that there was no evidence tending to prove the contract; (2) that the telegram being a Virginia contract, and damages for mental suffering not being recoverable in that state, there could be no recovery in South Carolina. In the first place, there were facts and circumstances similar to those in the case of Hellams v. Tel. Co., 70 S. C. 83, 49 S. E. 12, tending to prove the contract. And in the second place, the action is ex delicto, and not ex contractu. Hellams v. Tel. Co., supra.

The next question relates to the charge of the presiding judge. After charging the jury that the defendant had the right to make reasonable regulations for receiving and delivering messages, he also charged as follows: "Now, who received this telegram? is a question of fact for you to consider. And I charge you, in that connection, if you should conclude that the message was received at the office of the defendant company, at an hour after the office had been closed for business, by one not in the employ and not an agent of the company, and such party failed to promptly deliver said message upon receipt of same, the company would not be liable for the failure of such individual, unless you should find that it was negligence on the part of the company in permitting such person to have access to the office and wires." There are also other portions of the charge indicating that the defendant would be liable if A. E. Norris failed to deliver the message promptly, even during office hours, provided the defendant was guilty of negligence in allowing him access to its office and wires. The reasonableness of the office hours does not seem to have been in dispute. The fact that the message was received, reduced to writing, and left on the operator's desk by Norris did not delay the delivery of the telegram after the office hours next morning, and

there was no testimony tending to show that the plaintiff suffered injury by his conduct, unless the law required that the message should have been delivered after office hours. We are then confronted with the question whether any duty rested upon the defendant to deliver the telegram after its office hours. In 27 Enc. of Law, 1038, the rule is thus stated: "If the hours established for an office are reasonable, the company is under no duty to transmit messages, except during such hours, and a message offered for transmission after the close of such hours at the office of destination may be transmitted within a reasonable time after the office is open next morning. Similarly, where a message is transmitted to the receiving office after its regular hours, the company is not guilty of negligence, in the absence of a special undertaking, in deferring delivery until the next morning." This principle has been recognized in the case of Bonner v. Tel. Co., 51 S. E. 117, which has just been filed, but with the limitation that it is inapplicable when there are facts from which an agreement to the contrary may be inferred, or even when there is a waiver of the regulation. There are no facts in this case, as in Dowdy v. Tel. Co., 124 N. C. 522, 32 S. E. 802, showing that the office was kept open for the use of the public after office hours. The rulings of the presiding judge were not in harmony with the principles hereinbefore stated.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded to that court for a new trial

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(71 S. C. 340)

GADSDEN v. CATAWBA WATER POWER CO.

(Supreme Court of South Carolina. April 10, 1905.)

1. INJURY TO EMPLOYÉ—ACTION—COMPLAINT.
An allegation in a complaint stating the reasons why a defendant was indifferent and careless was properly stricken out as irrelevant.

2. SAME.
Defendant cannot complain of allegations as to facts in aggravation of damages.

3. SAME—MOTION TO STRIKE OUT.
A motion to strike out allegations as irrelevant may be made on the pleadings.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1156-1162.]

4. SAME—AMENDMENT—ORDER.
An order requiring plaintiff to amend his complaint, and extending the time for defendant to answer, is within the discretion of the court, and when five days are given for the service of each the discretion is not abused.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 601.]

Appeal from Common Pleas Circuit Court of York County; Gage, Judge.

Action by Isaiah Gadsden, minor, by his guardian, against the Catawba Water Power Company. Judgment for defendant, and both parties appeal. Affirmed.

The following are the plaintiff's exceptions:

"(1) In holding that the said matters ought to be stricken out as irrelevant, and, so ordered, are irrelevant and material, whereas they are plainly issuable, material, and affect the amount demandable as damages.

"(2) In not holding that there was an absence of proof that the defendant was aggrieved or injured by the allegation claimed to be irrelevant, when such injury could not be inferred from the complaint, and in the absence of any affidavit or evidence whatever of such injury otherwise shown.

"(3) In not holding that, inasmuch as allegations for recovery of damages arising from willfulness and wantonness were in said complaint, that such so-called irrelevant matter was clearly admissible, as bearing on the quantity of damages to be recovered and the ability of the defendant to pay damages, and therefore relevant and material to be stated in the complaint.

"(4) In not holding that inasmuch as the notice of the motion did not allege that the defendant was aggrieved by such matter, and inasmuch as there was no other paper served making any such claim, the judge had no authority, under section 181 of the Code of Civil Procedure of 1902, to grant such order, and the judge was without authority to proceed further in the hearing of such motion.

"(5) In holding that the allegations of the complaint show injury to the defendant, when such allegations do not charge the defendant was aggrieved at all, but show a good, issuable cause of action against the defendant.

"(6) In not holding that he was bound by the act of the General Assembly prohibiting the splitting and dividing of causes of action in case of a corporation (i. e., Act of 1898, embodied in Code Civ. Proc. 1902, as section 186a), and in not holding that the court was without power to tell a suitor what he shall or shall not insert in his complaint, where such stated complaint contains issuable, material, and relevant allegations in a cause of action, and has violated no rule of practice, and in not holding that such suitor had a right to go to a jury on his whole complaint, and the issues made by the pleadings, without the elimination of an element showing liability to exemplary damages.

"(7) In giving the defendant time to answer the complaint after five days from the time mentioned in his order, when there was no motion to extend the time for answering, and when the time to answer had not expired at the time of motion noticed, order signed or filed.

"(8) In practically saying by his order that the defendant need not serve his answer within the time required by section 164 of the Code of Civil Procedure of 1902, when an extension was not asked.

"(9) That such order directly nullified the

practice prohibiting the courts from compelling a suitor to strike out a part of his complaint demanding exemplary damages.

"(10) That his honor erred in requiring the plaintiff to serve an amended complaint within five days after the filing of his order, when the complaint already served contained valid and issuable allegations demanding relief."

The defendant appeals on the following grounds:

"(1) Because his honor erred in holding that the allegation in the fourth paragraph of the complaint herein, to the effect 'that injuries were frequently attending employés in its service,' was not irrelevant.

"(2) Because his honor erred in holding that that complaint charged willful action by defendant, and plaintiff had the right to allege and prove that defendant had notice of frequent injuries to other employés, and was bound to be on the lookout for accidents.

"(3) Because his honor erred in not holding that the following allegation in paragraph 4 of the complaint herein was irrelevant, to wit, 'Although injuries were frequently attending employés in its service,' and in failing to order that the same be stricken from the complaint."

Buchanan & Hannahan, for plaintiff. A. G. Brice and W. B. Wilson, for defendant.

GARY, A. J. In this case there are two appeals, but by consent they were heard together. The plaintiff appealed because his honor the circuit judge struck out certain allegations of the complaint on the ground that they were irrelevant and redundant, and the defendant appealed because he refused to strike out others.

The plaintiff alleges that he suffered personal injuries through the willfulness, recklessness, and negligence of the defendant. The motion was to strike out the allegations which we have italicized in the fourth paragraph of the complaint. That paragraph is as follows:

"That there was not on said train sufficient lights, nor a sufficient number of men safely to discharge the work and properly to operate it, nor did the defendant select proper co-employés of plaintiff. The engineer was reckless, intemperate, and incompetent. The engine was defective, out of repair, and dangerous. *That the defendant carried insurance to indemnify itself against liabilities for injuries to its employés, making it indifferent and careless of the injuries to the plaintiff.* That the defendant failed and omitted to instruct the plaintiff in the work to be performed, and of the danger of the service, *although injuries were frequently attending employés in the service;* and through these violations of duty, causing or contributing to the above injury, the defendant willfully, recklessly, and negligently damaged and injured the plaintiff to the amount of $20,000."

The circuit judge made the following order: "Motion to strike out irrelevant matter in the complaint. The allegations are inversely stated: (1) That defendant was careless and indifferent to plaintiff because it carried indemnity insurance; (2) that injuries were frequently attending employés in its service. The allegation that defendant was careless and indifferent is not irrelevant, but the reason assigned therefor is. It would be irrelevant for the plaintiff to allege that defendant failed to carry such insurance for the benefit of its employés, and it is as well irrelevant to charge that such insurance was carried. The other allegation is not irrelevant. The complaint charges willful action of defendant. To prove that, plaintiff may show that defendant had notice of frequent injuries, and was therefore bound to be on the lookout for accidents. If proper to prove, it may be allowed. I am of the opinion that the irrelevancy pointed out appears from the pleadings, and no proof that it aggrieves the defendant is required, beyond that furnished by the pleadings. The motion is granted so far as the words, 'The defendant carried insurance to indemnify itself against liabilities for injuries,' are concerned. Further than that, it is denied. Let plaintiff so amend the complaint within five days of the filing of this order, and let the defendant have five days thereafter to answer."

The exceptions will be set out in the report of the case.

The first question for consideration is whether the circuit judge erred in ordering the words, "The defendant carried insurance to indemnify itself against liabilities for injuries," to be struck out. Section 181 of the Code of Civil Procedure of 1902 provides that, "if irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby." Mr. Pomeroy, in section 551 of his book entitled "Code Remedies," says, "An allegation is irrelevant when the issue formed by its denial can have no connection with nor effect upon the cause of action." As said by the circuit judge, the allegation struck out only stated the reasons why the defendant was indifferent and careless. It in no sense constituted an element of damage, and could have no connection with, nor effect upon, the cause of action. At most, the allegation was merely evidentiary, and properly struck out.

The next question for consideration is whether there was error in refusing to strike out the words "although injuries were frequently attending the employés in the service." This allegation tended to show notice on the part of the defendant that the work was dangerous, and, if it failed to exercise due care after knowledge of this fact, it might be considered by the jury in aggravation of damages. It cannot be said that it has no connection with, nor effect upon, the

cause of action. The authorities are not in harmony as to the necessity of alleging facts in aggravation of damages, as will be seen by the following quotation from 5 Pl. & Pr. 705, and notes, to wit: "As a general rule, it is not necessary to the plaintiff's right of recovery that the particular circumstances of aggravation should be set out in the declaration, although such matters are not infrequently alleged, and in some cases have been required in order to warrant a recovery." Facts in aggravation of damages partake not only of an evidentiary, but of an elementary, nature. Their characteristics as an element of damages make it proper to allege them in the complaint. As they are likewise evidentiary, it is not essential that they should be alleged, but they may nevertheless be introduced as testimony to support other allegations in a proper case. The only effect of alleging them is to give notice to the adverse party that they will be relied upon, and he certainly has no just ground of complaint that he is apprised of this fact. The circuit judge therefore properly refused to strike out said allegations.

It is also assigned as error that the circuit judge did not have authority, under section 181 of the Code of Civil Procedure of 1902, to grant the order, inasmuch as the notice of motion did not allege that the defendant was aggrieved by said allegations. It does not appear that this was urged as an objection against the hearing of the motion. But waiving this fact, this court is satisfied that the ruling was correct.

Other assignments of error are because the circuit judge required the plaintiff to amend his complaint, and in allowing defendant further time to answer. These matters were within the discretion of the circuit judge, and we see no reason to reverse his order in these respects.

It is the judgment of this court that the order of the circuit court be affirmed.

(71 S. C. 346)

WERBER v. CAIN et al.

(Supreme Court of South Carolina. April 10, 1905.)

1. GUARDIAN—RELEASE OF MORTGAGE.

A release by a guardian, "The within mortgage is hereby released and discharged, and the clerk of the court is authorized to satisfy the same of record," indorsed on the record of the mortgage, is sufficient to release the lien of the mortgage in favor of the subsequent mortgagee, though the debt had not in fact been paid, where there was no evidence of fraud, or notice that the mortgage had not been paid.

2. SAME—SALE OF LAND—TITLE OF PURCHASER.

A guardian took a conveyance to himself, as an individual, of land on which he held a mortgage as guardian, leaving the mortgage unsatisfied, in order to protect the land against subsequent incumbrances, and sold a portion of the land and satisfied the mortgage as to the part sold, and applied most of the purchase money to the mortgage debt and a small portion to the settlement of a junior mortgage. *Held*, that the purchaser took the land free from the lien of the guardian mortgage as against the wards.

Appeal from Common Pleas Circuit Court of Sumter County; Watts, Judge.

Action by Catherine M. Werber against W. O. Cain and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

C. L. Cuttino and Cooper & Fraser, for appellants W. M. and S. R. Cain, Cassie E. George, and Helen E. Ramsey. Thomas & Gibbes, for appellant Annie May Cain. Lee & Moise, for respondent Werber. I. C. Strauss, for other respondents.

JONES, J. On January 28, 1887, Emma F. Mellett executed her bond and mortgage upon 403 acres of land in Sumter county to W. O. Cain, as guardian of the children of his brother, R. M. Cain, deceased, to secure the sum of $3,000. In December, 1892, Emma F. Mellett applied to plaintiff, then Catherine E. Moses, now Werber, through her brother, H. C. Moses, for a loan of $3,000, which loan the plaintiff was willing to make upon security of a first mortgage upon said land. Upon the importunity of Mrs. Mellett, who was his sister, and in financial distress, W. O. Cain, the guardian, indorsed upon the mortgage of 1887 the following: "The within mortgage is hereby released and discharged, and the clerk of the court is authorized to satisfy the same of record. Dated December 26th, 1892. (Signed) W. O. Cain, guardian;" and on December 29, 1892, this indorsement was entered by the register of mesne conveyance upon the record of the mortgage, with the statement that said indorsement appeared upon the original mortgage. The mortgage thus indorsed was exhibited to H. C. Moses, agent for plaintiff, and he thereupon, relying upon the same as a valid discharge of the mortgage, delivered a check for $3,000 to the agent of Mrs. Mellett, and received the mortgage to plaintiff securing said loan, said mortgage being dated December 17, 1892, but not delivered until after the mortgage of 1887, with said indorsement thereon, was exhibted to him by the agent of Mrs. Mellett. On same day, the plaintiff executed a mortgage on same premises to W. O. Cain, as guardian, to secure $3,000, which mortgage, by its terms, was made second in order of priority to the mortgage to plaintiff. Mrs. Mellett paid nothing to the guardian, W. O. Cain, for the execution of the release of the mortgage of 1887, and the guardian accepted the mortgage of 1892 as junior to plaintiff's mortgage, in order to aid his sister to secure said loan from plaintiff, at the same time he testifies that he believed the land was ample security for both mortgages. Neither the plaintiff nor any one acting for her in the transaction knew anything as to the transaction between Mrs. Mellett and W. O. Cain, guardian, except what was inferable from the terms of the indorsement placed by W. O. Cain upon mortgage of 1887. The

plaintiff is now seeking to foreclose her mortgage for balance due thereon, and the first and main question which arises upon this appeal is whether, upon the facts stated, the mortgage of 1887 must still be regarded as a subsisting prior lien in behalf of the wards of the said guardian, notwithstanding the said attempted release by the guardian, and this, of course, depends upon the force and effect to be given the terms of said release with respect to plaintiff claiming to be an incumbrancer for valuable consideration without notice.

The general rule is that "a guardian, as the officer of the court of equity, is charged with the preservation of all the rights and interests of the ward. He cannot, however, generally change the nature or diminish the capital of the estate, but, with this exception, he is authorized to do any act for the infant which a prudent man in the management of his own business would do." Capehart v. Huey, 1 Hill, Eq. 409; Long v. Cason, 4 Rich. Eq. 66. It is clearly within the apparent authority of the guardian to execute a discharge and satisfaction of a mortgage to him as such, and cause the same to be entered of record, as it is his duty to collect and give acquittance for debts due him as guardian. There being no specific form of release of a mortgage prescribed by statute, we agree with the circuit court that the release in this case is sufficient to work a discharge of the mortgage in favor of a stranger dealing with a party on the faith of it. It is contended that the terms of the release give notice that payment has not been made, and therefore that the release was in breach of the guardian's duty, but we do not take that view. In the absence of any evidence of fraud, or collusion, or knowledge affecting plaintiff with notice that the mortgage had not in fact been paid, plaintiff had a right to presume that the guardian was not acting in conflict with his duty. When a mortgagee indorses upon a mortgage that it has been released and discharged, and the clerk is authorized to enter satisfaction on the record, it is at least presumptive or prima facie evidence that the mortgage debt has been paid, so far as the one executing the release is concerned. So that there is nothing in the form of the release that should have put the plaintiff upon inquiry as to whether the mortgage had in fact been paid, or to suggest a breach of the guardian's trust. This case is distinguishable from Lynch v. Hancock, 14 S. C. 85. In that case, of those claiming the right of subsequent purchasers for valuable consideration without notice, Hancock had purchased before the attempted release of the mortgage, and Rhett had made his contract for purchase from Hancock before the indorsement was placed upon the mortgage. Their contracts, therefore, had in no wise been influenced by the subsequent attempted release of the mortgage lien. Arthur and Johnson, who made a contract to purchase from Rhett after the attempted release of the mortgage, knew that Rhett had no title, and no right to demand title until he had complied with his agreement with Hancock, which he had never done. They, therefore, could not, by mere payment of the purchase money to Rhett, who had no title, put themselves in position of purchasers for valuable consideration without notice, for they had acquired nothing more than an equity, and their equity was subordinate to a prior equity of Muller or Wadlington, who had acquired rights as assignee under the mortgage before its attempted release by Fair, who had no authority to release the mortgage beyond his own interest therein. This case falls within the principles announced in Wheeler v. Alderman, 34 S. C. 534, 13 S. E. 673, 27 Am. St. Rep. 842, and City Council of Charleston v. Ryan, 22 S. C. 339, 53 Am. Rep. 713.

The next question relates to the rights of defendants Jane Rose and David Nathaniel, claiming to be subsequent purchasers for valuable consideration without notice. On January 5, 1895, Emma F. Mellett executed a deed, with general warranty, conveying said premises to W. O. Cain individually, in which deed it was stipulated that the mortgage by Mrs. Mellett to W. O. Cain, as guardian, should remain open to protect against subsequent incumbrance. On November 29, 1902, W. O. Cain executed a deed, with general warranty, conveying 95 acres of said premises to Jane Rose and David Nathaniel, upon the payment of $1,500 as consideration. Of this consideration, $1,423.85 was applied to the mortgage previously mentioned, executed by Mrs. Mellett to W. O. Cain, as guardian, in 1892; and W. O. Cain, on December 16, 1902, executed a release of his mortgage lien on said 95 acres. The remainder of the consideration paid by defendants Rose and Nathaniel, $76.15, was applied to the compromise and discharge of a junior mortgage on said premises held by J. Ryttenberg & Son, amounting to seven or eight hundred dollars, with a view to clearing the land of this incumbrance, which, as long as it remained unadjusted, would be an obstacle to a voluntary sale of the land. In view of what has already been said with reference to the mortgage of 1887, and in view of the fact that practically the entire purchase price was applied towards the extinguishment of the mortgage of Emma F. Mellett to W. O. Cain, as guardian, there is nothing to prevent the Ryttenbergs from occupying the position of purchasers for valuable consideration without notice. With respect to the application of the comparatively small sum of about $75 to the extinguishment of the Ryttenberg mortgage, there is nothing in the record which should have induced Rose and Nathaniel to suspect this was not to the interest of the wards; on the contrary, their guardian was thereby enabled

to collect the sum of $1,425.85 on the indebtedness due them, and this transaction would naturally tend to prevent any possible litigation or expense in clearing the premises of the Ryttenberg incumbrance.

The decree of the circuit court was very carefully considered, and satisfactorily disposed of the issues involved in this case, and we might well have contented ourselves with merely affirming the same without comment. The exceptions are all controlled by the foregoing conclusions, and must therefore be overruled.

The judgment of the circuit court is affirmed.

GARY, A. J., did not sit in this case because of illness.

(71 S. C. 256)

DARGAN v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES.

(Supreme Court of South Carolina. April 13, 1905.)

1. INSURANCE—PAYMENT OF PREMIUM—WAIVER.

Evidence *held* sufficient to justify inference of jury of waiver of conditions in application that the contract of insurance should not take effect until the first premium had been paid "during my good health."

2. SAME—ACTION—INSTRUCTIONS

Where the point in controversy in an action on a policy was whether the policy had been in fact issued, an instruction that the company admits that the insured applied for a policy, and that "they issued a policy, but never delivered it to him," is not erroneous, as the word "issue" was used in the sense of preparing and signing the policy, but did not include delivery.

Appeal from Common Pleas Circuit Court of Florence County; Watts, Judge.

Action by Ella C. Dargan against the Equitable Life Assurance Society of the United States. From judgment for plaintiff, defendant appeals. Affirmed.

J. P. K. Bryan, for appellant. Willcox & Willcox, for respondent.

JONES, J. The appeal in this case is from a verdict and judgment for plaintiff in an action on a policy of insurance on the life of Walter Dargan, payable to plaintiff, his wife, in the sum of $1,500. The exceptions allege error in the refusal of motion for nonsuit, in the refusal to direct a verdict, and in certain portions of the charge to the jury, all of which, except the fifth exception, to which reference will be made later, hinge upon the question whether there was any testimony tending to support plaintiff's action. The main issue raised by the answer was that no contract of insurance was ever delivered to Walter Dargan, that the application for insurance contained the following clause: "I hereby agree that this application and the policy hereby applied for, taken together, shall constitute the entire contract between the parties hereto; * * * that this contract shall not take effect until the first premium has been paid during my good health;" that Walter Dargan did not, while in good health, pay the first premium on said policy applied for, but soon after said application fell sick, and died on the 10th day of July, 1901, without having paid the first premium, and without a delivery to him of any policy by defendant.

The testimony was to the effect that on the 20th day of June, 1901, Walter Dargan, then in good health, made application in writing to the defendant company for a policy of insurance, which application contained the stipulation above quoted. The local agent of the defendant company, who took the application, was Mr. John J. Dargan, an uncle of Walter Dargan. The applicant passed the physician's examination, and the application was forwarded to defendant's home office on June 24, 1901. A policy, No. 1,054,307, was written and forwarded to the state agent, and received by him at Rock Hill, S. C., on July 2, 1901. It was forwarded to the local agent for delivery, and he on receipt of it, at once wrote to Walter Dargan that he had the policy and was ready to deliver it. The local agent testified that he did not mail the policy to Walter Dargan when he received it, because Walter Dargan told him to keep it when it came. We quote from the testimony of Mr. John J. Dargan: "Q. Did you fail to deliver the ordinary life policy, for which he had applied, immediately upon its receipt, for the reason that he had not paid the premium? A. No; that had nothing to do with it. I mean his failure to pay the premium was not standing in the way of my delivering it. Q. The failure to pay the premium did not cause you to hold up? A. I would have sent him the policy, as I had arranged with him to pay it myself, if necessary. Q. Isn't it a fact that the reason you held up this policy was that you wanted to see him, and persuade him to take the other policy? A. No, sir; I did not send it because he was sick. Q. But I mean when you first received it? A. No; he told me to keep it. He told me to keep the policy when it came." The testimony tended to show that when the local agent received the policy for delivery and notified Walter Dargan of that fact, Dargan was in good health. The testimony further was to the effect that Walter Dargan became sick on the 6th or 7th of July, 1901, and died on the 10th of July, 1901. While Walter Dargan was sick, George E. Dargan, on his behalf, applied to the local agent for the policy, and offered to pay the premium, but because of Walter Dargan's illness, the local agent declined to deliver up the policy or to receive the premium. Two days after the death of Walter Dargan, his father made tender of the premium, and demanded the policy, which was refused. The policy was returned to the home office as "not taken out," and was canceled. The

testimony further shows that when the application was made for the policy Walter Dargan was urged by John J. Dargan and W. H. Gibbes to close up the transaction by note or due-bill, so as to make the insurance binding from the date of the application, but he declined to do so, stating that he would make settlement later when the insurance arrived. We quote further from the testimony of John J. Dargan as follows: "Q. Isn't it true that Mr. Walter Dargan was taken sick before any one offered to pay the premium on his behalf? A. There never was a question about paying his premium. I kept offering that that would be arranged. When he applied for insurance, I told him to arrange the premium. Q. Had he not declined previously your offer? A. He did that day decline it. Q. No offer on your part to pay the premium for him or advance the premium had been accepted by Mr. Walter Dargan? A. That is right."

This court, no matter what view it may entertain as to the force and sufficiency of the testimony, is powerless to interfere with the action of the circuit court in refusing to direct a nonsuit or a verdict, if there be any testimony whatever tending to support the plaintiff's cause of action. The fact that the policy never went into the manual possession of Walter Dargan is not fatal. If John J. Dargan, the local agent, after receiving it for delivery, retained the custody of it for Walter Dargan by his request or direction, that was some evidence to go to the jury on the question of delivery. Young v. Insurance Co., 68 S. C. 391, 47 S. E. 681. Notwithstanding an express provision in a policy of insurance that the company shall not be liable on the policy until the premium be actually paid, a delivery of the policy, as a completed contract, under an express or implied agreement that a credit shall be given for the premium, is a waiver of the stipulation, and in such case the company is liable for a loss that may occur during the period of the credit. Farnum v. Phœnix Insurance Company, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 238; Boehen v. Williamsburgh City Insurance Co., 35 N. Y. 131, 90 Am. Dec. 787; Bodine v. Exchange Fire Insurance Co., 51 N. Y. 117, 10 Am. Rep. 566; Knickerbocker Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689. The reason for the rule is that a delivery of the policy, as a valid contract, is wholly inconsistent with the assertion of nonperformance of conditions precedent to defeat it. The same principle was enforced in Gandy v. Insurance Co., 52 S. C. 228, 29 S. E. 655. As insurance agents should not, and as a rule do not, deliver over policies without payment of the premiums unless they intend to give credit, the mere fact of a delivery without demand of the premium raises a presumption that credit is intended. The evidence tends to show that the defendant's agents were willing to extend credit to the insured, since at the time of the application they were willing to accept the duebill of the insured for a binding receipt, and, as already stated, the local agent, John J. Dargan, testified that the nonpayment of the premium had nothing to do with the fact that he did not mail the policy to the insured as soon as it was received from the home office, as he had arranged with the insured to pay the premium himself, if necessary. If, therefore, the agent of the defendant, after notifying the insured that he had the policy for delivery, received instructions from the insured to hold the policy for the insured, and so held the policy, there was evidence of a constructive delivery of the policy to the insured while in good health.

The appellant argues that it is not a legitimate inference from the evidence that the local agent held the policy for the insured, but that the true inference is that he held it for the company. That, however, was a question for the jury. If there was a constructive delivery upon credit for the premium at any moment before the insured became in bad health, the subsequent illness of the insured could not change the status or defeat a recovery upon the policy; certainly if the insured died within the period of the probable credit. As a delivery of the policy upon a credit for the premium has the same legal effect as a delivery upon cash payment of premium, even if there was a constructive delivery of the policy upon credit while the insured was in bad health, the case of Hollings v. Bankers' Union, 63 S. C. 192, 197, 41 S. E. 90, 92, is authority for right of recovery upon the policy. In that case Mr. Justice Gary, speaking for the court, said. "If the defendant knew at the time it accepted a premium of insurance and delivered the policy that E. B. Hollings was sick, there is but one inference of which this fact is susceptible, and that is that the defendant waived the right to insist upon this objection; otherwise it would be allowed to take advantage of its own wrong." As, in our view, there was some testimony tending to show a constructive delivery of the policy while the insured was in good health upon a credit for the premium, and that there was a tender of the premium within a few days thereafter in the lifetime of the insured, the case was properly submitted to the jury. This conclusion makes it also necessary to overrule all exceptions to the charge with reference to the delivery of the policy and the question of waiver, based upon the sole ground that the charge was erroneous, because there was no evidence whatever as to these matters.

The fifth exception requires but a brief reference thereto. The circuit judge charged the jury: "The company admits that Mr. Dargan did apply for a policy, and that they issued a policy, but that they never delivered it to him by reason of the fact that Mr. Dargan did not comply with the terms and

conditions in his application." The exception complains that the court charged that the policy was issued, whereas that was the very point in controversy. But it is manifest, from the language used, that the court did not use the word "issued" in its full technical sense, which includes delivery, but in the sense of preparing and signing the policy for delivery, because he further explained that the company claimed that the policy was never delivered.

The judgment of the circuit court is affirmed.

WOODS, J., did not sit in this case because disqualified.

(128 N. C. 555)

AMMONS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 26, 1905.)

1. RAILROADS — RULE REQUIRING PURCHASE OF TICKETS BEFORE ENTERING CARS.

A rule of a railroad company requiring passengers to procure tickets before entering the cars is reasonable.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1005, 1045, 1433.]

2. SAME—ENFORCEMENT OF RULE.

The rule may be enforced either by ejecting from the train a passenger without a ticket, regardless of a tender by him of the fare in money, or by requiring the payment of a larger fare on the train than that charged for a ticket.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1005, 1433.]

3. SAME — CONDITIONS PRECEDENT TO ENFORCEMENT — FACILITIES FOR PURCHASING TICKET.

In order to entitle the railroad to enforce the rule by ejection from the train or by exacting a larger fare, it must have afforded the passenger reasonable facilities to purchase the required ticket.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1433.]

4. SAME—FAILURE TO SUPPLY TICKETS FOR SALE—KNOWLEDGE OF CONDUCTOR—ACTION FOR WRONGFUL EXPULSION FROM TRAIN —SUBMISSION TO JURY—ERROR.

In an action against a railroad for wrongfully ejecting plaintiff from one of its trains, plaintiff testified that, on applying for a ticket, defendant's agent told him he was out of tickets, but to board the train, and he would tell the conductor not to charge plaintiff extra fare; defendant's rule requiring the payment of 25 cents extra when a passenger has no ticket. The conductor refused to accept plaintiff's statement that the agent had no tickets, and ejected him from the train on his refusal to pay extra fare. *Held*, that plaintiff's right of recovery did not depend on the conductor's knowledge or ignorance of the fact that the agent had no tickets for sale, and refusal to submit the case to the jury under proper instructions was error.

Appeal from Superior Court, Swain County; Long, Judge.

Action by W. R. Ammons against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. New trial.

The plaintiff alleges that he was unlawfully ejected from one of the defendant's trains, and sues to recover damages for the wrong thus committed. At the close of the testimony, and after the plaintiff had requested certain instructions to be given to the jury, the court held that he could not recover in the action. The plaintiff thereupon submitted to a nonsuit, and appealed. It is necessary to state only the substance of his testimony, which is as follows: On June 20th the plaintiff went to Almond, a station on defendant's line, to buy a ticket to Noland, which is nine miles away. The defendant's agent told him he was out of tickets, but to get on the train, and he would tell the conductor not to charge extra fare. The agent said the ticket rate was 41 cents. The extra or train rate was 65 cents. The agent said the plaintiff would have to pay only 41 cents. He boarded the train, and the conductor asked him for his ticket. The plaintiff told him what the agent had said to him, and the conductor demanded 75 cents, and said that the agent did have tickets. He then told the plaintiff to pay 75 cents or get off. He pulled the bell cord, when the plaintiff said, "If you put me off, I will sue the company," and the conductor replied, "It would not make a durn bit of difference to me if you did." When the conductor called for the fare, the plaintiff offered him 50 cents, and added that he did not mind a rebate, but did not want to pay 75 cents. The conductor refused to take the 50 cents, and put the plaintiff off the train 400 yards from the station. It is a rule of the company to require the payment of 25 cents extra when a passenger has no ticket. There was evidence as to the damages, not necessary to be stated.

A. J. Franklin and F. C. Fisher, for appellant. Moore & Rollins and A. B. Andrews, Jr,. for appellee.

WALKER, J. (after stating the case). Assuming the plaintiff's testimony to be true, and giving him the benefit of all reasonable inferences therefrom—and this is the way it should be considered—we think the judge erred in his intimation of opinion against the plaintiff's right to recover. The law of the case, at least in the present development of the latter, and in the aspect of it now presented, seems to be well settled, and is thus stated by a learned and accurate text-writer: "It is undoubtedly competent for a railroad company, as a means of protection against imposition, and to facilitate the transaction of its business, to require passengers to procure tickets before entering the car; and where this requirement is duly made known, and reasonable opportunities are afforded for complying with it, it may be enforced either by expulsion from the train, regardless of a tender of the fare in money, or by requiring the payment of a larger fare upon the train than that for which the ticket might have been procured. A regulation or by-law of the carrier is not unreasonable which provides that when such tickets are not procured

before the commencement of the journey, and the carrier is therefore put to the inconvenience of collecting from the passenger his fare during its progress, the price of the carriage shall be more than would have been charged for the ticket, and that upon the refusal of the passenger to pay the higher fare, not extortionate in amount, he shall be ejected. And if adopted in good faith, and with a view to facilitate the business of the carrier, there can be certainly nothing unreasonable or unjust in such rule, especially in the case of railway carriers. But, as a condition precedent to the existence of this right of expulsion for the refusal to procure a ticket or to pay the higher fare, an opportunity, at least reasonable, and such as the statute requires where a statute exists, must have been afforded by the carrier to the passenger, not himself in fault, to provide himself with the required ticket. If, therefore, no office be kept or opened at the proper time, nor adequate facilities be provided for the purpose of supplying passengers with them, or if the office provided for the purpose be closed before the time fixed by law or by a rule of the carrier, and for either reason the passenger has been unable to obtain a ticket, the higher rate cannot be lawfully demanded. And if, without having afforded such proper facilities to the passenger, the carrier should exact from him the additional charge for carriage without a ticket, the former may sue for and recover the amount so paid above the established rate when a ticket is purchased; and if, upon his refusal to pay it, he be ejected, when he is ready and offers to pay his fare at such established rate, his expulsion will be illegal, and he may recover damages for the trespass." Hutchinson on Carriers (2d Ed.) § 570 et seq.; 5 Am. & Eng. Enc. of Law (2d Ed.) p. 595, and note 4. In his work on Carriers, at section 269, Fetter thus states the doctrine: "By the overwhelming weight of authority, the furnishing of proper facilities to enable a passenger to purchase a ticket is a prerequisite to the right to demand a train fare at a higher rate than the ticket fare; and, if such facilities are not furnished, a passenger who, without fault on his part, boards the train without such a ticket, will, on tender of the ticket fare, be entitled to all the rights and privileges that a ticket would afford him. If he is rightfully on the train without a ticket, it is his right to complete his journey by paying the ticket rate for his fare. So it has been held that the fact that the company agrees to refund the excess of train fare on presentation of the conductor's receipt or check at a regular station does not authorize the higher train charge, if no reasonable opportunity is given the passenger to purchase a ticket in the first instance. It cannot be justly said that it is reasonable to require the passenger to pay more than a regular rate on the train, even though a process is created by which he may at some future time get back the excess, unless the passenger has first had an opportunity to purchase a ticket at the station from which he starts." These principles are well sustained by the authorities cited in their support, and are in themselves most just and reasonable. They apply with peculiar force to the facts of this case.

The plaintiff's right of recovery cannot be made to depend upon the conductor's knowledge or ignorance of the fact that the agent had no tickets for sale to intended passengers. If he did not know it, and refused to accept and act upon the plaintiff's statement, no fault can be imputed to the plaintiff, and the defendant cannot escape liability, as the cause of action rests upon the fact that there was no opportunity afforded to purchase a ticket, and the plaintiff is not responsible, and cannot be made to suffer, for the conductor's ignorance of existing conditions. The defendant's station agent could easily have informed the conductor that his tickets had been exhausted, and actually promised the plaintiff to do so, so that in this case there was no excuse for a want of knowledge of the facts. It is sufficient to declare, in the light of the authorities and with the plaintiff's testimony before us, that he was entitled to have the case submitted to the jury under proper instructions from the court. Having so decided, we need not discuss the question of damages. The subject, though, has recently been considered by this court in the following cases: Holmes v. Railroad, 94 N. C. 318; Rose v. Railroad, 106 N. C. 168, 11 S. E. 526; Tomlinson v. Railroad, 107 N. C. 327, 12 S. E. 138; Allen v. Railroad, 119 N. C. 710, 25 S. E. 787; Remington v. Kirby, 120 N. C. 320, 26 S. E. 917. There was error in the ruling of the court that the plaintiff upon his own showing was not entitled to recover.

New trial.

(58 W. Va. 62)

WHEELING MOLD & FOUNDRY CO. v. WHEELING STEEL & IRON CO.

(Supreme Court of Appeals of West Virginia. May 27, 1905.)

1. SALE—BREACH OF CONTRACT—LIQUIDATED DAMAGES.

Under the contract sued on, the plaintiff was to manufacture and deliver to the defendant certain machinery at a time and place specified, at a price specified, and, in case of failure to complete and deliver the machinery at such time and place, $50 was to be deducted from the contract price for each day required to complete and deliver the machinery beyond the time specified. *Held*, that the $50 per day to be deducted for delay in the completion and delivery of the machinery is in the nature of liquidated damages, and not a penalty.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 161.]

2. SAME—DELAY—EXCUSE.

The plaintiff cannot excuse delay in the completion and delivery of said machinery beyond the time specified in such contract, and avoid the deduction of $50 per day from the contract price for such delay, by showing merely that it proceeded in good faith and with due diligence, with the use of all means in its power and at its command, to perform the contract.

3. SAME.

Under such contract the plaintiff was required to furnish sufficient means and ability to perform the contract on its part, according to its terms.

4. APPEAL — ADMISSION OF IMPROPER EVIDENCE.

A verdict of a jury will be set aside for the admission of improper evidence over objection where it is apparent that such evidence was misleading, and prejudicial to the party complaining.

(Syllabus by the Court.)

Error from Circuit Court, Ohio County.

Action by the Wheeling Mold & Foundry Company against the Wheeling Steel & Iron Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hubbard & Hubbard, for plaintiff in error. Henry M. Russell, for defendant in error.

COX, J. By a contract in writing bearing date the 16th day of September, 1901, entered into by and between the Wheeling Steel & Iron Company, designated therein as the "owner," and the Wheeling Mold & Foundry Company, designated therein as the "contractor," the latter company was to manufacture and deliver to the former company certain pipemill machinery. The contract recited that the contractor had full knowledge of the owner's requirements in regard to the machinery, and full knowledge that the building of the machinery was to be begun forthwith, and that it was necessary that it should be delivered at Benwood, W. Va., on or before noon of January 14, 1902. Among other things, the contract provided, in effect, that the contractor should not further engage its capacity so as to militate against the manufacture and delivery of the machinery at Benwood, W. Va., by noon of January 14, 1902; that neither party should be liable to the other in damages for delays due to wars, strikes, fires, or accidents beyond their control; that, in case of delay from any of said causes, a certificate for time lost should be required; that all drawings furnished the contractor should remain the property of the owner, and be returned to it on completion of the work; that the owner should furnish certain materials, including motors, to be used in and in connection with the manufacture of the machinery to be manufactured and delivered by the contractor; that all foundations should be prepared by the owner; that, in consideration of the faithful carrying out of said contract, together with all its various stipulations, and the delivery of the machinery at Benwood, W. Va., by noon of January 14, 1902, the owner should pay the contractor $58,526; that, if the machinery should be delivered before the date specified, $50 per day should be added to the contract price for each day of 24 hours that the machinery should be delivered before the date specified; that, in case of delay, $50 for each day of 24 hours required to complete and deliver the machinery beyond the time specified should be deducted from the contract price; that payment of 80 per cent. should be made on monthly estimates until such payments aggregated the sum of $46,820; that the remaining 20 per cent. should be payable 30 days after the complete erection and acceptance of the machinery. On the 15th day of April, 1903, this action of assumpsit was brought by the Wheeling Mold & Foundry Company against the Wheeling Steel & Iron Company. $46,825.03, having been paid or credited, the plaintiff claimed the residue of the contract price, and in addition the amount of certain "extras," not disputed by defendant. A trial by jury was had, resulting in a verdict for plaintiff for $12,298.93; being the residue of the contract price, without interest, and the amount of the extras not disputed. Defendant moved to set aside the verdict, which motion was overruled, and judgment was entered on the verdict, and defendant excepted, and was afterwards allowed a writ of error to the judgment.

The assignments of error by defendant are numerous. They may, however, be grouped under four heads: First, the rejection of defendant's notice of recoupment; second, the admission and rejection of evidence; third, the giving and refusing of instructions to the jury; fourth, the sufficiency of the evidence to support the verdict.

1. The rejection of defendant's notice of recoupment.

The notice of recoupment proceeded on the theory that defendant might recoup damages for delay in excess of the $50 per day provided by the contract. At the instance of defendant, and without objection, the court instructed the jury, in effect, that the con-

tract did not impose a penalty or forfeiture. The $50 per day for delay, to be deducted from the contract price, was in the nature of liquidated damages, and by the amount thereof, fixed by the contract, the defendant was bound in an action at law to recover from it the contract price. Welch v. McDonald, 85 Va. 500, 8 S. E. 711. See 19 Am. & Eng. Enc. Law, 422, 412, 413; Pettis v. Bloomer, 21 How. Prac. 317; Texas, etc., Ry. Co. v. Rust (C. C.) 19 Fed. 239; Kunkel v. Wherry, 189 Pa. 198, 42 Atl. 112, 69 Am. St. Rep. 802; Button Fastening Co. v. Breed, 163 Mass. 10, 39 N. E. 346; McPhee v. Wilson, 25 U. C. Q. B. 169; Smith v. Smith, 4 Wend. 468; Malone v. Philadelphia, 147 Pa. 416, 23 Atl. 628; Streeper v. William, 48 Pa. 450; Sedgwick on Damages (8th Ed.) §§ 403, 419; Crane v. Peer, 43 N. J. Eq. 553, 4 Atl. 72; 13 Cyc. 98. Defendant was not prejudiced by the rejection of its notice of recoupment.

2. The admission and rejection of evidence.

Defendant complains of certain general evidence admitted over its objection. This evidence was principally adduced from witness Blue, president of plaintiff company, and witness Long, plaintiff's engineer. This evidence was to the effect that plaintiff was diligent generally in the performance of its contract. The evidence consisted of many expressions by the witnesses for the plaintiff, such as the following: "We made as many castings as we could, and did as much machine work on them as we could. We did as much, I believe, as anybody could." "We went ahead with the work just as hard as we could." "We performed the contract to the best of our ability in regard to the way material came to us." "Why, it did everything in its power to carry out the contract; that is, in my opinion." "We completed the machine work with all possible speed." "We attempted to push the work as best possible." "No, sir; the company did everything in their power to expedite matters"—and the like. These conclusions or opinions were allowed to go to the jury. We will consider this general evidence in the light of instruction No. 3 given at the instance of the plaintiff, which is as follows: "If the jury find from the evidence that, after the making of the written agreement which has been introduced in evidence, the plans mentioned in the said agreement were changed, with the consent of both the plaintiff and the defendant; and if they further find that these changes made it impracticable for the work provided for in the said agreement to be completed within the time specified in the said agreement; and if they further find from the evidence that the plaintiff, the Wheeling Mold & Foundry Company, proceeded in good faith and with due diligence, and with the use of all means in its power and at its command, to proceed with and complete the work provided for in said agreement, and that any delays which may have taken place in the completion of the said work were not due to any neglect or default upon the part of the plaintiff—then the plaintiff is entitled to recover in this action the amount remaining due and unpaid of the contract price provided for in the said agreement, without any deduction therefrom by reason or on account of such delay in the completion of the said work." The clause of the instruction to which we direct special attention is substantially that if the plaintiff proceeded, in good faith and with due diligence, with the use of all means in its power and at its command, to complete the work provided for by the contract, the plaintiff was not liable for the delays occurring, but was entitled to the contract price, without deduction. The contract in question required plaintiff to deliver the machinery at or before noon on January 14, 1902—about four months from the date of the contract. The machinery was not delivered until about the 23d day of September, 1902—more than a year from the date of the contract. The agreement to deliver was on the part of the plaintiff. It was incumbent on it to show that it was excusable for the delay, and the court below, in effect, properly so instructed the jury by instructions Nos. 2 and 3 given at the instance of the defendant. The evidence tending to show good faith and diligence on the part of the plaintiff, or the conclusions or opinions of the witnesses that plaintiff acted diligently or in good faith, with the means at its command, in the performance of the contract, and instruction No. 3 given at the instance of the plaintiff, were, we think, erroneous and misleading. We do not think the instruction was cured by the clause therein "that any delays which may have taken place in the completion of the said work were not due to any neglect or default upon the part of the plaintiff." The question to be determined was whether or not the plaintiff was excusable for the delay. It was not excusable because it acted in good faith and with diligence, merely. The requirement from the plaintiff was not that it would act in good faith and with diligence, only, in performing the contract, but that it would absolutely complete and deliver the machinery at the time and place specified in the contract. The contract required the plaintiff to furnish the means and ability to perform. Plaintiff may have acted in good faith and with diligence with all the means in its power, and yet have lacked sufficient means or ability to perform the contract. The plaintiff was responsible for both means and ability to perform, and it was as much liable for delay occasioned by lack of them as it would have been for willful failure to perform. Jones v. Anderson, 82 Ala. 302, 2 South. 911. See, also, Lewis v. Atlas Mutual Life Ins. Co., 61 Mo.

534; Cochran v. Ry. Co., 131 Mo. 607, 33 S. W. 6; Shouse v. Neiswaanger, 18 Mo. App. 236; Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; U. S. v. Gleason, 175 U. S. 602, 20 Sup. Ct. 228, 44 L. Ed. 284; Cutter v. Powell, 2 Smith's Leading Cases, 1, and note; Story on Contracts, §§ 588, 1334; The Harriman, 9 Wall. 172, 19 L. Ed. 629, and cases there discussed; Lawson on Contracts, § 422; Parsons on Contracts, § 672, and note 1. The evidence complained of, and instruction No. 3 given at the instance of the plaintiff, tended to make plaintiff excusable for delay, provided it acted in good faith and with due diligence, with the means at its command. This was prejudicial to the defendant. This evidence should have been excluded, and instruction No. 3 given at the instance of the plaintiff should have been refused. It was proper for the plaintiff to prove that it was prevented from performing the contract, or that it was hindered or delayed in its performance, by the act of the defendant. It was proper for the plaintiff to prove any fact or facts which would, in law, excuse it for delay, but not facts, conclusions, or opinions which would not excuse it for delay.

Defendant complains of the admission of evidence tending to show that the machines contemplated by the contract were completed on September 18, 1902. It was proper to show this fact, as a step in the performance of the contract.

Defendant complains of the rejection of certain evidence which it claims tended to show the insufficiency of plaintiff's plant to perform the work contemplated by the contract. This evidence was sought to be adduced from witness Julian Kennedy, who was the engineer named in the contract, and who made the plans for defendant for said machinery. This witness, from his testimony, is probably an expert upon the question of plants engaged in the manufacture of machinery such as was contemplated by this contract. He was not asked as to his knowledge of this particular plant, nor did he testify as to his knowledge thereof, if he had any. He was simply asked to state the custom of well-recognized and well-organized plants generally as to certain matters. We think this evidence was clearly inadmissible and was properly excluded.

Defendant complains of the rejection of certain evidence tending to show that the plans and drawings were not returned by plaintiff to defendant as provided by the contract. Evidence tending to show that the plans and drawing were not returned was admitted. Its materiality will hereafter be adverted to in connection with one of the instructions asked for by defendant.

Defendant complains of the rejection of certain papers and documents comprising the contracts and orders for work, other than the contract sued on, which might have engaged plaintiff's plant during the period from the date of the contract sued on to the date of the completion and delivery of the machinery contemplated thereby, offered for the sole purpose of showing that such other contracts or orders contained no provision by which the price of the work contemplated thereby would be affected by the time of delivery, and no provision against taking work that would interfere with the carrying out of those contracts or orders. In our view, it was wholly immaterial in this case whether such contracts or orders contained such provisions or not. The requirement on the part of the plaintiff to deliver was not dependent upon its contractual duties to others. These papers and documents, being offered only for the purpose mentioned, were properly rejected.

3. The giving and refusing of instructions to the jury.

Three instructions were given at the instance of the plaintiff, six at the instance of the defendant, and eleven asked for by defendant were refused. Instructions Nos. 1 and 2 given at the instance of the plaintiff, in our judgment, correctly propounded the law. Instruction No. 3 given at the instance of the plaintiff, and heretofore referred to, was erroneous. The chief subject-matter of instructions Nos. 7, 10, and 11 asked for by defendant, and refused, was substantially included, and the law correctly propounded thereon, in instruction No. 4 given at the instance of the defendant. Instruction No. 8 asked for by defendant and refused was without evidence upon which to predicate it, so far as we can see from the record. It is not claimed that any delay was due to accident beyond the control of the plaintiff, and for which a certificate was required under the contract. Instruction No. 9 asked for by defendant and refused was to the effect that defendant was not chargeable with delay caused by the correction of errors in the machinery which might have been discovered in time to avoid delay if the plaintiff had made reasonably careful examinations of the plans and manufactured parts of the machines. This instruction appears to be proper, and should have been given. Instructions Nos. 12 and 13 asked for by defendant and refused were to the effect that defendant was not chargeable with any delay in the delivery of motors under the contract unless plaintiff needed such motors before they were delivered, and was unable to occupy the interval with other parts of the work. These instructions seem to us to be correct, and one or both of them should have been given. Instructions Nos. 14 and 15 asked for by the defendant and refused were properly refused, as they would have tended, at least in part, to place upon plaintiff a duty not required of it, but required of defendant, by the contract. Instructions Nos. 16 and 17 would, in effect, if given, have instructed the jury that the

sidered hereafter with the eleventh assignment.

Sixth. This assignment is, in effect, that the allegata and probata did not agree. The gravamen of the charge in the declaration was that the defendant committed an assault and battery upon the person of the plaintiff. It is claimed that there is a misstatement in the declaration of the purpose for which plaintiff was in the store of defendant at the time of the assault, when viewed in the light of the evidence, and that this constituted a variance. The purpose for which plaintiff was in defendant's store is not material to the charge in the declaration. The averment of purpose might be stricken therefrom and the declaration remain sufficient. We have carefully examined the case of Wilkinson v. Pensacola & Atlantic R. R. Co., 35 Fla. 82, 17 South. 71, relied upon by defendant, but we cannot concede that it goes to the extent claimed for it by defendant. We conceive the rule to be as laid down by Chitty's Pl.: If "the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage, and it need not be proved; nor will it vitiate, even on a special demurrer, it being a maxim that utile per inutile non vitiatur. As observed by Lord Mansfield, 'The distinction is between that which may be rejected as surplusage, which might be struck out on motion, and what cannot.' Where the declaration contains impertinent matter, foreign to the cause, and which the master on a reference to him would strike out (irrelevant covenants, for instance), that will be rejected by the court, and need not be proved. But if the very ground of the action be misstated, that will be fatal, for then the case declared on is different from that which is proved, and the plaintiff must recover secundum allegata et probata." 1 Chitty, Pl. (11th Am. Ed.) 229. "Mr. J. Holroyd said: 'If the plaintiff state, as a cause of action, more than is necessary for the gist of the action, the jury may find so much proved and so much not proved, and the court would be bound to pronounce judgment for the plaintiff upon that verdict, provided that the facts proved constituted a good cause of action.'" Id. 229. The matter complained of here is no part of the ground of action, and need not be proved as laid. Consequently, no material variance occurred.

"Seventh, because it is shown in the evidence that, at the time of the institution of this suit, the plaintiff was an unmarried female infant; that during the pendency of the suit she became an infant under coverture, and was, at the time of the trial, a married woman of full age; and the cause should therefore have abated or have been revived in the name of her husband." At common law the wife and husband must join in a suit for damages for an injury to the person of the wife, the husband being a necessary party. Failure to join him in the action seems to have been cause for abatement; but the rule is wholly changed in our practice and under our statute. The husband is no longer a necessary party; in fact, his existence or nonexistence is immaterial to the maintenance of the action. If he exists, failure to join him is no cause for abatement. Normile v. Wheeling Traction Company (decided by this court) 49 S. E. 1030.

The eighth assignment will hereafter be considered with the fifth and eleventh assignments.

Ninth, that it was error to permit witnesses Margaret and A. C. Stevens to testify as to complaints made by plaintiff as to her physical condition subsequent to the alleged assault, and as to noncomplaint prior thereto. These witnesses were the parents of the plaintiff, and were allowed to testify as to complaints by plaintiff after the injury, as exhibiting the natural symptoms and effects of the injury, and to the fact that she did not complain before the injury. The weight of authority seems to sustain the admissibility of this evidence in civil cases, within certain limitations. "The representations of a sick person of the nature, symptoms, and effects of the malady under which he is laboring at the time are received as original evidence." 1 Greenleaf, Ev. § 162b. In the case of Kuney v. Dutcher, 56 Mich. 308, 22 N. W. 866, it was held that, on the trial of an action for assault and battery committed three years before, members of plaintiff's family may give an account of his physical condition before the assault, of his sufferings then and since, and of his continued infirmities without apparent improvement. "Complaints and representations indicative of present pain, whether made before or after the suit, but as exhibiting the natural symptoms and effects of the injury, and whether made to a medical expert or other person, are admissible." Towle v. Blake, 48 N. H. 92. "It has frequently been held that exclamations of bodily or mental pain, and contemporaneous statements as to where the pain is, are admissible in evidence of the existence and locality of the pain. The declarations must be concerning the present condition, and the evidence must generally relate to such complaints and expressions as usually and naturally furnish testimony of the present existing physical condition." Elliott on Ev. §§ 523, 524. See, also, Wigmore on Ev. § 1718. "While a witness not an expert can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to the statement or narrative given by his patient in relation to his condition, symptoms, sensations, and feeling, both past and present. In both cases (physician and ordinary witness) these declarations are admitted from necessity, because in this way only can the bodily condition of the party * * *

be ascertained." Roosa v. Land Co., 132 Mass. 439.

Tenth, that it was error to refuse to permit the defendant to show that plaintiff had defendant arrested and taken before a justice on a charge of assault and battery growing out of this alleged assault, and that defendant was acquitted of the charge, etc., on the ground that these facts were part of the res gestæ; and that the court refused to permit the witness Lulu Fielder to answer the question, "Were you a witness on that trial?" After the alleged assault, it is claimed that plaintiff went before a justice and had defendant arrested for assault and battery, on which charge defendant was afterwards tried and acquitted. This record of acquittal defendant desired to introduce as part of the res gestæ. We do not think that this subsequent trial and acquittal can be considered as a part of the res gestæ. It was not a part of the assault and battery, a part of the principal thing done, a part of the subject-matter. On this subject, see Little v. Commonwealth, 25 Grat. 921; People v. Vernon, 35 Cal. 49, 95 Am. Dec. 49; Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883; V. & M. R. R. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 172, 30 L. Ed. 299; 3 Cyc. 1098; 1 Greenleaf on Ev. §§ 108–110; State v. Abbott, 8 W. Va. 753; Beckwith v. Mollohan, 2 W. Va. 477; Corder v. Talbott, 14 W. Va. 277; 24 Am. & Eng. Enc. Law, 681–683. It was not error to refuse to permit witness Lulu Fielder to answer whether or not she had been a witness on the trial before the justice. This fact, standing alone, was wholly immaterial. If the defendant desired to lay the basis for contradiction or impeachment of the witnesses on the ground that she had testified differently on the trial before the justice, then he should have so stated to the court; but he did not. He only asked to prove the single isolated fact that she had been a witness in that trial, and its refusal was proper.

We will now consider together the fifth, eighth, and eleventh assignments of error: Fifth, that the verdict is contrary to the evidence. Eighth, that the evidence shows clearly that the defendant merely took such steps as were necessary to the recaption of the property, of the possession of which he had been fraudulently and illegally deprived by the plaintiff; and that in so doing he used no greater force than was reasonably necessary for the purpose. Eleventh, that the verdict is excessive. We cannot say that the evidence showed that defendant used no more force than was necessary to repossess himself of the property in question. We cannot say that there was no evidence sustaining the plaintiff's case. As we have said, it was only a question as to what witnesses and to what testimony the jury should give credence. It is the almost exclusive province of the jury to determine the credibility and weight of the testimony. The damages awarded were $1,000. It may be difficult to see, from reading the record, how the jury arrived at the conclusion that plaintiff was entitled to $1,000 damages under the evidence and circumstances presented. But in obedience to plain law, we feel compelled to sustain the finding. Both plaintiff and defendant were before the jury, and testified as witnesses. The jury had the opportunity of seeing their demeanor in court and upon the witness stand, and was better able to determine the questions of intent, motive, malice, wantonness, and willfulness, so material upon the question of the quantum of damages, than those who had no such opportunities. If we are correct in what we have said in relation to instruction No. 2, given for plaintiff, we cannot disturb the verdict on the ground that it is excessive. The principle of law applicable is clearly stated by Mr. Minor (4 Minor, Inst. 930): "The estimation of damages is peculiarly within the province of the jury, they being considered especially competent to determine such matters, and therefore it is particularly incumbent upon the court to forbear any encroachment upon the function of the jury in this particular, save in the strongest cases of prejudice. No mere difference of opinion on the part of the court, however decided, justifies an interference with the verdict for this cause; but the amount must be so out of the way as to evince passion, prejudice, partiality, or corruption in the jury." This principle has been restated or repeated in whole or in part in all our decisions on this subject.

Finding no reversible error in this record, we affirm the judgment of the circuit court of Kanawha county entered in this action on the 2d day of November, 1903.

(58 W. Va. 70)

HOLLEY'S EX'R v. CURRY et al.

(Supreme Court of Appeals of West Virginia. May 27, 1905.)

1. EQUITABLE MORTGAGE — WHAT CONSTITUTES.

A writing which is in all respects sufficient as a deed of trust securing a debt, except that it is not under the seal of the party purporting to be the grantor therein, is held to be an equitable mortgage.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 57, 58.]

2. SAME—DESCRIPTION OF PROPERTY.

It is essential to the validity of a grant that the thing granted should be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed. Blake et al. v. Doherty et al., 5 Wheat. 359, 5 L. Ed. 109.

3. SAME—SUFFICIENCY.

A writing constituting an equitable mortgage describes the real estate sought to be charged thereby as follows: "Seventy-two acres of land situate near Hamlin, the same bought of the Land Company. Also twelve and one-half acres of land also situate near Hamlin & the same conveyed to said B. F. Curry by

James T. Carroll, Jr. Also 3 acres situate near Hamlin and known as the old church lot. Also my store house and lot and livery stable and lot in Hamlin." Such writing is not void on its face for uncertainty in the description of the real estate sought to be charged thereby.

4. LIMITATIONS—NEW PROMISE.

The following clause contained in a writing, "to secure to D. S. Holley, as executor of the last will and testament of James A. Holley, dec'd, the payment of whatever amount said B. F. Curry may owe him as such executor on a settlement," is not sufficient to constitute a new promise, removing the bar of the statute of limitations.

5. SAME—CONSTRUCTION.

Such clause contained in a writing, constituting an equitable mortgage, made by a party, is a sufficient description of a debt to secure the amount such party may owe on a settlement to be made, in which settlement there can be included against him only those items not barred by the statute of limitations at the time of the making and delivery of such writing.

(Syllabus by the Court.)

Appeal from Circuit Court, Lincoln County.

Bill by E. W. Holley's executor against B. F. Curry and others. Decree for defendants, and plaintiff appeals. Reversed.

C. W. Campbell, Geo. R. Heffley, C. E. Burns, and J. E. Chilton, for appellant. D. E. Wilkinson, for appellees.

COX, J. This is an appeal from a decree of the circuit court of Lincoln county in a suit in chancery brought on the 9th day of August, 1893, by E. W. Holley, surviving executor of James A. Holley, deceased, against B. F. Curry and others, to enforce the lien of a writing purporting to be a deed of trust bearing date the 2d day of September, 1882, executed and acknowledged by B. F. Curry to J. E. Chilton, trustee, against certain real estate which plaintiff claimed was charged by said writing for the purpose of securing a debt to plaintiff as executor. Such proceedings were had that, upon final hearing, plaintiff's bill was dismissed, and of this plaintiff complains.

Numerous defenses were interposed by the defendants by demurrers, answers, and otherwise. It is claimed by the defense that the writing aforesaid is a mere nullity, and that it cannot be enforced as a lien, for the following reasons: First, because it was not under seal; second, because of uncertainty in the description of the real estate sought to be charged thereby; third, because of uncertainty in the description of the debt sought to be secured thereby to James A. Holley's executor.

The writing purports to be a deed of trust. It was executed, acknowledged, and recorded as such, but no seal or scroll was affixed to the signature of B. F. Curry thereto. It is not a deed. Atkinson v. Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544; Dickinson v. Railroad, 7 W. Va. 390. Although not a deed, if otherwise free from objection, it is, in substance, a contract for a lien, and, as such, an equitable mortgage. Atkinson v. Miller, supra; Wayt v. Carwithen, 21 W. Va. 516; Knott v. Mfg. Co., 30 W. Va. 790, 5 S. E. 266.

In determining matters of description of the real estate sought to be charged and of the debt sought to be secured by said writing, the same principles apply which would apply if the writing were a deed instead of an equitable mortgage. The writing in question describes the real estate sought to be charged as follows: "Seventy-two acres of land situate near Hamlin, the same bought of the Land Company. Also twelve and one-half acres of land also situate near Hamlin & the same conveyed to said B. F. Curry by James T. Carroll, Jr. Also 3 acres situate near Hamlin and known as the old church lot. Also my store house and lot and livery stable and lot in Hamlin." There are many decisions by this court on the subject of description of real estate in deeds and other writings. Among them are Warren v. Syme, 7 W. Va. 474; Thorn v. Phares, 35 W. Va. 771, 14 S. E. 399; Simpkins v. White, 43 W. Va. 125, 27 S. E. 361; Mathews v. Jarrett, 20 W. Va. 415; Westfall v. Cottrills, 24 W. Va. 763. The decisions of other states on the question of description are almost innumerable, and not always consistent. It may be laid down generally that great liberality is allowed in the matter of description. In description, that is certain which can be made certain. A deed will not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it is intended to convey. The office of description in a deed or other writing is not to identify the land, but to furnish means of identification. Simpkins v. White, supra; Blake v. Doherty, 5 Wheat. (U. S.) 359, 5 L. Ed. 109; Cox v. Hart, 145 U. S. 376, 12 Sup. Ct. 962, 36 L. Ed. 741; 2 Devlin on Deeds (2d Ed.) § 1012, note 1; Jones, Real Prop. § 323; Brewster on Conveyancing, § 75. In the case of Blake v. Doherty, supra (the opinion being delivered by Chief Justice Marshall), it is held: "It is essential to the validity of a grant that the thing granted should be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed." Usually general descriptions, such as "all the estate both real and personal of the grantor," "all my land" in a certain town, county, or state, "all my land wherever situated," "all my right, title and interest in and to my father's estate at law," and the like, are held good. Brewster on Conveyancing, § 81; Pettigrew v. Bobbelaar, 63 Cal. 396; Frey v. Clifford, 44 Cal. 335; Austin v. Dolbee, 101 Mich. 292, 59 N. W. 608; Huron Land Company v. Robarge, 128 Mich. 686, 87 N. W. 1032; Warren v. Syme, supra. Descriptions omitting town, county, or state where the property is situated have been held sufficient,

where the deed or writing provides other means of identification. Hawkins v. Hudson, 45 Ala. 482; Webb v. Mullins, 78 Ala. 111; Garden City Sand Co. v. Miller, 157 Ill. 225, 41 N. E. 753; Lloyd v. Bunce, 41 Iowa, 660; Mee v. Benedict, 98 Mich. 260, 57 N. W. 175, 22 L. R. A. 641, 39 Am. St. Rep. 543; Norfleet v. Russell, 64 Mo. 176; 13 Cyc. 549; McCullough v. Olds, 108 Cal. 529, 41 Pac. 420. Many other cases might be added. "If the land is situated in a city, and the land is described as being in a certain city, although the name of the state or county may not be given, the court, in an action of ejectment in which the deed is offered in evidence, will take notice that such city is in a certain county in the state." 2 Devlin on Deeds (2d Ed.) § 1011; Harding v. Strong, 42 Ill. 148, 89 Am. Dec. 415.

Under the authorities, the writing in question is not, on its face, void for want of certainty in description of the real estate sought to be charged thereby. This writing does not state in what county or state the real estate is situated. It was acknowledged and recorded in Lincoln county, in this state. The number of acres in some of the tracts is given. Three of the tracts are described as near Hamlin; the fourth, as in Hamlin. The first tract is described as the same bought of the land company, the second, as conveyed to Curry by James T. Carroll, Jr. Hamlin is the county seat of Lincoln county, in this state, and of this fact the court will take judicial notice. People v. Faust (Cal.) 45 Pac. 261. These things afford some, and we think sufficient, means of identification.

The papers copied in the record, marked, "B. F. Curry's Title Papers," cannot be considered, as they appear to have been copied in the record without authority.

This cause was twice referred to commissioners—the last time to Commissioner Jimison, who, in response to the requirement that he report "the number of acres and value of the lands named in said deed of trust, its location and what title, if any, Curry has to the same," reported certain lands included under the description in said writing. We cannot disturb this finding.

The writing in question describes the debt sought to be secured thereby in the following language: "And to secure to D. S. Holley as executor of the last will and testament of James A. Holley, dec'd, the payment of whatever amount said B. F. Curry may owe him as such executor on a settlement." An indulgence of 12 months was provided for by this writing. Is this description sufficient to secure any debt to Holley, executor? A deed of trust or other writing charging real estate to secure a debt must in some way describe and identify the debt it is intended to secure. Literal accuracy is not required. Substantial accuracy, reasonably describing the debt, is sufficient. The description of the debt must be correct as far as it goes, and must be full enough to direct attention to the sources of correct information, and be such description of the debt as not to mislead or deceive as to its nature and amount. Goff v. Price, 42 W. Va. 384, 26 S. E. 287. It is held in the case of Riggs v. Armstrong, 23 W. Va. 760, that "it is not necessary to the validity of a trust deed that it should truly state the debt it is intended to secure; but it may stand as a security for the real, equitable claims of the cestui que trust, if they appear to be bona fide, and are satisfactorily proven to be the debts intended—in fact, to be secured." See, also, Findley v. Cunningham, 53 W. Va. 1, 44 S. E. 472; Shirras v. Caig, 7 Cranch, 34, 3 L. Ed. 260; McCarty v. Chalfant, 14 W. Va. 531; Lawrence v. Tucker, 23 How. 14, 16 L. Ed. 474; Lyle v. Ducomb, 5 Bin. 590; Wood v. Weimar, 104 U. S. 786, 26 L. Ed. 779; Bowen v. Ratcliff, 140 Ind. 393, 39 N. E. 860, 49 Am. St. Rep. 203. The description here gives the party from whom and to whom the debt is due. Settlement is all that remains in order to ascertain the true amount secured. It seems clear to us that the description of the debt is sufficient. The description being sufficient, it is still necessary to determine what is included in it. Does the clause "to secure to D. S. Holley, as executor of the last will and testament of James A. Holley, dec'd, the payment of whatever amount said B. F. Curry may owe him as such executor on a settlement," include all items against Curry upon settlement, whether such items were barred by the statute of limitations or not, at the time the writing was made and delivered? In other words, does this clause constitute a new promise by Curry, removing the bar of the statute of limitations? Under our decisions, the answers to these questions are not difficult. The clause mentioned does not constitute a new promise, removing the bar of the statute of limitations. In the case of Quarrier's Adm'r v. Quarrier's Heirs, 36 W. Va. 310, 15 S. E. 154, it was held that "a promise to pay the 'agreed balance on your judgment' is not good as a new promise; the amount of such agreed balance not appearing." In the case of Bell v. Crawford, 8 Grat. 110, it was held that "a promise to settle is not good as a new promise." Judge Brannon, in the opinion in the case of Quarrier's Adm'r v. Quarrier's Heirs, supra, said: "On similar reasoning, we can say that a promise to pay a balance not defined, but to be agreed on or settled in the future, will not constitute a new promise." In the case of Stiles v. Laurel Fork Oil & Coal Co. et al., 47 W. Va. 838, 35 S. E. 986, it was held that "an acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in any wise conditional, nor by way of compromise or attempt at settlement." See, also, Findley v. Cunningham, supra. In the settlement to be made under the clause in question, only those items against Curry not barred at the

time the writing was made and delivered can be included.

One of the objects of this suit is to make settlement under this clause. Commissioner Jimison, in his report, allowed against B. F. Curry three items (Exhibits 4, 5, and 6 with plaintiff's bill) not barred by the statute of limitations, which, with interest to September 2, 1882, less payment made by B. B. Curry, aggregated the sum of $234.75; and, as a set-off to this aggregate sum, he allowed two items, viz., $166.18 and $188.18, being the individual store accounts due the firm of B. F. Curry & Bro. from Margaret Holley and D. S. Holley individually. These items of set-off more than extinguished the three items of charge above mentioned, but no allowance was made for the residue. The item of $166.18 was excepted to by the plaintiff in the court below, but the other item of $188.18 was not excepted to. As to the item of $166.18 excepted to, we have examined the evidence, and do not find it sufficient to justify that set-off. Neither do we find the evidence sufficient to justify the charge against B. F. Curry under the equitable mortgage for the Margaret Holley note (being Exhibit No. 5 with the plaintiff's bill). Exhibits Nos. 4 and 6 were proper charges against B. F. Curry. B. F. Curry claimed to be only the security of his brother B. B. Curry as to those items, but, as to the payee, both B. B. Curry and B. F. Curry were principals. Excluding the Margaret Holley note, and including the set-off of $188.18, the set-off more than extinguishes the amount of Exhibits 4 and 6. Therefore nothing is chargeable against B. F. Curry under the equitable mortgage on account of said Exhibits Nos 4 and 5.

All other items on both sides of the account were barred by the statute of limitations at the time the writing in question was made and delivered, except the two items allowed by Commissioner Jimison as follows: Exhibit No 7 filed with plaintiff's bill, being the C. A. Johnson note; amounting, with interest to the 15th of October, 1902, to $36.17. Amount due on the H. H. Miller note, with interest to October 15, 1902, amounting to $696.29. These two items aggregated $733.46. These items were properly reported by Commissioner Jimison as the true amounts due from B. F. Curry to the estate of James A. Holley, deceased, and secured by said equitable mortgage.

Commissioner Jimison reported that there was due to L. M. Thacker on the Scites notes, also secured by said equitable mortgage, the sum of $136. This debt must be provided for pro rata with the plaintiff's debt in any sale under said equitable mortgage.

For the reasons stated, the decree of the circuit court of Lincoln county entered in this cause on the 15th day of February, 1904, is reversed, and this cause is remanded, to be further proceeded with according to the principles announced in this opinion and the rules governing courts of equity, and with directions to pass upon the exceptions to the reports of the commissioners, and to enter such proper decrees as may be necessary to subject the real estate reported by Commissioner Jimison to the payment of the plaintiff's debt and the debt reported in favor of Thacker, with proper interest on each.

(71 S. C. 352)

McDONALD v. SOUTHERN RY.

(Supreme Court of South Carolina. April 12, 1905.)

DEATH BY WRONGFUL ACT—ACTION BY MOTHER—ILLEGITIMATE CHILD.

A mother cannot recover, as sole beneficiary, under Lord Campbell's act, for the death of her illegitimate child.

Appeal from Common Pleas Circuit Court of Sumter County; Purdy, Judge.

Action by Alice McDonald, administratrix of Benjamin Pierson, against the Southern Railway. Judgment for defendant, and plaintiff appeals. Affirmed.

L. D. Jennings, for appellant. E. M. Thompson and C. L. Cuttino, for respondent.

POPE, C. J. This was an action, under what is known as "Lord Campbell's Act," for damages in the sum of $1,995 for the unlawful killing by the defendant, as a railway, of one Benjamin Pierson, alias Benjamin Lawson, while lying asleep on the railroad track of the defendant. The lad was about 12 years of age, unmarried, and childless. The plaintiff was the administratrix of his estate, and brought suit for her own benefit. It will be useless to consume time in going over that part of the case that relates to the death and intestacy of the lad, Benjamin Pierson, alias Benjamin Lawson, through the carelessness and negligence of the defendant railroad company, as well as the marriage of his mother to one Lewis Pringle, who has not been known or heard of within the last seven years. All those questions of fact were found against the plaintiff. The naked issue to be considered here is the right of the mother, the plaintiff, to recover damages under Lord Campbell's act for the killing of her illegitimate son, Benjamin Pierson, alias Benjamin Lawson. The circuit judge, in his charge, held that the mother could not be a legal heir to an illegitimate son, and the three grounds of appeal are as follows:

"First. Because his honor erred, it is respectfully submitted, in refusing to charge the plaintiff's eleventh request to charge, as follows: 'That if the jury find from the evidence in this case that the plaintiff was never married to the said Lewis Pringle, either by ceremony or otherwise, and that the deceased was a bastard child of the plaintiff, yet, under the law in this state, she would have such a beneficial interest in him as would enable her to maintain this action'—in that the statute provides that every such action

shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife or husband, or child or children, then for the benefit of the parent or parents, in that the plaintiff was the parent of the deceased, and his honor should have charged that she had such a beneficial interest in him as to give her the right to maintain this action.

"Second. It is respectfully submitted that his honor erred in charging the following request of the defendant: 'A bastard is not a child, within Lord Campbell's act, under which this action is brought, and the mother of a bastard child has no right of action for his homicide, nor can his administratrix maintain such an action. If you find from the evidence that the deceased was the illegitimate son of the plaintiff, then you must find a verdict for the defendant railway company. I have already charged you that, and so charge you again.' Erred in charging that a bastard is not a child, under Lord Campbell's act, because the mother is a parent, and it is provided in said act that the parent may maintain such an action, and it does not say that a parent of a bastard child cannot maintain such an action. Erred in not charging that the mother has such a beneficial interest in her bastard child as to give her the right to any sum of money that might be recovered by the administratrix or administrator of a bastard child. Erred in charging that, 'if you find from the evidence that the deceased was the illegitimate son of the plaintiff, then you must find a verdict for the defendant railway company,' because the administratrix had the right to maintain this action as administratrix, independently of her interest in whatever might be recovered.

"Third. It is respectfully submitted that his honor erred in charging that under section 2852, Civ. Code 1902, when it speaks of 'parent or parents,' it is just the same as if it was written 'legal parent or parents,' whereas, his honor should have charged that the mother of a bastard child is the parent, and has such a beneficial interest in him as to give her the right to maintain this action; and his honor should have held that the latter part of said section does not refer to a parent, because, if the parent is the only beneficiary, then she takes the whole amount, and it is not necessary to refer to the statute of distributions to find out what amount she would be entitled to."

It will be seen, presented in different phases, that the question is the right of a mother of an illegitimate son to recover damages for his being illegally killed by the railroad, under the provisions of Lord Campbell's act. The plaintiff (appellant) claims that the word "parent," as used in that act, has no reference to the legitimacy of the offspring. As early as the year 1812 it was held by the court of equity in this state, as found in the two cases of Barwick v. Miller, 4 Desaus. 434, and Jones v. Sarah Burden, 4 Desaus. 439, by the judges in the Court of Appeals, except Judge James, that it was established law in this state that the mother of a bastard child who dies intestate cannot inherit either real or personal estate from her bastard child. 13 Cyc. p. 337, says: "It is a well recognized rule of construction that prima facie the word 'child' or 'children,' when used in a statute, means legitimate child or children, and that bastards are not within the meaning of the terms; and, therefore, where parents are given the right of action for the death of a child, such action cannot be maintained by a parent for the death of a bastard." A scrutiny of the case of Robinson v. Georgia Railroad & Banking Company, 117 Ga. 168, 43 S. E. 452, shows that it holds exactly in accordance with this statement of the law. There seems to be but one decision, and that is in an Ohio case (Muhl's Adm'r v. Michigan Southern Railway Company, 10 Ohio St. 276), which seems to antagonize these views, but a careful examination of the text of this case will show that the question does not seem to have been thoroughly considered; but, be that case as it may, there is no alteration in the last 100 years in the attitude of the courts of this state to this question. A mother cannot inherit from her bastard child. It is useless to multiply words on this question, for we think the circuit judge was entirely correct in his charge on this point, and the verdict of the jury thereon is conclusive of this matter.

It is the judgment of this court that the judgment of the circuit court be and it is affirmed.

GARY, A. J., did not sit in this case, because of illness.

(71 S. C. 280)

LANCASTER et al. v. LEE et al.

(Supreme Court of South Carolina. April 1, 1905.)

1. WASTE—ACTION BY REMAINDERMAN.
In an action against a life tenant by a remainderman to stay waste, where the life tenant claims to hold by fee simple, the case was properly transferred to calendar 2 for trial by jury; the issue being a legal one, so that the verdict of the jury was final until set aside.

2. EVIDENCE—RECORD OF DEED.
Where defendant proves execution, delivery, and loss of a deed, a record thereof may be introduced as a copy of the original, though it has been ruled out because of noncompliance with registry laws.

3. WASTE—INSTRUCTIONS.
In an action to stay waste, the issue was as to whether a deed had been executed and delivered as alleged in the answer. *Held*, that an instruction as to the form, execution, and delivery of the deed was not erroneous because it did not cover the bona fides of the deed, and the question of fraud raised by the reply.

4. APPEAL—REVIEW.
In an action to stay waste, where verdict was rendered for defendant on claim of title,

and plaintiff has served notice of appeal from the verdict, which determined the equity issues, he cannot complain that the judge did not hear equity issues at that term, and that a deed lost at the time of the hearing before the jury has been found.

5. NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

Where an issue in an action to stay waste was execution and delivery of a deed alleged to have been lost, and judgment is rendered for defendant, and the deed is found after the trial, the remedy of plaintiff is by a motion for a new trial for newly discovered evidence.

Appeal from Common Pleas Circuit Court of Bamberg County; Aldrich and Dantzler, Judges.

Action by Annie Lee Lancaster and Minnie Lee Faust against Richard F. Lee, Sr., Bruce Lee, and Richard F. Lee, Jr. From judgment on verdict on issue of title, and from circuit orders refusing to hear equitable issues, plaintiffs appeal. Affirmed.

Izlar Bros. & Rice, for appellants. E. T. La Fitte, for respondents.

JONES, J. The plaintiffs, claiming an estate in remainder under the will of their grandfather Linton Lee, who died September, 1865, brought this action against their father, Richard F. Lee, Sr., the alleged life tenant under the will, and their brothers, Richard F. Lee, Jr., and Bruce Lee, for injunction to restrain waste in cutting timber from the land described. The defendants, by their answer, denied that plaintiffs had any estate in the premises, and set up fee-simple title in Richard F. Lee, Sr., under a deed by said Linton Lee to him, alleged to have been executed December 15, 1864. This issue of title was submitted to a jury before Judge Aldrich, and they rendered verdict in favor of defendants. Defendants made motion for a new trial, which was refused. Judgment was rendered upon the verdict, and plaintiffs gave notice of intention to appeal. Counsel for plaintiffs having informed the court that he had evidence to submit upon the equitable issues, Judge Aldrich ordered that the case be transferred to calendar 2 and continued. The case, being on calendar 2, at July term, 1904, was called by Judge Dantzler; and thereupon plaintiffs' counsel moved for a trial at said term, or an order to take testimony, but Judge Dantzler refused the motion. The appeal is from this order as well as from the judgment on verdict on the issue of title, and the rulings and charge of Judge Aldrich on said trial.

1. The first question we notice is whether this was a case in which the issue of title was properly submitted to the jury. It has been settled by repeated decisions that in equity cases, such as partition and foreclosure of mortgage, whenever an issue of title is raised by the pleadings it is properly triable by a jury. There is no good reason why the same rule should not apply in a case in equity for injunction to stay waste, wherein the issue of title is raised. In Bank v. Peterkin, 52 S. C. 238, 29 S. E. 546, 68 Am. St. Rep. 900, it is broadly asserted that this rule applies to any case in equity wherein is raised the issue of title to land, which, if successful, would defeat plaintiff's recovery. The same general rule had been stated in Sale v. Meggett, 25 S. E. 77. Furthermore, the order transferring the case to calendar 1, because of the issue of title raised, was done with the consent of plaintiffs' counsel, H. F. Rice, indorsed on the order. Such an issue submitted to the jury was not an issue out of chancery, for the mere enlightenment of the chancellor's conscience, to be accepted or rejected by him as he pleased, but was a legal issue, triable by jury, whose verdict is final on the question until set aside by competent authority.

2. We consider next whether Judge Aldrich erred in allowing secondary evidence of the existence, execution, and contents of the deed of Linton Lee to Richard F. Lee, Sr. This deed purports to have been executed December 15, 1864, by Linton Lee to Richard F. Lee, Sr., and purports to convey in fee simple the premises in which plaintiffs claim interest as remaindermen under the will of said Linton Lee. No attempt was made to record same until after the commencement of this action. About September, 1903, the original deed was delivered to the clerk of court for Bamberg county for record, and it was transcribed in Book C, p. 491, of that office; but, for want of compliance with the statute regulating recording, the circuit court ruled that it had not been properly recorded, and was therefore not an official record. After this attempt to record, the original deed had been returned by the clerk to one of the defendants, who gave it to Mr. La Fitte, attorney for defendants, who, for convenience of parties and for safe-keeping, delivered it to the deputy clerk, who died before the trial. On the trial the deed could not be produced after diligent search in all proper places. The court, after very considerable evidence as to the existence, execution, and loss of the paper, allowed the clerk of the court, who had transcribed the deed upon the book in his office, to state it was a correct copy, and allowed such copy to go in evidence in proof of the contents of the deed. Under State v. Crocker, 49 S. C. 242, 27 S. E. 49, if the deed had been properly recorded, the official record, upon proof of the loss of the original, could have been introduced without previous notice. But as the transcription of the deed was held not to be an official record, the question is whether, under the common-law rules of evidence, the transcript was admissible to prove the contents of the deed. Under such rules of evidence, the contents of a lost paper may be proved by a copy as secondary evidence, when it is shown that the copy has been compared with the original and is correct. Wharton on Criminal Evidence, 178; Starkie on Ev. (9th Am. Ed.) 270; 2 Phillip on Ev. 480. This re-

quirement was fully met in this case by the testimony of the clerk of the court that he had himself actually transcribed the original deed upon the book in his office. Appellants argue, however, that this rule should not apply in the circumstances of this case, because the deed is attacked for fraud in the pleadings and the production of the original is necessary in such case. However weighty such a consideration might be, if there was reason to suspect fraud, in inducing great care on the part of the circuit court in requiring satisfactory proof of execution and loss, it still could not have the effect to alter the above-stated rule of evidence.

3. The court instructed the jury as follows: "The law is that, if Linton Lee made a deed of land to Robert F. Lee, then that deed must have been in writing, must have described the land he was going to sell, or make some proper reference by which it could be located, and it must have been signed by Linton Lee. It must have been signed in the presence of two witnesses, because the law requires that a deed must not have only been signed by the grantor and two witnesses, but it must have been executed by the grantor, Linton Lee; that is, he must have made the deed, or adopted the deed as his own, and have signed it with his name, and affixed his seal to his signature, 'L. S.' Then, in order to make it complete to pass the land, he must have delivered the deed to Robert F. Lee. There is a request here upon that very principle. The second request of the defendant is 'that if the jury believe from the testimony that Linton Lee, the testator, conveyed the fee in the land in dispute to the defendant R. F. Lee, and it was delivered [and, to constitute a delivery, it is only necessary for the grantor to part with the dominion of the paper title in his lifetime to the grantee], then they must find for the defendants.' That is substantially correct, but I will modify or explain it, rather, a little more. First, what does 'dominion' mean? 'Dominion' means to pass the instrument of writing from one man to another, as symbolic of his transferring the land to the person to whom it is delivered. Now, the delivery must be made. It must be had. If a man draws a deed, and intends to deliver it, but never does, it is never a deed, because it is not consummated by delivery, and that delivery must be an actual delivery; that is, the maker of the deed must intend to pass it over to the grantee, the person to whom it is made. His dominion and right to the control over the property as set out in the deed passes with the delivery. Sometimes it is called 'manual delivery,' handing it over to him." It is objected that this charge is reversible error, because it ignored the question of the bona fides of the instrument and the question of fraud raised by the pleadings. The plaintiffs, in reply to defendants' answer, did stoutly allege that the deed was never duly executed and delivered, and was fraudulent, null, and void. As matter of pleading, such reply was wholly unnecessary, as the Code does not require any reply to answer not setting up a counterclaim, and it is always permissible to plaintiff to show in evidence, without pleading, that a deed relied on by defendant is void for fraud. Amaker v. New, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687. The fact that plaintiff alleged fraud did not make it incumbent on the trial judge to qualify his said charge by reference to the allegation of fraud. To justify a court in submitting a question of fraud to a jury, there must be some evidence of fraud. The real issue was not that Linton Lee and Richard F. Lee, Sr., committed a fraud in the execution and acceptance of the deed in question in 1865, since, of course, Linton Lee, as against the plaintiffs, had the right to dispose of his property by deed to the defendant, if he saw fit to do so, notwithstanding a former will making a different disposition. There was no suggestion that Linton Lee at the time of the alleged execution of the deed was incapable of making a deed, or was weak of mind and acted under undue influence exerted by defendant, and no creditors' rights are involved at all. Therefore the real question was whether the deed had in fact been executed and delivered as alleged in defendant's answer. Upon this question the charge of the judge was full, clear, and correct.

4. The question is made that Judge Aldrich erred in not hearing the case on the chancery side of the court at the same term of court that the issue of title arising out of the pleadings was submitted to the jury. With reference to the order of Judge Dantzler, the question is made that he should have heard the case when called on calendar 2, July term, 1904, or should have referred the case to the master to take testimony, instead of continuing the case. On this motion, plaintiffs' counsel announced to the court that the lost deed had been found, and its production would require further testimony on the part of plaintiffs. We think appellants can take nothing by the exceptions raising these questions. In the first place, appellants gave notice of appeal from the verdict and judgment on the issue of title. This was sufficient to warrant Judges Aldrich and Dantzler in declining to proceed with the final disposition of the case, and whether it was proper practice, or not, to enter up judgment on the verdict on the issue of title in a case in equity, appellants are not in a position to complain of failure to proceed to hear the alleged equitable issues, in face of their appeal from the result of the trial of the legal issues of title, upon which the equitable issue depended. In the next place, appellant was not in the least prejudiced by failure to proceed with the determination of the alleged equitable issue, because, so long as the verdict stands, showing that plaintiffs have no interest in the premises, and that defendant Richard F. Lee, Sr., is the owner in fee simple, plain-

and plaintiff has served notice of appeal from the verdict, which determined the equity issues, he cannot complain that the judge did not hear equity issues at that term, and that a deed lost at the time of the hearing before the jury has been found.

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2. We consider next whether Judge Aldrich erred in allowing secondary evidence of the existence, execution, and contents of the deed of Linton Lee to Richard F. Lee, Sr. This deed purports to have been executed December 15, 1864, by Linton Lee to Richard F. Lee, Sr., and purports to convey in fee simple the premises in which plaintiffs claim interest as remaindermen under the will of said Linton Lee. No attempt was made to record same until after the commencement of this action. About September, 1903, the original deed was delivered to the clerk of court for Bamberg county for record, and it was transcribed in Book C, p. 491, of that office; but, for want of compliance with the statute regulating recording, the circuit court ruled that it had not been properly recorded, and was therefore not an official record. After this attempt to record, the original deed had been returned by the clerk to one of the defendants, who gave it to Mr. La Fitte, attorney for defendants, who, for convenience of parties and for safe-keeping, delivered it to the deputy clerk, who died before the trial. On the trial the deed could not be produced after diligent search in all proper places. The court, after very considerable evidence as to the existence, execution, and loss of the paper, allowed the clerk of the court, who had transcribed the deed upon the book in his office, to state it was a correct copy, and allowed such copy to go in evidence in proof of the contents of the deed. Under State v. Crocker, 49 S. C. 242, 27 S. E. 49, if the deed had been properly recorded, the official record, upon proof of the loss of the original, could have been introduced without previous notice. But as the transcription of the deed was held not to be an official record, the question is whether, under the common-law rules of evidence, the transcript was admissible to prove the contents of the deed. Under such rules of evidence, the contents of a lost paper may be proved by a copy as secondary evidence, when it is shown that the copy has been compared with the original and is correct. Wharton on Criminal Evidence, 178; Starkie on Ev. (9th Am. Ed.) 270; 2 Phillip on Ev. 480. This re-

quirement was fully met in this case by the testimony of the clerk of the court that he had himself actually transcribed the original deed upon the book in his office. Appellants argue, however, that this rule should not apply in the circumstances of this case, because the deed is attacked for fraud in the pleadings and the production of the original is necessary in such case. However weighty such a consideration might be, if there was reason to suspect fraud, in inducing great care on the part of the circuit court in requiring satisfactory proof of execution and loss, it still could not have the effect to alter the above-stated rule of evidence.

3. The court instructed the jury as follows: "The law is that, if Linton Lee made a deed of land to Robert F. Lee, then that deed must have been in writing, must have described the land he was going to sell, or make some proper reference by which it could be located, and it must have been signed by Linton Lee. It must have been signed in the presence of two witnesses, because the law requires that a deed must not have only been signed by the grantor and two witnesses, but it must have been executed by the grantor, Linton Lee; that is, he must have made the deed, or adopted the deed as his own, and have signed it with his name, and affixed his seal to his signature, 'L. S.' Then, in order to make it complete to pass the land, he must have delivered the deed to Robert F. Lee. There is a request here upon that very principle. The second request of the defendant is 'that if the jury believe from the testimony that Linton Lee, the testator, conveyed the fee in the land in dispute to the defendant R. F. Lee, and it was delivered [and, to constitute a delivery, it is only necessary for the grantor to part with the dominion of the paper title in his lifetime to the grantee], then they must find for the defendants.' That is substantially correct, but I will modify or explain it, rather, a little more. First, what does 'dominion' mean? 'Dominion' means to pass the instrument of writing from one man to another, as symbolic of his transferring the land to the person to whom it is delivered. Now, the delivery must be made. It must be had. If a man draws a deed, and intends to deliver it, but never does, it is never a deed, because it is not consummated by delivery, and that delivery must be an actual delivery; that is, the maker of the deed must intend to pass it over to the grantee, the person to whom it is made. His dominion and right to the control over the property as set out in the deed passes with the delivery. Sometimes it is called 'manual delivery,' handing it over to him." It is objected that this charge is reversible error, because it ignored the question of the bona fides of the instrument and the question of fraud raised by the pleadings. The plaintiffs, in reply to defendants' answer, did stoutly allege that the deed was never duly executed and delivered, and was fraudulent, null, and void. As matter of pleading, such reply was wholly unnecessary, as the Code does not require any reply to answer not setting up a counterclaim, and it is always permissible to plaintiff to show in evidence, without pleading, that a deed relied on by defendant is void for fraud. Amaker v. New, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687. The fact that plaintiff alleged fraud did not make it incumbent on the trial judge to qualify his said charge by reference to the allegation of fraud. To justify a court in submitting a question of fraud to a jury, there must be some evidence of fraud. The real issue was not that Linton Lee and Richard F. Lee, Sr., committed a fraud in the execution and acceptance of the deed in question in 1865, since, of course, Linton Lee, as against the plaintiffs, had the right to dispose of his property by deed to the defendant, if he saw fit to do so, notwithstanding a former will making a different disposition. There was no suggestion that Linton Lee at the time of the alleged execution of the deed was incapable of making a deed, or was weak of mind and acted under undue influence exerted by defendant, and no creditors' rights are involved at all. Therefore the real question was whether the deed had in fact been executed and delivered as alleged in defendant's answer. Upon this question the charge of the judge was full, clear, and correct.

4. The question is made that Judge Aldrich erred in not hearing the case on the chancery side of the court at the same term of court that the issue of title arising out of the pleadings was submitted to the jury. With reference to the order of Judge Dantzler, the question is made that he should have heard the case when called on calendar 2, July term, 1904, or should have referred the case to the master to take testimony, instead of continuing the case. On this motion, plaintiffs' counsel announced to the court that the lost deed had been found, and its production would require further testimony on the part of plaintiffs. We think appellants can take nothing by the exceptions raising these questions. In the first place, appellants gave notice of appeal from the verdict and judgment on the issue of title. This was sufficient to warrant Judges Aldrich and Dantzler in declining to proceed with the final disposition of the case, and whether it was proper practice, or not, to enter up judgment on the verdict on the issue of title in a case in equity, appellants are not in a position to complain of failure to proceed to hear the alleged equitable issues, in face of their appeal from the result of the trial of the legal issues of title, upon which the equitable issue depended. In the next place, appellant was not in the least prejudiced by failure to proceed with the determination of the alleged equitable issue, because, so long as the verdict stands, showing that plaintiffs have no interest in the premises, and that defendant Richard F. Lee, Sr., is the owner in fee simple, plain-

tiffs' alleged equity to enjoin waste is completely overthrown, and the inevitable result of the hearing on said equitable issue must be to dismiss the complaint, as no equity remains which is not determined by the verdict. See Kimbrell v. Page, 70 S. C. 217, 49 S. E. 477. The announcement that the lost deed had been found, and that further testimony was necessary, could not have effect upon the result in that condition of the case. If the finding of the lost paper was deemed important to plaintiffs, as after-discovered evidence, they should have taken timely steps to secure a hearing for a new trial on that ground.

The foregoing conclusions control all the exceptions, and require that they be overruled.

The judgment of the circuit court is affirmed.

GARY, A. J., did not sit in the case, because of illness.

(71 S. C. 259)

SENTERFEIT et al. v. SHEALY et al.

(Supreme Court of South Carolina. March 31, 1905.)

1. EJECTMENT—EVIDENCE.
In an action to recover land, where a witness testifies that he knows the land in question, he may be asked if he knows the land described in a deed in evidence, the description being read as part of the question, and as to what name it is known by.

2. APPEAL—OBJECTIONS TO EVIDENCE.
An exception to a question will not be considered where appellants failed to indicate the ground of objection.

3. EJECTMENT—EVIDENCE.
In an action to recover land a part of estate lands partitioned by commissioners selected by co-tenants, when title is traced through partition deeds, a commissioner may testify as to the partition, and who the commissioners were.

4. SAME.
In an action to recover land claimed under a partition deed which reserved a life interest to the widow, another co-tenant may testify that the will reserved a life interest in the lands conveyed to him and other co-tenants.

5. SAME—RECORD OF MUTILATED DEED.
In an action to recover land, a deed produced at the trial showed mutilation, and that a plat therein referred to was missing. *Held*, that the record of the deed in the year of its execution, showing the missing portion, was admissible to prove such portion.

6. SAME.
In an action to recover land, where the record of a deed was in question, the grantor could not testify as to when his mother, who was also a grantor, heard the deed was recorded, why she came to the recorder's office, nor that he consented to the delivery of the deed, nor that he intended to deliver it.

7. CONTRACT—PAROL EVIDENCE.
A parol agreement not expressed in a partition deed between co-tenants cannot be shown.

8. DEED—CONSTRUCTION.
A partition deed, signed by the widow and other children of the decedent, conveyed to one child a fee-simple title except a life claim in said land in the widow. *Held* to reserve a life estate to the widow, with remainder in fee simple to the grantee.

9. ADVERSE POSSESSION.
Where a partition deed reserved a life estate to the widow, with remainder in fee simple to the grantee, no adverse possession can run against the grantee until the death of the widow.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Life Estates, § 26.]

10. NEW TRIAL—JURY—DISQUALIFICATION.
Where a juror, on examination, states that he knows of no relationship to the parties, and after verdict it is found that he is related, it is no ground for new trial, as the relationship could not have affected him.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 77.]

Appeal from Common Pleas Circuit Court of Lexington County; F. B. Gary, Special Judge.

Action by H. B. and W. H. Senterfeit et al. against R. B. and Amanda Shealy et al. From circuit judgment, defendants appeal. Affirmed.

The deed referred to in exceptions 1 and 2, from which the description was read, was in evidence. The deed construed by the court is as follows: "Know all men by these presents, that we, Sarah Shealy, widow of Andrew Shealy, deceased; Melvin Shealy, Sarah Shealy, his wife; Jane A. Shealy, Amanda M. Shealy, Leathy E. Shealy, Marshal Shealy, Catherine, his wife, and Reedy Shealy, all legal heirs of Andrew Shealy, deceased, late of Lexington county, and state aforesaid, in consideration of four hundred dollars to us in hand paid by Henry Shealy, of the same place, the receipt whereof we do hereby fully acknowledge, have bargained, sold and quit claim, and by these present do bargain, sell and quit claim unto the said Henry Shealy, and to his heirs and assigns forever, all of our, and each of our, rights, title, interest, estate, claim and demand, both at law and in equity, and as well in possession as in expectancy of, in and to all that certain farm or piece of land containing one hundred acres, situate in Lexington county, and state aforesaid, on the Pine Log Road adjoining lands of James M. Jones, No. 4, estate of John Lowerman, deceased, and tract No. 6, and hath such representation as a plat of the same hereunto annexed, made by W. E. Sawyer, D. S., 26th January, 1877, will more fully represent, with all and singular the hereditaments and appurtenances thereunto belonging, excepting a lifetime claim in said land to Sarah Shealy, widow of said Andrew Shealy, deceased. In witness whereof, we have hereunto set our hands and seals, February 6th, A. D. 1877. Signed, sealed and delivered in the presence of J. M. Jones, W. E. Sawyer." (Properly executed.)

E. F. Strother and G. T. Graham, for appellants. B. W. Crouch, Efird & Dreher, and E. L. Asbill, for respondents.

POPE, C. J. On the 15th day of May, 1901, this action was commenced. Its object was to recover from the defendants a tract of land containing 100 acres, situate in

Lexington county, in the state aforesaid, which tract of land is more fully described in a plat made thereof by W. E. Sawyer, deputy surveyor, known as "Tract No. 5" of the land belonging to the estate of Andrew Shealy, deceased, laid out January 26, 1877. Plaintiffs claim this land as arising from a partition of the lands of which Andrew Shealy died seised in 1873, and which said lands were partitioned amongst his seven children by three commissioners appointed by them. All parties being sui juris, deeds were signed to the tract so partitioned so that each one of the seven children received lands in kind, but a life estate in each tract was in said deeds reserved to Sarah Shealy, the widow of the said Andrew Shealy, deceased. The plaintiffs claim the tract so assigned in said partition to one Henry Shealy, who died in 1888, survived by his widow and one child. The child, an infant, died prior to the mother. The mother died being possessed of all the estate of her said husband, Henry Sheely, and his infant child. After her death a partition of said tract of land, containing 100 acres, was made under the decree of the court of common pleas for Lexington county, and at the sale ordered by said court the plaintiffs became the purchasers thereof. After the death of the life tenant, Sarah Shealy, in 1900, they demanded possession of said 100 acres, which was not only refused, but they were ordered not to come upon said lands. Thereafter they brought their action as aforesaid against the three defendants, who have retained possession thereof since the death of their mother, Sarah Shealy, deceased, widow of Andrew Shealy, deceased.

The defendants set up three defenses. The first was a general denial of all the allegations of the plaintiffs' complaint. The second was that neither the plaintiffs, their ancestors nor predecessors, were seised or possessed of the premises described in the complaint within 10 years before the commencement of this action, and that the defendants are the owners in fee of the said premises, and that they have held and possessed the said premises adversely to the pretended title of the plaintiffs for more than 10 years, under a claim of title in fee, exclusive of any other right. And for a third defense that prior to this action the defendants had been in the adverse, uninterrupted, peaceable possession of said premises for a period of 10 years, claiming the same as their own, and these defendants plead such possession as a bar to this action under the statute. The action came on for trial before the special judge Hon. Frank B. Gary and a jury. Full testimony was taken, and a full and comprehensive charge to the jury from the said special judge. The jury thereupon found for the plaintiffs the land in dispute. A motion was made for a new trial on the minutes of the court, which was refused. Thereafter, on judgment being entered up for the plaintiffs, the defendants appealed to this court. We will now undertake to pass upon these exceptions in their order.

"(1) Because his honor erred in allowing counsel for plaintiffs to read to the witness Mabus a description of the land in controversy from a deed which counsel held in his hand, and to ask said witness whether he knew the land described in the said deed, and what it was known as; the error being in counsel's telling the witness where the land was; instead of the witness telling the court and jury where the land was, and what he knew about it." Before the question objected to was asked, the witness had testified that he was 65 years old, that he knew Andrew Shealy and his children, and he lived not over two miles from him, and that he knew the Shealy lands tolerably well. We do not see that there was any serious objection to the mode adopted in obtaining the testimony of this witness touching the identity of the particular tract here sought for. Of course, this identification had to be made before the court and jury, and his honor, in permitting the question, stated that he knew no better way for the witness to indicate what the tract of land was, how located, etc., unless by pursuing the plan adopted; nor do we see that there was any ground in this matter to reverse the judgment. There was other and full testimony in regard to this tract of land. It happened to be the home tract of Andrew Shealy, deceased, where the children were brought up, some of whom have never left the place since their birth. Therefore we overrule this exception.

"(2) Because his honor erred in allowing counsel for plaintiff to propound to the witness Mabus the following question and allowing said witness to answer same: 'Q. Now, Mr. Mabus, I will read you the description of another piece of land, and ask you if you know that. (Description read to witness.) A. No, sir. Q. This is the same description I read to you; covers the same land? A. Yes, sir.'" The appellants fail to indicate to this court what their ground of objection to this question really is, and we will ask to be excused from involving ourselves in the difficulty of ascertaining exactly what the exception to the testimony is, and for the present we will overrule the exception because it is too general.

"(3) Because his honor erred in allowing the witness Reynolds to testify that the land of Andrew Shealy, deceased, had been divided, and that he and two others were the commissioners who had divided said land among the children of said Andrew Shealy, when it is respectfully submitted that the division of Andrew Shealy's lands was irrelevant to the matter in issue in this case." We cannot take this view of the matter. If anything, we think the presiding judge held the plaintiffs to too narrow a compass. Not only did this witness testify to the division, but two of the defendants did likewise. Truth is the great aim of investigation in courts.

The best manner that can be adopted to elicit the truth is always to be aimed at. The deed and the plat show that this tract of 100 acres now sued for was tract No. 5 in the partition of Andrew Shealy's, deceased, lands. As before remarked the partition was not made under proceedings from a court or in a court, but, all parties being of full age, consented to these three neighbors, as commissioners, making the partition. We cannot see that any mistake was made by the presiding judge in this particular, especially in view of the quantity of testimony given by other witnesses, and some of them parties to the cause. This exception is overruled.

"(4) For that his honor erred in admitting in evidence the record book of the clerk's office, which contained a record purporting to be a deed from Sarah Shealy and others to Henry Shealy, when the original deed was delivered to plaintiffs' counsel in open court, pursuant to notice, and there was no competent proof that said deed was mutilated, or that any part of it was lost." Certain it is that the plat to which direct reference is made in the deed itself as being a part of said deed of conveyance to Henry Shealy was not attached to said original deed when it was brought into court under notice. However, such plat was recorded with the deed in the clerk's office amongst the records of 1877, the year in which it was executed. Carrying out the view suggested by the appellant, it would seem that the jury would have been denied the pleasure and profit of the inspection of this plat if their views had prevailed. There were palpable evidences of a mutilation of the original deed when produced in court. How else could the changes that had been wrought in the body of the deed itself been brought to light than by a comparison of said original deed with the record from the office of the register of mesne conveyance, which purported to be a copy of the said deed, made in the very year of its execution? We must overrule this exception.

"(5) Because his honor erred in admitting in evidence the record of the clerk's office, which contained the record of a paper purporting to be a deed from Sarah Shealy and others to Henry Shealy, when the original deed had been produced, and in holding that the notice which was served on defendants had nothing to do with the copy to be introduced, and that plaintiff could put up the next best evidence, when it is respectfully submitted that, if the original had not been produced, or, if it had been produced, there had been no proof to show it had been mutilated, then a certified copy alone could have been admitted in evidence, and not the record book from the clerk's office; and his honor erred in matter of law in not so holding.

"(6) Because his honor erred in holding: 'Gentlemen, I hold he has the right to introduce this record for the purpose of proving that portion of the record which does not appear in the deed. I think the fact it is on record is certainly some evidence it was at one time in existence. Of course, the original is the highest evidence, and as far as it goes it ought to be used rather than the record.' The error being in his honor holding that the fact that this deed had been placed on record was sufficient to show that the deed had been mutilated."

The fact of the mutilation of the deed was a matter of evidence furnished by the paper itself. This condition spoke louder than words of the mutilation. His honor so found, and it was while being governed by this mutilated condition of the deed that he made the remarks attributed to him in these two exceptions. We do not ourselves see how any better evidence could have been furnished of the mutilation of the deed than by the comparison of such mutilated deed with a copy of said deed as entered on the records of the office of the register of mesne conveyances for Lexington county in the very year of the execution of the deed. Of course, other testimony might have been introduced if it had been obtainable, but there was no allegation that such evidence was obtainable. Practice makes perfect. The courts of justice, in reaching out after a proper remedy by which you may lay bare the mutilation of an original deed, must have resort to practical methods. These two exceptions are overruled.

"(7) For that his honor erred in admitting in evidence the record of a paper which purported to be a plat of the land in controversy, when there was not a particle of proof to show that the original plat was not in existence, and in the absence of any notice to the defendant that plaintiffs would use the record or certified copy of such plat, and in holding that in the absence of any proof the presumption was that the plat was lost or destroyed." The plat in controversy was referred to in the deed itself and as a part of said deed. When this deed was produced on notice to the defendants, the plat was conspicuously absent, but the record in the mesne conveyance office showed that it was recorded along with the deed in the year 1877. It was held in State v. Crocker, 49 S. C. 242, 248, 27 S. E. 49, that "it thus appears that one of the modes of proving a record is by the production of the record itself." This is the view we take of the exigencies of the case at bar, and therefore we overrule this exception.

We will now consider the eighth, ninth, tenth, eleventh, twelfth, and thirteenth exceptions, relating as they do to the witness R. B. Shealy.

"(8) For that his honor erred in not allowing the defendant R. B. Shealy to testify when his mother, Sarah Shealy, first heard that the deed from Sarah Shealy and others to Henry Shealy for the land in contro-

versy was on record, and in not allowing him to testify when his mother first knew that said deed was on record, when the recording of said deed was a most material question at issue in said case.

"(9) Because his honor erred in refusing to allow R. B. Shealy to testify for what purpose his mother came to Lexington about one year before she died.

"(10) Because his honor erred in refusing to allow R. B. Shealy to testify as to the state of his feelings when he first heard that the deed from Sarah Shealy and others to Henry Shealy had been placed on record.

"(11) For that his honor erred in ruling out the following question, which was propounded to R. B. Shealy: 'Did you consent for the delivery of this deed to anybody?' when the question of the delivery of this deed was one of the principal issues in the case.

"(12) For that his honor erred in allowing the witness R. B. Shealy to testify all about the division of Andrew Shealy's estate, which was a collateral matter, and irrelevant to the matter at issue in said case.

"(13) Because his honor erred in allowing R. B. Shealy to testify on recross-examination, against objection, that he thought his mother reserved an interest in other tracts of land, the same not being in reply to any new matter brought out by defendants in their examination of said witness in reply, and was wholly irrelevant to the matter in issue."

We see no practical importance growing out of when the old mother, Mrs. Sarah Shealy, first heard of her deed and others with her was on record. It was purely hearsay. Nor could R. B. Shealy testify for what purpose his mother came to Lexington the year before she died, nor was there any error in refusing R. B. Shealy's testimony as to his state of feeling when he first heard that this deed was on record, nor as to whether he consented to the delivery of the deed to anybody. We do not think his honor erred in allowing this witness to testify all about the division of Andrew Shealy's estate. He was a party to it, signed the deed, and on his cross-examination it is perfectly legitimate for R. B. Shealy to testify that he thought his mother reserved an interest in the other tracts of land. These exceptions are therefore overruled.

"(14) For that his honor erred in not allowing Amanda Shealy to testify that she never intended to deliver the deed from Sarah Shealy and others to Henry Shealy unto the said Henry Shealy, the question of the delivery of said deed being the most material issue in the case.

"(15) Because his honor erred in not allowing Amanda Shealy to testify that her mother did not know that the deed from Sarah Shealy and others to Henry Shealy was on record, and holding that her testimony on that point would be hearsay.

"(16) Because his honor erred in refusing to allow Amanda Shealy to testify in reply as to an agreement between herself, her mother, brothers, sisters, and Henry Shealy, about Henry Shealy's interest in the lands of Andrew Shealy, deceased, when counsel for plaintiff brought out of her on cross-examination that Henry Shealy would have received the property in controversy had he complied with the agreement; the more especially because counsel for plaintiff were trying to show to the jury that the defendants were trying to cheat Henry Shealy out of his interest in Andrew Shealy's estate."

We do not see that his honor made any error when he refused to allow Amanda Shealy to testify as to what these three exceptions set forth. She had signed the deed. After her mother's death the deed was found in her possession, and that deed had been recorded the year of its execution. These exceptions are, therefore, overruled.

"(17) Because his honor erred in holding and charging the jury that the deed from Sarah Shealy and others to Henry Shealy conveyed a life estate to Sarah Shealy, or reserved a life estate in Mrs. Shealy.

"(18) For that his honor erred in charging the jury: 'A deed may be so drawn as to convey a life estate to one person, and after the death of such person then to some one else absolutely; and this deed here introduced by plaintiffs, purporting to be signed by Sarah Shealy, Melvin Shealy, Jane Shealy, Amanda Shealy, Eliza Shealy, Marshal Shealy, Reedy Shealy, conveys a life estate to Mrs. Sarah Shealy and an absolute estate to Henry Shealy, but under this deed neither Henry Shealy nor his heirs would be entitled to the possession of the land described in this deed until after the death of Mrs. Sarah Shealy;' the error being that he told the jury that said deed conveyed a life estate to Sarah Shealy, and that under said deed neither Henry Shealy nor his heirs were entitled to the possession of it until after the death of Mrs. Sarah Shealy.

"(19) Except because the court erred in charging plaintiffs' seventh request, as follows: 'Under the terms of this deed Henry Shealy, if then living, or his heirs if he be then dead, would be entitled to the possession of the land set forth and described in this deed immediately upon the death of Mrs. Sarah Shealy;' the error consisting in his honor's telling the jury that said deed conveys a life estate to Mrs. Sarah Shealy, and that Henry Shealy nor his heirs were entitled to the land until after the death of Sarah Shealy."

As to these three exceptions we hold that it was the duty of the presiding judge to construe for the jury the meaning and effect in law of the deed of Sarah Shealy and others to Henry Shealy. Pelzer, Rogers & Co. v. Steadman, 22 S. C. 288. All the circuit judge did was to give the legal effect of the provisions of said deed, leaving the question of

its execution to the jury itself, and we think that the construction placed upon the deed by the circuit judge was natural and proper, to wit, that a life estate was reserved in said land under said deed to Mrs. Sarah Shealy, and that the remainder therein vested in Henry Shealy, his heirs and assigns. These exceptions are therefore overruled.

"(20) Except because the court refused to charge the defendants' fifth request, as follows: 'And if, after execution, the deed is retained by the grantor for any purpose, such as security, for the payment of the purchase money, which indicated that the transaction is not yet complete, delivery will not be presumed,' when one of the material issues in the case was whether or not the deed had ever been delivered." We think the circuit judge exercised a proper care in refusing to charge the language requested by the appellants in this exception set forth. He had already stated to the jury that the matter of the delivery of the deed was a question for their determination alone, in which he could be of no assistance to them, and the exercise of due care on his part not to trench upon the constitutional provision relating to charges on facts by circuit judges was carefully observed. This exception is overruled.

"(21) For that his honor erred in refusing to charge the defendants' ninth request, as follows: 'I charge that under the deed from Sarah Shealy and others to Henry Shealy that, if that deed was executed and delivered to Henry Shealy, that he took an absolute fee-simple title to the premises described in the complaint without limitation or condition, because the words used in said deed are not sufficient to create a life estate in said premises in favor of Sarah Shealy, or to give Sarah Shealy a life estate in said premises;' when it is respectfully submitted that under said deed Henry Shealy took an absolute title to said premises, and was entitled to the immediate possession thereof upon the execution and delivery of said deed." We think the circuit judge properly construed the provisions of this deed as only carrying the remainder to Henry Shealy, his heirs and assigns, with a life estate to his mother, Mrs. Sarah Shealy, and therefore he ought not to have charged as requested herein. The exception is overruled.

"(22) Because his honor erred in refusing to charge the defendants' tenth request, as follows: 'You are further charged that the words "excepting a life claim which Sarah Shealy may have in said premises" do not create any charge or affix any trust, in a legal sense, upon the property conveyed to Henry Shealy in fee simple under said deed;' when it is respectfully submitted that the words thus used in said deed are not sufficient to convey a life estate in said premises to Sarah Shealy, and do not create any charge or affix any trust upon the property conveyed by said deed." This exception is virtually overruled by what we have held in construing the twenty-first exception. We now formally overrule it.

"(23) For this his honor erred in refusing to grant a new trial in said case, when the affidavits submitted showed that the father of Joe F. Fallaw, the foreman of the jury, had married the aunt of the plaintiff, and when the court asked the jurors if any of them were related by blood or marriage to any of the parties to the action the said juror stated that he was not related to them." We think the question here involved has already been fully answered by the court in Garrett v. Weinberg, 59 S. C. 162, 37 S. E. 51; Mew v. Railroad Company, 55 S. C. 90, 32 S. E. 828; Civ. Code of South Carolina, 1902, §§ 2940, 2946; 23 St. at Large, p. 39. There is nothing in the case showing what ruling the trial judge made on the motion for a new trial, nor is there anything in the case to show that the court asked the jurors if they were related to any of the parties. The juror did say that he knew of no relation, and, if he did not know, the relationship would not affect him. It is also plain that the defendants did not use due diligence in ascertaining if any juror was related to the parties, and the motion comes too late to set aside the verdict for this cause after its rendition. This exception is overruled.

"(24) Except because the court charged the jury a portion of plaintiffs' tenth request, as follows: 'In other words, under this deed here I charge you that Mrs. Sarah Shealy had the right to the possession of the land described therein during her lifetime, but she could not hold said land adversely to Henry Shealy, or adversely to the heirs of Henry Shealy; neither could she hold it adversely to the purchasers of the interest of Henry Shealy's heirs.'" There is no specification of error in this ground of appeal, but, if there had been, we hold that the circuit judge did not err in his construction of the deed as set out. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(71 S. C. 311)

STATE ex rel. SEALE et al. v. DURANT et al.

(Supreme Court of South Carolina. April 5, 1905.)

MANDAMUS TO COUNTY—PAYMENT OF DEBTS.

Act 1902 (23 St. at Large, p. 1194), establishing the county of Lee, requires the Governor to appoint a commission to divide the debts of the counties of Sumter, Kershaw, and Darlington with the new county. The commission apportioned the debts of the counties of Sumter and Darlington, but made no apportionment of the debts of the county of Kershaw. *Held* that, until such apportionment is made, it is not the plain duty of the county board of Lee county to pay the amount found by the commission to be due by Lee county to Sumter county out of a fund raised by the sale of bonds to pay the debt due by Lee county to the old counties, where the fund is insufficient to pay the apportioned debt of all the counties.

Appeal from Common Pleas Circuit Court of Lee County; Purdy, Judge.

Petition by William H. Seale and others, county board of commissioners for Sumter county, for a writ of mandamus against J. Oliver Durant and others, county board of commissioners of Lee county, and J. M. Smith. From an order granting the writ, respondents appeal. Reversed.

J. T. Hay and B. F. Kelley, for appellants. L. D. Jennings, for respondents.

JONES, J. The board of county commissioners of Sumter county made application in the circuit court for a writ of mandamus to compel the board of county commissioners of Lee county to pay over to relators the amount alleged to be due Sumter county from Lee county as apportioned indebtedness growing out of its formation from parts of Sumter, Darlington, and Kershaw counties. Judge Purdy granted the writ, requiring that respondents draw their warrant against the fund provided for that purpose for $5,247.17, with interest from February 25, 1902, at 6 per cent., as proportionate part of bonded and note indebtedness, and for $2,206.90, with interest from December 10, 1902, at 7 per cent. per annum, as proportionate part of expenditures, making a total of $7,454.07, exclusive of interest. From this judgment respondents have appealed on a number of exceptions, which practically raise the question whether the circuit court committed error in issuing the writ, in view of the facts in the case and the law governing mandamus.

In the case of State v. Whitesides, 30 S. C. 579, 581, 9 S. E. 661, 662, 3 L. R. A. 777, the rule governing mandamus cases is thus stated: "Where a party has a legal right, to the enjoyment of which the discharge of a ministerial duty on the part of a public officer is necessary, and he has no other adequate remedy, in case the officer refuses to discharge this duty mandamus is the proper proceeding. * * * Upon application for this writ against a public officer, the questions to be considered are: (1) Is the duty claimed a ministerial duty? (2) Has the petitioner a legal right, for the enjoyment, protection, or redress of which the discharge of said duty is necessary? (3) Has he no other adequate and sufficient remedy? This same case defines a ministerial duty as one "expressly imposed by law, or arising necessarily as an incident to the office; involving no discretion in its exercise, but mandatory and imperative." It becomes necessary, then, to inquire, first, if such plain, ministerial duty imposed by law exists in this case. The county of Lee was established by act of 1902 (23 St. at Large, p. 1194). Section 12 (page 1200) of this act is as follows: "Sec. 12. The Governor is hereby authorized and empowered to appoint a commission of nine persons, two of whom shall be residents of each of the counties of Kershaw, Darlington and Sumter, two of the county of Lee, and one a resident of some other county, which said commission shall divide and apportion between said four counties the present lawful and bona fide indebtedness of the old counties of Kershaw, Darlington and Sumter, so that the county of Lee shall bear its just apportionment of the whole indebtedness of the old counties from which it has been formed, and also any charges or claims which said counties may have against the county of Lee for such transaction as may occur from the date of the passage of this bill to the next general election, having regard to the amount of unpaid taxes due to the said counties of Kershaw, Darlington and Sumter." In pursuance of this section, the Governor appointed as commissioner T. H. Gibbes, of Richland county, chairman; H. G. Garrison and N. A. Bethune, commissioners for Kershaw county; Robert McFarlane and C. W. Welling, commissioners for Darlington county; Neill O'Donald and C. G. Rowland, commissioners for Sumter county; and G. F. Parrott and C. T. Perine, commissioners for Lee county. These commissioners met in the city of Columbia, S. C., on July 14, 1903, and at this meeting a settlement sheet between Sumter and Lee counties, consisting of 36 pages, was submitted, and was adopted by the commission, "subject to be credited for any errors and subject to a settlement of school funds, leaving settlement of school funds open for settlement between the counties; Lee county to have thirty days from date to report any claims as to errors in the settlement sheet, and any such report to be made to the chairman of the commission." The proportion for division as between Sumter and Lee counties was .7463 per cent. for the former, and .2537 per cent. for the latter. A resolution was adopted striking out a credit allowed Lee county for $125 for dispensary insurance, and allowing Lee county credit for a proportion of that amount in the same ratio that the indebtedness is apportioned. A further resolution was adopted by the commission, allowing Lee county credit for her proportion of the value of the chain-gang equipment, as of date December 10, 1902, in the same proportion that the indebtedness was apportioned; the settlement of this item to be made by the survivors of both counties. It appears that on December 5, 1903, the said supervisors agreed upon $1,650 as the value of the chain-gang equipment, of which Lee county's proportion would be $416.06. It also appears that the school-fund matter has been adjusted between Sumter and Lee counties, and that no application has been made for other correction of said settlement sheet.

Notwithstanding the irregularity of not reporting to the commission the settlement of these matters left open by the commission, and formal action thereon by the commission, since these matters have been made

certain, and the correctness of the apportionment as between Sumter and Lee counties is not now disputed, we would not disturb the judgment of the circuit court if there were no other interests involved, save those of Sumter and Lee counties. With reference to the interest of Darlington county, it appears from the minutes of the commission that Mr. McFarlane presented the claim of Darlington county, and stated that Darlington and Lee counties had practically agreed, and that Darlington county owes Lee county $662.23. This statement and settlement was confirmed by the commission, "subject to correction of errors." As no error has been suggested, and it appears that Lee county is not indebted to Darlington county, there would be nothing to prevent affirmance of the judgment of the circuit court if only the interests of Darlington, Sumter, and Lee counties were concerned.

But the serious difficulty which exists is with reference to the status and interest of Kershaw county. The minutes of the commission show on this subject as follows: "Mr. Garrison stated on behalf of Kershaw county that no statement had as yet been submitted, but that the Kershaw county commissioners would submit their account to the Lee county commissioners, and, if they could not agree on the settlement, then they would submit the statement to the commission." That statement has not been presented to the commission, nor has the commission taken any action whatever with reference to apportioning the indebtedness between Kershaw and Lee counties. The untraversed return of respondents to the rule to show cause herein states "that the respondents have used all effort in their power to secure the apportionment of the debt between Kershaw and Lee counties, but so far have not been able to have the same adjusted; that so far as respondents are informed and can discover, upon the adjustment of indebtedness the county of Lee will be indebted to the county of Kershaw in the sum of not less than $4,000, and such indebtedness may reach $5,000; that the respondents cannot be required to pay the demand of the county of Sumter, which will about take the whole amount derived from the sale of the bonds aforesaid, and leave all indebtedness of the county of Lee to Kershaw county entirely unprovided for." For the purpose of raising funds to pay the apportioned indebtedness of Lee county to the counties of which it was formed, an act of the Legislature was adopted February 19, 1904 (Acts 1904, p. 590), authorizing the sale of $10,000 of coupon bonds, to be known as apportioned bonds. These bonds were issued and sold, and the proceeds, $10,000, are now in the hands of the board of county commissioners of Lee county for application according to the purposes of the act. Since the claims of Sumter county aggregate $7,454.07, with interest, and the probable claims of Kershaw county will not be less than $4,000, and may reach a greater sum, it is manifest that the fund is not sufficient to pay the claims of Sumter and Kershaw counties in full. To now pay Sumter county in full, and leave Kershaw county's claim unprovided for, would be so clearly unjust that a court of justice should not sanction payment in full to Sumter county, under the circumstances, unless some imperative rule of law compels. We know of no such rule. The statute appropriates a fund to the claims of Kershaw county as well as Sumter county, and, before any duty arises to pay, the commission charged with the apportionment of the indebtedness must act in the premises. So far the action of the commission is incomplete, and the conditions do not exist which would make it the plain ministerial duty of those in charge of the fund to pay it out. When the proportionate indebtedness of Lee county to Kershaw county is ascertained in the manner provided by law, then the duty would arise to pay the claims out of the fund in question in full, if the funds be sufficient; pro rata, if not sufficient. The case of McLaughlin v. County Commissioners, 7 S. C. 375, relied on by the circuit court and by counsel for Sumter county, does not seem to be in point, for in that class the claims of Mrs. McLaughlin had been duly audited for an amount not exceeding the fund for payment which had been specifically collected for such claims. Here all conditions precedent to payment have not been complied with, as in that case, because the commission to adjust the indebtedness has not finished its work, and the fund appears to be insufficient to pay in full all claimants having rights with respect thereto. This is not the case of a creditor whose diligence should give him priority or preference, but a case where a fund is for distribution according to law among several parties having equal rights with respect thereto. Wherever lies the fault of the nonaction of the commission with respect to the claims of Kershaw county, the commission must act as required by the statute before a ministerial duty to distribute the fund can arise.

The judgment of the circuit court is reversed and the petition for mandamus is dismissed.

GARY, A. J., did not sit in this case, because of illness.

(71 S. C. 331)

TEAM v. BRYANT et al.

(Supreme Court of South Carolina. April 7, 1905.)

MORTGAGE—FORECLOSURE—SETTING ASIDE—INSANITY OF MORTGAGOR.

A mortgage executed by a man subject to attacks of dementia with lucid intervals was foreclosed. He was not represented at such foreclosure by a committee, and the evidence did not show that at the time of the execution

of the mortgage, and when summons in foreclosure was served, he was suffering from such an attack, or was in a state of continued mental aberration for such time as to prevent his appearance and answer. *Held*, that the judgment would not be set aside on motion of his heirs.

Appeal from Common Pleas Circuit Court of Fairfield County; Gary, Judge.

Action by Tinnie R. Team against Dick Bryant and others. Judgment for plaintiff. Motion by certain heirs of defendant Bryant to set aside the judgment dismissed, and the heirs appeal. Affirmed.

The circuit decree on the motion is as follows:

"The plaintiff above named obtained judgment by default for foreclosure against the defendant Dick Bryant in June, 1902. The mortgaged premises were sold under said judgment in December, 1902, and were purchased by the plaintiff herein. Subsequently Dick Bryant died. A motion is now made on behalf of the heirs of Dick Bryant to have the said judgment vacated and set aside on the ground that Dick Bryant was of unsound mind at the time of the service of the summons and complaint upon him, and no committee or guardian ad litem had been appointed for him. It is not claimed that he was ever judicially declared to be of unsound mind, but, on the contrary, it is conceded that no such adjudication was ever had, and that consequently no guardian or committee was ever appointed for him. It appears by the proof of service indorsed on the record that the summons and complaint in the aforesaid action were duly and regularly served personally on Dick Bryant, and that fact is not denied. But it is urged that the defendant's insanity was so complete as to amount to at least as great disability as infancy would be, and that the judgment is therefore voidable, and should be set aside. There can be no doubt that this court has the power to avoid a judgment by default recovered against a defendant who is so insane at the time when action is brought against him as to be incapable of defending his rights, even though there has been no inquisition of lunacy or other judicial ascertainment of his insanity. But in such a case the fact of insanity must be established by a clear preponderance of the evidence. Ex parte Kibler, 53 S. C. 461, 31 S. E. 274. In this case it is not clearly established that Dick Bryant was so bereft of reason and sanity at the time when the summons and complaint were served upon him that he could not understand that he was being sued and must defend his rights. The evidence is submitted in the form of affidavits—'a most unsatisfactory mode of eliciting truth'—and is very conflicting. I gather from it that Dick Bryant was an old colored man, over ninety years old at the time of his death; that his wife predeceased him by about a year and a half; that for five years before his death he was partially, or some say totally, blind; that he was subject to fits apparently epileptic; that his temper was violent, and he was at times considered dangerous to the members of his own family, though he does not seem ever to have attempted or desired to do violence to others; that he would at times do silly, and even unclean, things, such as partially stripping off his clothes in public places or soiling his own house; and that he sometimes had delusions—as, for instance, seeing fire falling from heaven, or a river or a drove of cows coming towards him—but such delusions were only temporary, and, beyond exciting his astonishment or terror at the time, they do not appear to have governed his conduct. It is said that he suffered a severe injury to his head many years ago, prior to the Civil War, while he was a slave, and to this is attributed the subsequent alleged weakening of his mind. Yet after his emancipation he managed well, acquired considerable property, including the land now in question, reared a large family of children, and succeeded far better than the average person of his class. Many of his neighbors testify that they never heard of his being crazy until after his death, and amongst them is his own daughter, Louisa, who testifies that she knew him a few times to have fits, but as soon as the fit was over he had as good sense as anybody. This is corroborated by the opposing witness Lee Derby, in reply, who says that he was strictly honest, and a good neighbor, except when his 'spells' were on him, and then he had no reason in him; adding that they (the spells) came often. And the testimony of other witnesses is to similar effect. Many of the witnesses say he was incapable of attending to business, yet we find him, even in his blindness and old age, attending to various matters of business, making palings or boards, doing farm labor, making molasses, borrowing, hiring, paying for his small needs, etc. One important business transaction had by him but a year before this suit was brought was the making the note and mortgage in favor of the defendants C. P. Wray & Co. Both the note and the mortgage were witnessed by Mack Murphy, his son-in-law, who now swears that he was insane, and had been so for many years, and is the most zealous agent in this motion to annul the judgment herein. It is remarkable that with all the evidences of his insanity now alleged no effort was ever made during his lifetime to have a judicial inquiry into the state of his mind, and only after he is dead and beyond the jurisdiction of human tribunals is this court asked to sit in judgment upon his sanity; not for his benefit or protection, but for the sole purpose of upsetting the solemn determination of the court made in reference to his transactions which had gone unchallenged by him or any others for more than ten years. Doubtless Dick Bryant was

old, blind, infirm, suffering the weakness of both body and mind which extreme age is apt to entail. He was subject to fits or 'spells' of an epileptic or some other character which for the time being clouded or eclipsed the light of reason, and his pitiable condition toward the close of his life bordered on—perhaps at time amounted to—imbecility. But imbecility is not necessarily insanity. It may exist in different degrees between the limits of absolute idiocy on the one hand and perfect capacity on the other. 16 Enc. (2d Ed.) 563. If the defendant's mental condition was ever that of total incapacity, it was relieved by periods when he was in possession of his faculties, with understanding of the ordinary affairs of life sufficient to render him liable to suit by personal service. Such, I conclude from the evidence, was his state when the summons and complaint in this action were served upon him. J. D. Nelson, who served the summons and complaint on him in August, 1901, swears that Dick understood what was being done, and this is corroborated by the testimony of Henry Tucker, Dick's son-in-law, who swears that about that time Dick talked to him about the matter, giving an intelligent account of the origin of the mortgage debt and the reason it was never paid. It is ordered and adjudged that the motion be dismissed, with costs."

Buchanan & Hannahan and T. M. Cathcart, for appellants. Geo. W. Ragsdale, for respondent.

WOODS, J. The circuit court refused a motion made by the heirs of Dick Bryant, one of the defendants, now deceased, to set aside a judgment for foreclosure and sale. The motion was made on the ground that Dick Bryant was insane when the mortgage was given and the summons and complaint were served, and no guardian ad litem was appointed on his behalf. The case is very perplexing. The affidavits are convincing that Dick Bryant was at times irresponsible to the degree of complete insanity; governed in his conduct by delusions and violent passion rather than by reason, and sometimes indulging in revolting indecencies and exposures of his person without consciousness of impropriety. The affidavits, however, also show there were lucid intervals. But there is no satisfactory evidence of the duration of either the attacks of dementia or of the lucid intervals. In the circuit decree it is made very clear, however, that during these intervals he transacted business with intelligence, and that he was capable at such times of making valid contracts. "By 'lucid intervals' is meant, not merely a cessation of the violent symptoms of the disorder, but a temporary restoration of reason such as to create responsibility for acts done during its continuance. Still, restoration of the mental faculties to their original condition is not necessary. It is sufficient if there be such restoration that the person is able, beyond doubt, to comprehend and to do the act with such reason, memory, and judgment as to make it a legal act." 16 A. & E. Ency. Law (2d Ed.) 565. The rule as to mental capacity is more stringent in contracts than in wills, but the following language, taken from Lee's Heirs v. Lee's Ex'rs, 4 McCord, 183, 17 Am. Dec. 722, is applicable to contracts: "But it was not (as was said by Lord Erskine in his celebrated speech for Hadfield) every man of a frantic appearance and behavior who is to be considered a lunatic, either as it regards obligations or crimes, but he must appear to the jury non compos mentis, not at the anterior period, but at the moment the act was done. Coop. Med. Jurisp. 396. In the case of Cartwright v. Cartwright, 1 Phil. 100, this doctrine was carried still further. 'If (it was there stated by the court) you can establish that a party habitually afflicted by the malady of the mind has intermissions, and if there was an intermission at the time of the act, that, being proved, is sufficient, and the general habitual insanity will not affect it.'" The attacks described in the affidavits were so violent that it is extremely improbable Dick Bryant could have been induced to even make an effort to execute a mortgage while one was on him. It is to be further observed that, while there are general statements in the affidavits of insanity at the time the mortgage was made, there is no specific charge that it was not executed during a lucid interval. The mortgage was witnessed by a son-in-law, who is now very active in pressing the allegation of insanity, and it is highly probable from this circumstance, which is unexplained, that the mortgage was given when the mortgagor was in possession of his faculties.

It is also reasonable to suppose that Dick Bryant was sane when the summons was served upon him, and did not intend to resist the foreclosure, for it seems that some, at least, of his heirs who are now trying to set the foreclosure aside knew when the service was made; and it may be fairly inferred if the old man had been unable to look after the suit they would have taken some steps in his behalf. This nonaction on the part of his children tends to support the sworn statement of J. D. Nelson, who made the service, that he appeared to be quite in his senses when the summons and complaint were given him, and of Henry Tucker, Bryant's son-in-law, whose affidavit is to the effect that Bryant told him after the service about the origin of the mortgage and its nonpayment. There is no sufficient evidence that after the service of the summons he was in a state of continued mental aberration for such period of time as to prevent his appearance and answer as required by the summons. The additional direct testimony on these points is set forth in the circuit decree, and need not be repeated here.

On review of all the affidavits, we conclude that the judgment of the circuit court is supported by the preponderance of the evidence, and it is therefore affirmed.

(71 S. C. 273)

BROWN v. SOUTHERN RY.

(Supreme Court of South Carolina. March 31, 1905.)

CARRIERS — LOSS OF FREIGHT — CLAIM FOR DAMAGES.

Under 24 St. at Large, p. 81, providing that to entitle a consignee to $50 penalty for failure to adjust a claim for damages to freight in 90 days after filing claim with agent at freight destination, filing a claim with another officer of the carrier and forwarding the same by such officer in the discharge of his duties to the agent at the destination of the freight 90 days before action brought is not a filing with the agent at point of destination.

Appeal from Common Pleas Circuit Court of Fairfield County; Watts, Judge.

Action by Brooks Brown against the Southern Railway in magistrate court. From circuit order reversing judgment for plaintiff, he appeals. Affirmed.

Ragsdale & Dixon, for appellant. R. H. Welch, for respondent.

WOODS, J. The plaintiff recovered judgment in magistrate's court for $7.02, the value of a barrel of flour lost in transit over defendant's railroad from Atlanta, Ga., to Blythewood, S. C., and for $50 penalty provided by the act of 1903 (24 St. at Large, p. 81) for failure to adjust and pay the claim within 90 days "after the filing of such claim with the agent of such carrier at the point of destination of such shipment." The magistrate found the claim was not actually filed by the plaintiff with the agent at the point of destination, but had been sent to J. J. Hooper, the general claim agent of the defendant in Washington, D. C., who had, in the course of business, sent it to the agent at Blythewood for adjustment more than 90 days before the commencement of the action, and adjudged this to be a sufficient filing with such agent under the statute. The circuit judge held the plaintiff had not complied with the condition imposed by the statute for the recovery of the penalty, and modified the judgment accordingly.

It is conceded that the claim must be filed by the claimant or on his behalf with the agent of the carrier at the point of destination as a condition of the penalty, and that filing with any other agent is not sufficient. When the claim is filed with another officer or agent of the road, who, in the discharge of official duty, transmits it on behalf of the railroad company to the agent at the point of destination, this manifestly cannot be regarded filing the claim on behalf of the claimant with the agent at the point of destination, as required by the statute.

The judgment of this court is that the judgment of the circuit court be affirmed.

(104 Va. 8)

WRIGHT'S TRUSTEES v. WRIGHT et al.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

TRUSTS — DEED — CONSTRUCTION — DETERMINATION OF BENEFICIARIES.

A deed conveyed land to a trustee to hold the same during the natural life of a woman, for the joint use and benefit of herself and her present and future children, and provided that on the woman's death the property should be conveyed to such person as she might appoint by her will, and that, should she die without making a will, the trustee should convey the property in fee simple to her husband, but in case of his death the property should be conveyed in fee simple to such of his children as might then be alive; and full power was given the trustee, with the woman's consent, to sell the property and invest the proceeds for the trust purposes. *Held*, that the woman's children were entitled to share jointly and equally with her during her life in the profits from the trust property.

Appeal from Corporation Court of Petersburg.

Suit by Bernard Mann and another, as trustees, against Louisa Wright and others, for a construction of the trust, and from the decree certain defendants appeal. Affirmed.

Wm. B. McIlwaine, for appellants. Hamilton & Mann, for appellees.

CARDWELL, J. By deed bearing date the 12th of October, 1863, duly recorded on the following day, Albert Herzog and wife, in consideration of $8,000, cash in hand paid, conveyed to Charles Raitz a certain lot of land, situated in the city of Petersburg, described by metes and bounds, "upon trust, nevertheless, that the said Charles Raitz shall hold the same during the natural life of Louisa Raitz, wife of Casper Raitz, for the joint use, benefit, profit and advantage of herself and her present and future children by said Casper Raitz."

After the execution of this deed, those claiming as beneficiaries under it discarded the German name, "Raitz," for its English equivalent, "Wright," by which last-mentioned name all the members of the family have been known for many years, and by that name will be spoken of in this opinion.

Charles Wright, the trustee in said deed, having departed this life, Bernard Mann and Richard D. Gilliam were, by an order of the hustings court of the city of Petersburg entered October 30, 1900, appointed trustees in his place and stead, whereupon these substituted trustees filed the bill in this cause for the purpose of having a judicial construction of the trust created by the said deed.

It was the contention of one of the substituted trustees and Louisa Wright and four of her children in the court below that Louisa Wright took an exclusive equitable estate for life in the lot of land in question, and was therefore entitled to all the rents and profits therefrom, while the co-trustee and the two remaining children of Louisa Wright contended that all the children were entitled

to share with their mother the rents and profits during the continuance of the life estate; and the lower court decreed in accordance with this latter contention, from which decree Louisa Wright and four of her children obtained this appeal.

The learned counsel for appellants concedes that if the words "upon trust, nevertheless, that the said Charles Raitz shall hold the same during the natural life of Louisa Raitz, wife of Casper Raitz, for the joint use, benefit, profit and advantage of herself and her present and future children by said Casper Raitz," stood alone, the mother and the children would assuredly have taken a joint estate in the property for the life of the mother, whether the word "joint" had been used or not, but insists that the powers conferred upon Louisa Wright by the provisions of the deed, following the express trust it created, are wholly inconsistent with the idea that it was intended that her children should take a joint interest with her in the rents and profits of the trust property during her life, and that the case is controlled by the line of cases represented by Stace v. Bumgardner, 89 Va. 418, 16 S. E. 252; Walke v. Moore, 95 Va. 729, 30 S. E. 374; Vaughan v. Vaughan's Ex'x, 97 Va. 322, 33 S. E. 603; Tyack v. Berkeley, 100 Va. 296, 40 S. E. 904, 93 Am. St. Rep. 963; Honaker v. Duff, 101 Va. 675, 44 S. E. 900—especially relying upon the case of Walke v. Moore.

The provisions of the deed following that part of it creating the trust, set out above, are as follows: "And at her [Louisa Wright's] death shall convey and deliver the same to such person or persons as she may appoint by an instrument in writing executed by her as last wills and testaments may at that time be executed under the laws then in force, for which purpose full power and authority are hereby given said Louisa Raitz, notwithstanding her coverture, just as if she were a feme sole and unmarried; but should she die without making such instrument, then said trustee shall convey and deliver the same absolutely and in fee simple to said Casper Raitz, should he be then alive, but should he then be dead, then said trustee shall convey and deliver the same absolutely and in fee simple to such of his, the said Casper's, children as may be then alive and the descendants of such as may be dead, such descendants taking per stirpes. Full power and authority are hereby given said trustee at any time with the consent in writing of said Louisa to sell said property and invest the proceeds in other property real and personal, which shall be held by him for the same objects and purposes as he holds the property hereinbefore conveyed, and with like consent from time to time to change such investments."

In Walke v. Moore, supra, an equitable fee-simple estate was conveyed to the trustee, and the fact that the power was reserved to the wife to dispose of all the property by will was considered by the court as inconsistent with an intention on the part of the grantor that the children should take a joint estate with their mother in the property conveyed. There, as the opinion says, "if the grantor had given to the children a joint estate with their mother in the property, he would not have conferred on her the futile power to give it away to other persons."

In the case before us an estate for the life of Louisa Wright is created, separate and distinct from the equitable fee-simple estate in the property conveyed, and no power is conferred upon Louisa Wright or the trustee, with her consent, to defeat the joint interest of her children in this life estate vested in them by the clear and explicit terms employed by the grantor; nor is the fact that she is given the power to dispose of the equitable fee-simple estate in the property by will, nor the provision that Casper Wright should take it after the termination of the life estate, at all inconsistent with the intention that the children should share with their mother the rents and profits arising from the property during the existence of the life estate. The provision in the deed that the trustee might, with the consent of Louisa Wright, sell the property, and reinvest the proceeds in other property, to be held upon the same trust that the property sold was held, is the usual provision found in deeds of this nature, and merely left it to the mother's discretion to say when it was to the interest of herself and children that the investment should be changed. Authority is not given to Louisa Wright to sell and reinvest, but to the trustee, with her consent; and by the terms of the deed the new property was to be held upon the same trusts that the property sold was held, which is entirely consistent with the expressed intention of the grantor that the children of Louisa Wright should share jointly with her the rents and profits arising from the trust subject during her life.

The opinion by Buchanan, J., in Gaskins v. Hunton, 92 Va. 528, 23 S. E. 885, sustained by the authorities cited, states concisely the rule applicable in the construction of the deed here under consideration, viz.: "It is a settled rule of construction, both in deeds and wills, that if an estate is conveyed, or an interest given, or a benefit bestowed, in one part of the instrument, by clear, unambiguous, and explicit words, such estate, interest, or benefit is not diminished or destroyed by words in another part of the instrument, unless the terms which diminish or destroy the estate before given be as clear and decisive as the terms by which it was given."

The rule as thus stated is in entire harmony with the decisions of this court relied on by appellants, above named, wherein the intention to give to the woman alone, and excluding her children, is deduced from the context and the language of the instrument

taken as a whole. It has been rightly said that, in some of the cases wherein this subject was considered, unguarded expressions are used; but, upon the whole, the doctrine clearly established is that in construing deeds or wills, where the language of the grant or gift is to "the mother and her children," or to a trustee "for the benefit of the mother and her children," the children are excluded, and the mother given a fee simple, only where it appears from the context, or the whole instrument taken together, that such was the intention of the grantor or testator. In all cases the effort is to ascertain and give effect to the intention, and the whole instrument is to be looked to for such light as it might shed upon the particular language under consideration. Fitzpatrick v. Fitzpatrick, 100 Va. 552, 42 S. E. 306, 93 Am. St. Rep. 976, and authorities cited.

In the case at bar we are unable to deduce from the language employed in the deed any intention on the part of the grantor to exclude the children of Louisa Wright from sharing jointly and equally with her during her life the rents and profits arising from the property conveyed, and it follows, therefore, that the decree appealed from must be affirmed.

(104 Va. 39)

WINFREE v. JONES.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. BANKRUPTCY — PROVABLE CLAIMS — TORTS — UNLIQUIDATED DAMAGES.

A claim for damages against a lessee for abandoning the house, so that it was wrongfully entered, burned, and destroyed, was not a provable claim in bankruptcy proceedings, under Act Cong. July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418].

2. NEGLIGENCE—PROXIMATE CAUSE.

Where a lessee abandoned the house during the term and left it unlocked, and another entered and set fire to it, whereby it was destroyed, the lessee was not liable for the destruction of the house.

Error to Corporation Court of Newport News.

Action by M. B. Jones against W. B. Winfree. Judgment for plaintiff, and defendant brings error. Reversed.

John W. Friend, for plaintiff in error. Charles C. Berkeley and C. C. Mitchell, for defendant in error.

HARRISON, J. M. B. Jones, the plaintiff in the court below, brought this action to recover damages of the defendant, W. B. Winfree, for having, as alleged, negligently permitted a certain house to be burned while it was in his possession as tenant to the plaintiff, by abandoning it and leaving it unlocked, so that it was wrongfully entered, burned, and destroyed.

There was a verdict of $300 for the plaintiff, upon which judgment was entered by the lower court and thereupon this writ of error was awarded.

The first error assigned is the action of the lower court in rejecting a plea of bankruptcy tendered by the defendant.

The discharge, which was obtained October 23, 1903, on its face releases the defendant from liability for all claims which are made provable by the acts of Congress relating to bankruptcy. The question presented, therefore, is whether the claim here asserted was provable under the acts of Congress relating to bankruptcy.

It is to be observed that the claim is for unliquidated damages, and arises ex delicto. The act of Congress (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) has been construed, with respect to such claims, by the federal courts, adversely to the right to prove them. Beers v. Hanlin (D. C.) 99 Fed. 695; In re Hirschman (D. C.) 104 Fed. 69.

In the case last cited, after a well-considered discussion of the entire subject, pointing out the several classes of claims that are provable under the act of Congress, the court says: "The care used to particularize various provable debts in subsection 'a,' § 63, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], negatives the extended construction of subsection 'b' urged by petitioners. If the latter subsection authorizes the liquidation and subsequent proof of damages ex delicto, the whole subject could have been covered in very general language. Assuming petitioner's construction of section 63, subsec. 'b,' it would embrace claims arising from any tort. There is no language in the section which can be held to include some, and not all, torts. Yet the general policy of bankrupt acts has been not to include in provable debts claims for damages for personal wrongs. It is hardly possible, if Congress had intended such a departure from the history of bankrupt legislation, that it should not have expressed the intent unmistakably." After showing the necessity for the petitioners bringing themselves under section 63, subsec. 'b,' in order to prove their claims, the court says: "Section 63, subsec. 'a,' does not authorize the proof of any claim arising ex delicto, unless a recovery may be had quasi ex contractu."

This case is conclusive of the question at bar. The plaintiff could not have waived the tort and sued ex contractu. His claim rested entirely in tort. There was no contract of renting with covenant thereunder upon which he could have based an action ex contractu.

In the view we take of the merits of this case, the only remaining assignment of error necessary to be considered is that which relates to the action of the court in refusing to set aside the verdict of the jury as contrary to the law and the evidence.

It appears from the record that early in July, 1901, the plaintiff rented the house in question, situated in a negro community

known as "Klondike," to the defendant for one year from July 10, 1901; that the defendant remained in the house until the 8th or 9th of December, 1901, when he moved out, leaving the door of the upstairs, which opened on a porch connected by steps with the street below, unlocked and insecure; that, when the defendant moved out, the plaintiff, on the 10th of December, 1901, sued out an attachment against him, and recovered, December 26, 1901, judgment for $280 and costs, covering the rent to accrue for the whole year up to July 10, 1902, which judgment was subsequently paid by the defendant; that on the 30th or 31st of December, 1901, about midnight, the house was burned and totally destroyed, the fire breaking out in the rear part of the second floor of the building, the entrance to which was through the door opening on the upper porch, which had been left unlocked. It was agreed that two negroes would testify that several times prior to the fire a negro known as "Big Jim" was seen passing in and out of the upstairs of the house, and loafing about a barroom on the opposite side of the street during the afternoon of the day preceding the fire; that one witness would testify that a large man—whether white or black, not known—was seen running down the steps from the upstairs of the house just after the fire appeared in the part of the building where the door and windows entered. It is proper to say that the record furnishes no pretense or suggestion that the defendant had anything to do with the burning of the building, other than the alleged negligence of leaving the door unlocked. The record shows that the plaintiff knew that the defendant had abandoned the house. Indeed, as already seen, he took steps the next day to recover the rent for the entire year. So that the case presented by the plaintiff is that it was negligent in the defendant to leave the upstairs door of the house unlocked when he abandoned it on the 8th or 9th of December, 1901, thereby making it possible for any one to enter the house and set it on fire, and that for such negligence the defendant must respond in damages for the loss of the house by fire on the 30th or 31st of December, 1901.

In considering the liability of the defendant under the circumstances mentioned, the question arises upon the threshold of that inquiry, was the act of the defendant in leaving the door of the house unlocked on the 9th of December the proximate cause of the fire which destroyed the house on the 30th of that month?

"The rule of law excluding a recovery for remote consequences has been attributed by some to the difficulty of unraveling a combination of causes, and of tracing each result, as a matter of fact, to its true, real, and efficient cause. It has also been said that the law considers only proximate causes, for the reason that remote or speculative considerations would not afford a sufficient degree of certainty for judicial action. But in addition to this, considerations of fairness and justice require that no one should be held liable for the consequences of an act innocent in itself, and conceived without mischievous intent, which, by the concurrence of some event that could not by any possibility have been foreseen, has produced hurtful consequences to another." Watson on Damages, § 35.

The same author says that the injury must have been the proximate and natural consequence of such act, and that in this connection the term "proximate" excludes the notion of the intervention of any other culpable and efficient agency between the defendant's dereliction and the loss. Section 33 of the same work is as follows: "A natural consequence is one which has followed from the original act complained of, in the usual, ordinary, and experienced course of events—a result, therefore, which might reasonably have been anticipated or expected. Natural consequences, however, do not necessarily include all such as, upon a calculation of chances, would be found possible of occurrence, or such as extreme prudence might anticipate, but only those which ensue from the original act, without any such extraordinary coincidence or conjunction of circumstances as that the usual course of nature should seem to have been departed from."

These principles have been fully sustained and applied by this court. Connell v. C. & O. Ry. Co., 93 Va. 57, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786; Fowlkes v. Southern Ry. Co., 96 Va. 742, 32 S. E. 464; Watts v. So. Bell Telephone Co., 100 Va. 45, 40 S. E. 107; Standard Oil Co. v. Wakefield, 102 Va. 824, 47 S. E. 830, 66 L. R. A. 792.

In Connell v. C. & O. Ry. Co., supra, it is said (quoting from an opinion of Justice Miller of the Supreme Court) that, "to warrant the finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

And in the case of Fowlkes v. Southern Ry. Co., supra, where the subject is quite fully considered, this court says: "It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded. * * * In other words, the law always refers the injury to the proximate, not to the remote, cause. * * * If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury fol-

lowed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. * * * To the proximate cause we may usually trace the consequences with some degree of assurance, but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. * * * If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

The case at bar comes clearly within the influence of the principles to which we have adverted, and, when they are applied to the facts here shown, it would seem to be manifest that the alleged negligence and the damage complained of are not sufficiently conjoined to support the plaintiff's action. To the credit of the civilization in which we live, it cannot be maintained that the natural and expected result of leaving the upstairs door of an empty house unlocked is that some one who has no legal right there will enter the house and burn it, even though the house be located in a negro community. The house was entered and burned by some one unknown to the plaintiff three weeks after it was vacated—a result which cannot be said to have followed the act of alleged negligence, in the usual, ordinary, and experienced course of events. On the contrary, such a result could not reasonably have been anticipated or expected.

This act was clearly the culpable and efficient intervening and proximate cause of the damage, and such damage cannot be said to be the legitimate sequence of the alleged negligence of the defendant. The injury complained of was the direct and immediate consequence of the act of the unknown party in setting fire to the house, and the damage cannot, under the law, be traced to the remote negligence of leaving the door unfastened. Considerations of fairness and justice require that no one should be held liable for the consequences of an act innocent in itself, and committed without mischievous intent, which, by the concurrence of some event that could not reasonably have been anticipated, has produced hurtful consequences to another.

It is often difficult to determine what damages should be considered as flowing, in a natural and continuous sequence, from an act of negligence, and where there is doubt it is a question for the jury. In the case at bar, however, the question is so entirely free from doubt that the court can, as a matter of law, declare that the negligence alleged was not the proximate cause of the injury, reparation for which is here sought in damages. It is therefore unnecessary to consider the instructions and the questions discussed in connection therewith, for under no instructions would a recovery by the plaintiff be justified under the facts of this case.

For these reasons, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for further proceedings not in conflict with the views expressed in this opinion.

(104 Va. 34)

PEOPLE'S NAT. BANK v. VIRGINIA TEXTILE CO. et al.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. RECEIVERS—EFFECT OF APPOINTMENT ON EXISTING LIENS.

Where a receiver is appointed at the instance and for the benefit of lien creditors, and charged with the duty of operating the property for their advantage, all proper charges, expenses, and liabilities incurred, incident to the receivership, are a first charge not only on the current earnings of the receivership, but on the corpus of the estate.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 279–282.]

2. SAME—DEBTS INCURRED BY RECEIVER—DETERMINATION.

In order to determine the amount and correctness of debts alleged to have been incurred by a receiver, there should be a reference to a commissioner to take evidence concerning the same.

3. SAME—DECREE.

A decree directing the payment of debts and expenses incurred by a receiver should set forth specifically the amount of each claim, and the date from which interest is to be computed.

Appeal from Corporation Court of Lynchburg.

Suit by the People's National Bank against the Virginia Textile Company and others, in which a receiver was appointed for the defendant textile company. From a decree ordering a sale of the textile company's plant, and directing distribution of the proceeds, plaintiff appeals. Reversed.

Caskie & Coleman, for appellant. John W. Harvey and Harrison & Long, for appellees Woodward & Stillman and Adams Bros.-Paynes Co. Wilson & Manson, for appellee Lynchburg Building Co. J. H. Lewis, L. D. Lewis, and J. E. Edmunds, for appellees G. W. Kavanaugh and others.

WHITTLE, J. This case is within narrow limits, and practically presents a single question for decision.

It was a suit in equity instituted by the appellant for the ultimate purpose of enforcing the lien of a deed of trust upon the plant of the appellee the Virginia Textile Company to secure coupon bonds to the amount of $25,000, all of which were held by the plaintiff. The bill was filed in open court, and the defendants were the textile company and the trustees in the deed of trust, who were also attorneys for the plaintiff, and one of whom was president of the bank.

The bill alleged the indebtedness of the textile company to the plaintiff, and their default in payment of certain notes and installments of interest on the coupon bonds; that plaintiff was informed that some of the defendant's goods which had been shipped to the city of New York for sale had been attached by a creditor, and that other creditors were threatening to levy attachments upon its property; that the company had, at great expense, established valuable business connections, and organized and educated a force of skilled laborers, which, if disbanded, could not be replaced; that the retention of both the customers and employés was essential to maintain the value of the plant and other assets; and that the business was being conducted at heavy cost and daily loss. In order, therefore, to prevent the loss and damage which would result from a scramble among creditors for priority, and a wasting of the assets by a multiplicity of suits, the bill prayed for the appointment of a receiver to continue the business of the company under the direction of the court, and with such powers and authority as it might be deemed wise to bestow upon him, and for the usual relief afforded in such proceedings.

The defendants answered the bill, admitting the truth of its allegations and uniting in its prayer. Thereupon a decree was passed by the court appointing the president of the bank receiver, with direction to take possession of all the company's property, which included not only the plant on which the plaintiff had the first lien, but other property, some of which was primarily liable for supply claims. The decree also invested the receiver with large powers, authorizing him to carry on the business and operate the property as a textile mill "at the cost and risk of the fund," using the assets as a basis of credit; and, in order that he might be freehanded in the discharge of his duties, he was protected by injunction from interference either by the company, its agents and officers, or by creditors, the latter being required to litigate their demands in that suit.

When the receiver took charge of the business, the estimated value of the assets was $68,027.51, consisting of:

Machinery and equipment.....	$53,773 88
Office furniture	260 65
Supplies on hand.....	10,801 43
Due from sales agent.....	3,191 55

The receiver died about one year after his appointment, and his management was attended with serious loss. With the exception of the original plant and $2,102.19 paid to supply claim creditors, the assets of the company were consumed or lost; leaving a balance of $3,013 still due on supply claims, and additional liabilities created by the receiver amounting to several thousand dollars.

Subsequently the plant was sold by decree of the court, the bank becoming the purchaser at the price of $15,975. It paid the costs and expenses of sale, but claimed the right to apply the residue of the purchase money to the coupon bonds secured by the deed of trust, as the first lien on the property.

The legality of that contention, the result of which, if sustained, would be to exonerate the property sold from responsibility for both the amount of assets diverted from the payment of supply claims, and also for liabilities incurred by the receiver, presents the main question in controversy.

The decision of the lower court was adverse to the pretension of the bank, and it was decreed to pay a sufficient amount of the purchase money to discharge all the other indebtedness and the costs of the suit.

The general rule is conceded, that the appointment of a receiver does not affect vested rights or interests of third persons in property which is the subject of the receivership, or disarrange the order of priority of existing liens. But this principle is subject to an exception as firmly established as the rule itself, namely, that where the receiver is appointed at the instance and for the benefit of lien creditors, and charged with the duty of operating the property for their advantage, all proper charges, expenses, and liabilities incurred, incident to the receivership, are held to be a first charge upon not only the current earnings but also the corpus of the estate.

The case in judgment comes fully within the influence of the foregoing exception, and the trial court correctly so held. Miltenberger v. Logansport, 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; Kneeland v. American L. & T. Co., 136 U. S. 89, 10 Sup. Ct. 426, 34 L. Ed. 1052; Kneeland v. Luce, 141 U. S. 491, 12 Sup. Ct. 32, 35 L. Ed. 830; Chicago, etc., v. McNulta, 153 U. S. 554, 561, 14 Sup. Ct. 915, 38 L. Ed. 819; Cake v. Mohun, 164 U. S. 311, 17 Sup. Ct. 100, 41 L. Ed. 447; Metropolitan, etc., v. Tonawanda, etc., 103 N. Y. 245, 8 N. E. 488. See, also, Karn & Hickson v. Rorer Iron Co., 86 Va. 754, 11 S. E. 431; Osborne v. Big Stone Gap, etc., Co., 96 Va. 58, 30 S. E. 446; State Bank v. Domestic, etc., Co., 99 Va. 411, 39 S. E. 141, 86 Am. St. Rep. 891.

It appears, however, that the only evidence of the amount and correctness of the debts alleged to have been incurred by the receiver is furnished by a list appended to the report of the administrator of the receiver. The accounts there listed aggregate $2,721.83, and there was a general provision in the decree for their payment.

There ought to have been a reference to a commissioner to inquire into and take evidence touching these debts, and, if allowed, the decree for their payment should set forth specifically the amount of each claim, and the date from which interest is to be computed. Spoor v. Tilson, 97 Va. 279, 33 S. E. 609.

Under rule 9 (45 S. E. vi), the Lynchburg Building Company assigns as error the fail-

are of the court to make provision for the payment of the rent of its building occupied by the receiver.

It appears that the amount of that claim is in dispute, and it also should be made the subject of a reference to a commissioner.

The decree appealed from must therefore be affirmed on the main question involved, but reversed in the particulars indicated, and remanded for further proceedings to be had in conformity with the views expressed in this opinion.

(104 Va. 189)

VIRGINIA PASSENGER & POWER CO. v. PATTERSON.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. DEEDS — ESCROW — DELIVERY BY DEPOSITARY—COMMUNICATION OF CONDITIONS.

Where a deed is delivered in escrow, and the depositary delivers the same to the grantee without any statement of the conditions imposed by the grantor on the delivery, the grantee is not bound by such conditions; but where the depositary, in delivering the deed, states the conditions to the grantee, the latter can claim no right under the deed without complying with the conditions.

2. TRIAL — INSTRUCTIONS—SUPERFLUOUS REQUESTS.

A request repeating questions submitted to the jury by the instructions given may be refused.

Error to Circuit Court of City of Richmond.

Action by R. A. Patterson against the Virginia Passenger & Power Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Bryan and Williams, for defendant in error.

CARDWELL, J. R. A. Patterson, defendant in error, plaintiff in the court below, brought this action in the circuit court of Henrico county against the plaintiff in error, the Virginia Passenger & Power Company, defendant below, as the successor in title to the rights, franchises, etc., of the Westhampton Park Railway Company, to recover damages for acts of trespass upon three separate portions of his lands, and at the trial of the cause in the circuit court of the city of Richmond, to which court it had been removed, recovered a verdict and judgment for $1,500, to which judgment a writ of error was awarded by this court.

Patterson was the owner of two certain tracts of land, two miles from the city of Richmond, at the western terminus of Grove Road—the first lying partly on the north side of Grove Road, running back eastwardly to Patterson avenue, and known as the "Mitchell Place," and the second lying between the Westham or Cary Street Road and Patterson avenue, and known as the "Wrenn Place"—which two tracts are adjacent, and constitute together a single tract, of about 100 acres. Together with other landowners in that vicinity, Patterson was one of the incorporators of the Westhampton Park Railway Company, chartered for the purpose of building an electric railway from the city of Richmond to the Green's Mill property, located at a point several miles in the county of Henrico. Efforts on the part of these original incorporators to finance and construct through a certain agency the contemplated electric railway line having failed, Patterson was approached by one Robertson, on behalf of the Westhampton Park Railway Company, with the request that he (Patterson) grant a right of way through his land, upon which to lay a track and operate electric cars between a point upon an established line near the city of Richmond and Westhampton Park, or the Green's Mill property, in Henrico county; and, as an inducement to Patterson to accept this proposition, various representations were made by Robertson as to the equipment and schedule of the proposed road, tending to encourage travel, the development of property along its line, and its enhancement in value. Relying upon these representations, Patterson executed a deed conveying to the "Westhampton Railway Co." a strip of ground 60 feet in width, beginning at the Wrenn place, where the Grove Road terminates, and running through the Wrenn place to the tract known as "Reveille," upon which Patterson resided. No money consideration was paid for this deed, it having been made solely in consideration of the representations made by Robertson, and the promise and agreement entered into at the time that the company constructing the railway line upon said 60-foot strip of land would also construct a substantial driveway on both sides of its tracks, satisfactory in all respects to Patterson, with such crossings and culverts as he might require, and without injury to, or material inconvenience in the use of, his property.

The declaration contains three counts, charging separate acts of trespass upon three distinct portions of Patterson's property, the first alone of which did the plaintiff in error, by virtue of the deed above mentioned or otherwise, have even the semblance of right to invade; the acts done upon the remaining two being wholly unauthorized.

The route first contemplated was westward from the city of Richmond upon the extension of Grove avenue, and along the Grove Road to Patterson's property, thence along rights of way through various tracts to what is known as the "Three Chop Road"; but it was afterwards determined to run out Floyd avenue, extended, as far as that was a public highway, then along rights of way forming an extension of Floyd avenue until Patterson's property was reached, then northwardly across the eastern end of his property (the Wrenn place) to the Grove Road. Lying in the way of this second selected route was the refusal of the Richmond, Fredericksburg & Potomac Railroad Company to allow the

proposed electric road to cross its "Belt Line" track at grade, and it was thereupon concluded to go under that road, necessitating a cut of some 14 or 15 feet, at the bottom of which water was encountered in such volume that it could not be overcome by use of pumps, and ditching had to be resorted to a distance of 1,600 feet long along the Belt Line track, which invaded Patterson's land, cutting it away in some portions, and in others throwing upon it embankments of earth, stones, and rubbish taken from the ditch alongside, and causing other damage to his lands, without notice to or license from him.

The plea of not guilty was interposed by the plaintiff in error, and under it the trial was had upon the theory asserted as a defense, first, that plaintiff in error had the right, under the deed from Patterson granting a right of way along the originally proposed route of the electric railway over certain of his lands, to construct the same as it had been constructed; and, second, that in so far as the route had been changed, and other portions of Patterson's property had been touched or injured, he acquiesced, and was estopped from claiming damages for injuries resulting therefrom.

It will be observed that upon the issues joined it was essentially a case for a jury under proper instructions from the court.

The evidence proved, or strongly tended to prove, that the deed in question had been delivered by Patterson to his son in January, 1901; that the deed contemplated the granting of a right of way from the terminus of Grove avenue directly westward through Patterson's land; that it speaks of a "map of the proposed Westhampton Park Railway Line, to be recorded simultaneously with this deed"; that the deed remained in the hands of its depositary, A. W. Patterson, for six months; that in the meantime the route of the proposed railway had been changed from Grove Road to Floyd avenue, extended, so that the deed which had been executed, and left with A. W. Patterson by his father no longer answered the purposes of the railway company, and therefore another deed, covering the new condition, was requested of Patterson; that a plat of the route as finally laid out was submitted to A. W. Patterson by Robertson for the purpose of drafting a new deed in conformity therewith, and that Patterson, the father, refused to give such a deed; that Robertson then obtained the deed here in question from A. W. Patterson, in connection with the new route, but without any intention or suspicion on the part of A. W. Patterson that Robertson was going to record the same; that, with full knowledge of all these facts, and especially of the conditions upon which the deed was to become operative, and knowing further that A. W. Patterson had given him the deed without any intention or expectation that it would be recorded, Robertson took the same to the clerk's office and had it recorded; and that the plat filed for record with the deed is not the one referred to therein, and does not answer at all to the route therein described.

As to whether or not Patterson had such knowledge of the damage being done to those portions of his lands not embraced in the right of way intended to be conveyed by his deed, and so acquiesced in the alleged wrongful acts on the part of the plaintiff in error, as that he should be estopped from setting up a claim for damages resulting therefrom, the evidence is all-sufficient to sustain the finding of the jury that he had no such knowledge. Therefore, as we view the case, it is only necessary to determine whether or not it was fairly submitted to the jury upon the instructions of the court.

While there are a number of questions raised and discussed at length in the petition for this writ of error, the most of which were not raised for consideration in the court below, there were but two bills of exceptions taken by plaintiff in error to the rulings of the court at the trial of the cause, the first of which relates to the instructions given and refused, and the other to the refusal of the court to set aside the verdict and grant a new trial on the ground that it is contrary to the law and the evidence, and because the damages allowed were excessive.

Both parties asked for instructions, but they were all refused, and in lieu thereof the following were given:

"The jury are instructed that plaintiff cannot recover any damages for the ditch on the land of Belt Line Road, but, if the jury believe that the ditch encroaches to any extent on the lands of plaintiff, he should be allowed compensation for the actual value of the land taken and actual damages to his adjacent land consequent upon the ditch on such strip of his land as defendants occupied beyond the Belt Line Railroad track.

"The jury are instructed that as to so much of plaintiff's land as lies south of the Grove Avenue Road, extended, the defendants must be regarded as trespassers, and under obligation to pay to plaintiff full compensation. The measure of that compensation must be the actual value of the plaintiff's land taken by defendant's road, and if the jury believe that the taking and use of this land diminished the value of plaintiff's adjoining land more than the railway benefited it, they should take that damage into consideration, and add a reasonable estimate therefor to the actual value of the land taken.

"But if the jury believe that the plaintiff knew, and, without protest against the invasion of that portion of his land, acquiesced in the construction and completion of the road, the jury may infer that he accepted the consummation of defendant's road as full compensation for any damage inflicted by defendant on that portion of his land.

"If the jury believe from the evidence that

at the time when the plaintiff executed and delivered the deed of January 12, 1901, to his son A. W. Patterson, to be done with as he thought best, he knew that the said A. W. Patterson was counsel or attorney for John C. Robertson for the purpose of acquiring rights of way to promote the building of defendant's railway, the jury are instructed that the delivery of the deed to A. W. Patterson was a consummate delivery to the grantees, and that in the transfer of that deed by A. W. Patterson to John C. Robertson, as the then representative of the defendant company, the said A. W. Patterson had no right to qualify or abate the legal rights of defendant under that deed, and that, in the user for the purpose of their road by the defendant of so much of plaintiff's land as is embraced in the deed, the defendants were not trespassers, and the plaintiff is not entitled to any damages for such taking or user.

"If the jury believe from the evidence that the plaintiff delivered the deed of January 14, 1901, to A. W. Patterson, to be held by him in escrow, and did not know at that time that the latter was attorney for John C. Robertson for the purpose of procuring rights of way for the construction of a railway, and if they further believe that the said A. W. Patterson delivered the said deed to the said Robertson without any statements of the conditions required by his father, then they are instructed that the defendant company, acting under said deed, was not a trespasser.

"But if the jury shall believe that Dr. Patterson did not know that A. W. Patterson was attorney or counsel as aforesaid, and shall farther believe that A. W. Patterson accompanied delivery of deed to Robertson with a statement of conditions required by his father, then they are instructed that the defendants can claim no right under the deed without compliance with such conditions."

After these instructions had been given, plaintiff in error asked for an additional instruction, numbered 4, which was also refused. It is only to the last two instructions given by the court and the refusal to give No. 4 that objection is made.

These instructions objected to relate to the evidence tending to show that the deed in question was not to be delivered to or used by the electric railway company, except upon compliance with the stipulations and conditions alleged in the declaration; and we are unable to see any ground for complaint on the part of plaintiff in error thereto, as they submit that phase of the case not only fairly to the jury, but most favorably to plaintiff in error's view of the evidence. Instruction No. 4, refused, was but a repetition of a question already submitted to the jury by the instructions given, and there was no error in refusing it.

Damages were claimed to the amount of $5,000, while the amount allowed by the jury is $1,500; and no good reason is presented for considering this amount excessive, and none whatever occurs to us. Not only did the jury hear the evidence introduced, but they had the exceptional advantage of a view of the lands involved.

We are of opinion that the verdict is in accordance with the evidence, that the damages awarded are not excessive, and that there is no error in the rulings of the circuit court at the trial. Therefore its judgment must be affirmed.

(104 Va. 164)

CITIZENS' BANK OF NORFOLK v. TAYLOR & CO.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. CONTRACTS—CONSTRUCTION.
Where one of the constructions which may be placed on a contract is a reasonable one, and appears to have been the one adopted by the parties, it should prevail.
[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 730, 735.]

2. NEW TRIAL—DISCRETION OF TRIAL COURT.
Where the trial court grants a new trial, some latitude must be allowed to his discretion, especially where the propriety of its exercise is affirmed by a verdict on the new trial for the party to whom it was granted.
[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 9, 10.]

Error to Law and Chancery Court of City of Norfolk.

Action by the Citizens' Bank of Norfolk, as receiver of the Norfolk Ice Company, against Taylor & Co. Judgment in favor of defendant, and plaintiff brings error. Reversed.

J. W. Willcox, for plaintiff in error. Loyall & Taylor and James Elliott Heath, for defendant in error.

KEITH, P. The Citizens' Bank of Norfolk, receiver of the Norfolk Ice Company, brought its action in assumpsit against Taylor & Co. upon the following contract:

The Citizens' Bank of Norfolk, receiver, "hereby agrees to sell to Taylor and Company, and Taylor and Company hereby agrees to purchase from the said receiver, sixty tons of canned ice, merchantable quality, and weighing two hundred and three hundred pounds, full weight, each can or piece, during each and every day of the month of May, 1903, and the entire output of both of the plants now in the hands of the receiver, and known as Hygeia and Citizens' Plants, during the months of June, July, August and September 1903; the said entire output not to exceed one hundred and ten tons per day; and forty tons during each and every day of the months of October and November, 1903; and sixty tons during each and every day of the month of April, 1904; the said ice of the quality and quantity aforesaid, to be delivered to the said Taylor & Company, or on their orders, at the platforms of the said several plants

operated by the said receiver; the said Taylor & Company hereby agreeing to pay to the said receiver for the said ice at the rate of $2.20 per ton of two thousand pounds; the said purchase price to be settled for in cash on or before the tenth day of the month next succeeding the delivery thereof, during the pendency of this contract.

"It is further understood and agreed that the said receiver shall keep on hand and refrigerated at the Citizens' Plant an amount of ice not exceeding three hundred and fifty tons at any one time, unless otherwise agreed upon in writing by both parties hereto.

"It is further understood and agreed that during the continuance of the contract now existing between the said receiver and the Fruit Growers Express, the said receiver is to reserve from the amount of ice manufactured by it at the said plants whatever quantity of ice may be necessary to fill the said contract, which said contract ends the 30th day of June, 1903."

The defendant pleaded the general issue and certain special pleas, and the jury at the first trial found a verdict for the plaintiff for $2,000, which was set aside by the court. At the second trial there was a verdict for $1,500, which was set aside by the court, and at the third trial there was a verdict for the plaintiff for $1,288, subject to a demurrer to the evidence, upon which the court gave judgment for the defendant. Upon each of these trials exceptions to the ruling were taken by the plaintiff in error, the record preserved, and all of them are now before this court for review. The question for us to determine is, shall the judgment be affirmed; or, if it is to be reversed, upon which verdict shall judgment be rendered in favor of the plaintiff in error?

It is not altogether clear from the record upon what ground the court acted in setting aside the first and second verdicts; but, looking to the record of those trials and to the subsequent action of the court in entering judgment for the defendant upon the demurrer to the evidence, it would seem that the court was of opinion that the defendant, having taken all the ice manufactured by the plaintiff during the month of June, 1903, had discharged its duty; while the contention of the plaintiff in error is that, though defendant took and paid for its actual output during that period, it did not take the quantity which it was ready to manufacture and deliver up to the limit of 110 tons prescribed by the contract, and that it was hindered in its manufacture of ice by the conduct of the defendant. The contract calls for canned ice, each block weighing "two hundred and three hundred pounds," full weight, the defendant contracting to take the entire output of both plants operated by the receiver, with the provision that this output was not to exceed 110 tons per day, "the said ice of the quality and quantity aforesaid to be delivered to the said Taylor & Co., or on their orders, at the platforms of the several plants operated by the said receiver."

During the month of May the sixty tons provided for in the contract for that month was delivered and received in accordance with the contract. On June 4, 1903, Nichols, the manager of the ice plants, addressed Taylor & Co. the following note:

"In accordance with terms of contract you were to take the full capacity of both plants during the months of June, July, August and September. We desire to inform you that we are prepared to operate in full from June 1st. That we now have, subject to your orders, on storage, 271 tons of ice from last month's supply, and with the daily increase the amount of your storage capacity with us will soon have reached its limit. Enclosed please find bill for 220 tons 290/2000 lbs., due you on May purchase, now on storage and held subject to your order."

The platforms of the ice plants were uncovered, and ice placed upon them, under the influence of the sun, quickly deteriorated —not only lost its weight by melting, so as to fall below the standard weight required by the contract, but its quality rapidly became so impaired as to render it unmarketable. The platforms, too, had a very limited capacity, but adjacent to and communicating with them were storerooms in which a considerable amount of ice could be kept, and it was the custom of the ice company to place the ice as manufactured in the storerooms, and transfer it to the platforms when Taylor & Co. were ready to receive it. This course or custom was pursued during the month of May without protest or objection, so far as the record discloses. It seems to have imposed no inconvenience upon Taylor & Co., but to have been in their interest as well as in that of the plaintiff in error; indeed, it would have subserved the convenience of plaintiff in error to have placed the ice, as far as it could be done, on the platform, and required the defendant in error to take it or leave it at its peril.

The contention of defendant in error is that it was the duty of plaintiff in error to go on and manufacture the ice, place it on the platforms, and that it would be for the defendant in error to take it or not, as it saw fit; but, the condition precedent having been formed, it concedes that it would have been liable for the price. That seems to be an unreasonable construction of the contract, looking to its subject-matter. It was a continuing contract with reference to a subject of a perishable character; and a reasonable construction, and that which the parties themselves had placed upon it, and that under which they had lived during the month of May, is that which should prevail. This was evidently the view taken of the case by the juries, for in three successive trials they found verdicts for the plaintiff.

Although the records of the first and second trials are before us for review, to ascertain if any errors have been committed on such trials, they are not to be considered as upon a demurrer to the evidence. But some latitude must be allowed to the discretion of the trial court in setting aside a verdict as contrary to the evidence, and this is especially true where, on the new trial, a verdict is found for the opposite party, or the amount of the verdict is materially diminished. Chapman v. Va. Real Estate Inv. Co., 96 Va. 177, 31 S. E. 74; Marshall's Adm'x v. Valley R. Co., 99 Va. 798, 34 S. E. 455.

While in each case there was a verdict for the plaintiff, that verdict was in each instance somewhat diminished, being reduced from $2,000 upon the first trial to $1,288 upon the final trial. Upon the last trial, however, the case stood strictly upon a demurrer to the evidence, and the evidence was sufficient to go to the jury. The whole situation was before the jury. They visited the locality; they heard and saw the witnesses; they knew the course of dealing that prevailed; and we are of opinion that the evidence was sufficient to support their verdict, and the court erred in not rendering a judgment upon the demurrer to the evidence in favor of the plaintiff for the sum of $1,288.

For these reasons we are of opinion that the judgment should be reversed, and this court will enter such judgment as the circuit court should have rendered.

(104 Va. 97)

CHESAPEAKE & O. RY. CO. v. F. W. STOCK & SONS.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. CARRIERS—ACTIONS—PLEADING—DECLARATION.
A declaration against a carrier for loss of goods in transit, alleging the consideration, the promise, the breach, and the giving of the notice of loss required by the bill of lading, states a cause of action in assumpsit upon the contract of carriage.
[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 569, 570.]

2. SAME—BILLS OF PARTICULARS.
In an action against a carrier for the loss of goods in transit, the refusal to require plaintiffs to show in the bill of particulars where the goods and cars were delivered to defendant was not error where defendant was not embarrassed in making its defense by the lack of such statement.

3. EVIDENCE—LETTERS—CARBON COPIES.
A carbon copy, made at the same time and by the same impression of type as a letter, may be regarded as a duplicate original of the letter itself, and admitted in evidence without notice to produce the letter itself.

4. SAME—OFFER OF SETTLEMENT.
An offer of settlement, not accompanied with a caution that it is confidential and without prejudice, and not shown to have been made as a concession in an effort to buy peace, is receivable in evidence as an admission.
[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 745–753.]

5. CARRIERS—LOSS OF GOODS — MEASURE OF DAMAGES.
The measure of damages for loss of goods by a carrier is the value of the goods at destination, with interest from the time when the goods should have been delivered, less the unpaid costs of transportation.
[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 599–607.]

6. CARRIERS—CONNECTING CARRIERS—LIABILITY.
A connecting carrier is not liable for a loss not occurring on its portion of the through route, unless it stands in the relation of principal and agent, or partner, or some similar relation to the defaulting carrier; and in order to hold it liable facts showing such relation must be alleged in the declaration.
[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 780, 795.]

7. PLEADING—BILL OF PARTICULARS—OFFICE.
The bill of particulars is no part of the declaration.
[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 949.]

8. CARRIERS — CONNECTING CARRIERS — THROUGH CONTRACTS.
A bill of lading guarantying a through rate to destination does not establish an agency or partnership relation between the connecting railroads, so as to render one liable for the default of the other.

9. TRIAL — INSTRUCTIONS — SUFFICIENCY OF EVIDENCE.
A scintilla of evidence, which is not sufficient to support a verdict, does not call for an instruction on the issue to which it is addressed.

10. SAME—AMENDMENT OF REQUESTS.
While the court is bound to give any correct instruction applicable to the evidence which is asked for by either party, yet it may refuse to give an incorrect instruction, and need not amend the same so as to accord with the law and the facts, and give it as amended.

Error to Circuit Court of Elizabeth City County.

Action by F. W. Stock & Sons against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiffs, and defendant brings error. Reversed.

S. O. Bland and R. G. Bickford, for plaintiff in error. H. G. Avery and Gordon Paxton, for defendants in error.

KEITH, P. Stock & Sons made two shipments of flour from points in the state of Michigan to Phœbus, in the state of Virginia. The first shipment was made in October, 1902, in car No. 5,905; the second in February, 1903, in car No. 25,578. There was a loss of goods upon each shipment, for which Stock & Sons brought an action of assumpsit against the Chesapeake & Ohio Railway Company.

The loss claimed upon the goods shipped in car No. 5,905, amounting to $612.75, was paid into court, and there is no controversy with respect to it, except as to the allowance of interest from November 1, 1902; the contention of plaintiff in error being that it was entitled to reasonable time after the goods should have been delivered to ascertain if it was liable.

The injury to car No. 5,905 occurred on the 18th of October. There is no dispute about the amount or the liability. The money has been paid into court, and, even upon the theory of plaintiff in error as to the extent of

its liability for interest, that it was entitled to a reasonable time to investigate as to its liability, and that pending such inquiry the amount for which it was found to be responsible should not bear interest, we would not disturb the verdict of the jury, which gives interest from the 1st day of November.

The real contention in the case is in respect to plaintiff in error's liability for loss of the goods shipped in car No. 25,578. There seems to be no controversy with respect to the amount of the loss, which was $758, and a settlement was only prevented by disagreement with reference to the allowance of interest. The parties not being able to agree, this suit was instituted, resulting in a verdict for $612.75, with interest from the 1st of November, 1902, and for $758, with interest from March 1, 1903, to be credited by the sum of $612.75, the amount paid into court.

The first assignment of error is to the judgment of the court overruling a demurrer to the declaration.

We are of opinion that the declaration is sufficient.

Speaking of actions in assumpsit, Hutchinson on Carriers (2d Ed.) at section 744, says: "Notwithstanding these essential differences between actions on the case and in assumpsit against the carrier, it seems to have been in former times a very perplexing question how the one form of action should be distinguished from the other. The declarations in the two kinds of actions, according to approved formulas, were so nearly alike that in many cases the astutest judges became perplexed in their efforts to find out to which class the declarations belonged. It seems, however, to be finally settled that, while the allegation of a promise in the declaration will not be sufficient to impress upon it the distinctive feature of a declaration upon the contract, because the words 'agreed,' 'undertook,' or even the more significant word 'promised,' must be treated as no more than inducement to the duty imposed by the common law, yet, if there be an averment of a promise and a consideration, the declaration will be construed to be upon the contract, and not for the breach of duty. And consequently, when the word 'consideration' was left out, the action was held to be in tort."

The difficulty is doubtless a survival of the time when assumpsit, though founded upon contract, was deemed a species of action on the case, having its origin in a wrong. 4 Cyc. 320. Encyc. Pl. & Pr. vol. 2, p. 988.

The first six counts state a cause of action arising upon an express contract. They set forth the consideration, the promise, the breach, and that notice in writing was given by the plaintiffs to the defendant, as prescribed by the bill of lading. The seventh count is in the usual form of a general count in assumpsit, and is free from objection.

The second assignment of error is to the refusal of the court to require plaintiffs to show in the bill of particulars where the goods and chattels and cars in the bill of particulars mentioned were delivered to the defendant.

It is evident that the plaintiff in error was not embarrassed or hindered in any degree in making its defense by the lack of this statement, and this assignment of error is overruled.

The third, fourth, seventh, and eighth assignments of error are with respect to the notice of the claim of loss. The court permitted a letter to be introduced from Stock & Sons to A. R. Sydnor, dated March 31, 1903, addressed to him as agent of the Chesapeake & Ohio Railway Company at Norfolk, Va., the receipt of which was acknowledged by Sydnor on April 1, 1903.

The contention of plaintiff in error is that copies of a letter cannot be admitted in evidence where no notice has been given to produce the original, and no foundation laid for the introduction of a copy. To this the defendants in error reply that a letter-press copy is not regarded as equivalent to the letter itself, but a carbon copy, which is made at the same time and by the same impression of type with the letter, may well be regarded as a duplicate original with the letter itself. And we think this position is sound.

As was said in Hubbard v. Russell, 24 Barb. 404: "If two letters are written at the same time to the same person, one being the exact counterpart of the other, one being sent to the person addressed and the other retained by the writer, each is an original, and the one retained may be put in evidence by the party who retained it, without notice to the opposite party to produce the other."

We can find in the record, however, no satisfactory proof that the letter objected to was a carbon copy made at the same time and by the same impression of type with the letter, and therefore to be regarded as a duplicate original of the letter itself.

It is also contended on behalf of the defendants in error that the admission of these letters was at most harmless error, because the stipulation that the carrier shall not be liable for loss or injury unless the claim therefor is presented in writing within a specified number of days after the occurrence of the injury has no application, and is not to be considered in cases where the carrier was of necessity aware of the loss and of its extent, as where there is a complete failure to deliver, or where the injury to the goods was examined by the carrier's agent in person for the purpose of ascertaining its extent—citing 5 Am. & Eng. Ency. 324; 6 Cyc. 506; while in this case both car loads of the damaged flour were sold by the defendant, and the proceeds received by it.

As this case must go back for a new trial upon another ground, when the difficulty here presented can doubtless be obviated, we will pass to the next assignment of error.

It seems that W. L. Williams was local

counsel of the Chesapeake & Ohio Railway Company at Norfolk; that a suit had been instituted at Norfolk by Stock & Sons against the Chesapeake & Ohio Railway Company, in which suit were involved a car consigned to Norfolk and also those involved in the present suit. Mr. Williams testified that he received from the generad counsel of the Chesapeake & Ohio Railway Company, after the institution of the suit at Norfolk, three vouchers, with which to make settlement of the alleged claims, and that he offered a sum in settlement of the suit which aggregated the three vouchers. The contention of the plaintiff in error is that this offer was made by the railway company to buy its peace, and was made for the Kanawha & Michigan Railway Company. The principle is invoked by the plaintiff in error that offers made in an effort to compromise threatened or pending litigation are inadmissible in evidence; that a party may with impunity attempt to buy peace; and that the rule is general both in England and the United States that the offer will be presumed to have been made without prejudice if it was plainly an offer of compromise. West v. Smith, 101 U. S. 273, 25 L. Ed. 809.

In Brown v. Shields, 6 Leigh, 440, speaking of a letter which was admitted by the trial court over the objection that the offer was made by way of compromise, Judge Carr says: "To my apprehension that letter does not come within the rule of exclusion, according to the authorities cited. There was no treaty for a compromise on foot; the letter asked for none; proposed no meeting, no arbitrators; offered no purchase of peace. Buller says, if the term 'buy their peace' be attended to, they will resolve all doubts on this head of evidence; and Bayley, J., says that the 'essence of an offer of compromise is that the party making it is willing to submit to a sacrifice and to make a concession.' There is no such thing in this letter. The spirit it breathes is wholly different. * * * I do not think that this letter was either written upon a pending treaty for a compromise, or was meant to propose a compromise, or to state terms to which the writer would submit, or sacrifices or concessions which he was willing to make 'to buy his peace.'"

Greenleaf (16th Ed.) vol. 1, § 192, says: "It is to be observed that confidential overtures of pacification, and any other offers or propositions between litigating parties, expressly stated to be made without prejudice, are excluded on grounds of public policy. * * * But if it is an independent admission of a fact merely because it is a fact, it will be received; and even the offer of a sum by way of compromise of a claim tacitly admitted is receivable, unless accompanied with a caution that the offer is confidential."

There was no such caution given in this case, nor can we say that the facts plainly show that the admission was made as a concession or sacrifice, in an effort upon the part of plaintiff in error to buy its peace.

The ninth assignment of error is to the giving of two instructions asked for by defendant in error, the first of which is as follows:

"The court instructs the jury that the measure of damages in case of loss of goods by a common carrier is the value of the goods at the destination to which he undertook to carry them, with interest on such value from the time when the goods should have been delivered, after deducting the costs of transportation, if this has not been paid."

The objection urged by plaintiff in error to this instruction is that the bill of lading provides that the measure of damages in case of loss or injury is the value of the goods at the place and time of shipment, and not at the point of delivery.

The instruction is taken from Hutchinson on Carriers (2d Ed.) § 769, and the rule seems to be a reasonable one.

In the Southern Pacific Co. v. D'Arcais, 64 S. W. 813, the Texas Court of Civil Appeals held that: "The measure of damages for loss of goods by the negligence of a carrier in transportation is the value of the goods at the place of destination. A stipulation in the contract of shipment, limiting the liability to value at place of shipment, will be disregarded as against public policy, notwithstanding it was an interstate shipment."

In Mobile Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527, the syllabus states that in an action against a carrier for the loss of goods the measure of damages is the value of the goods in the place where they were to have been delivered, with interest. See, also, Railroad Co. v. Williams (Tex. Civ. App.) 31 S. W. 556; Galveston R. Co. v. Ball (Tex. Sup.) 16 S. W. 441.

Plaintiff's second instruction is as follows:

"The court instructs the jury that, even if they believe from the evidence that car No. 25,578, involved in this suit, was wrecked before it came upon the rails of the defendant's road, yet if they also believe from the evidence that the defendant was liable and responsible for the transportation of the said car from the point where the same was loaded to Phœbus, Virginia, then they shall find for the plaintiffs."

The goods in controversy were shipped from a point in Michigan over several connecting lines to Gauley, in the state of West Virginia, where they were to be delivered to the Chesapeake & Ohio Railway for carriage to Newport News. The loss occurred by a wreck which took place before the car in which the goods were shipped had reached the point at which it was to be delivered to the plaintiff in error.

"A connecting carrier cannot, as a rule, be held for the default of the initial or of other connecting carriers, in the absence of a part-

nership, express or implied." 4 Elliott on Railroads, § 1444.

To impose liability upon a connecting carrier for a loss not occurring upon its portion of the through route, there must be some allegation in the pleadings which establishes the relation of principal and agent, or some similar relation; as, for instance, that they were participants in common in the profits of the business. For a partnership may be formed as well in the business of carriers as in any other, and between corporations engaged in that business as well as between individuals, so as to make them individually and jointly liable. Hutchinson on Carriers, § 158.

"In suing the last of several connecting carriers for a loss, it is necessary to allege that the carriers were joint contractors, or that the property was delivered to and received by the defendant. If, however, several carriers associate and form a continuous line, and contract to carry goods through for an agreed price, which the shipper pays in one sum, and which the carriers agree to divide among themselves, they are jointly and severally liable for a loss on any part of the line, and the word 'partners,' or any particular word to describe the relation existing between the carriers, need not be used in the petition." 3 Ency. Pl. & Pr. 853.

"The joint arrangement between the connecting lines may be such as to make each the agent for the other in undertaking the continuous transportation of goods." 6 Cyc. 478.

The original declaration in this case charged that the Chesapeake & Ohio Railway Company was a common carrier of goods and chattels, along with other connecting lines, namely, the Lake Shore & Michigan Southern Railway Company and Toledo & Ohio Central Railway Company, which latter carrier, with the defendant, form a part of the railway line known as the "Kanawha Dispatch," which common carriers aforesaid were joint and several contractors for hire, in and by a certain train of railway cars, from a point in Michigan, to Phœbus, Va. But the plaintiffs saw fit to file an amended declaration, in which this allegation does not appear, nor anything which is the equivalent of or akin to it. In the bill of particulars which the plaintiffs filed it is stated that wherever the words "joint and several contractors" occur in the original declaration the same shall for the purposes of the bill of particulars be read as "agents one of the other." But we are confronted with the difficulty that the bill of particulars is no part of the declaration.

The situation, then, is as follows: The original declaration passed out of the case when the amended declaration was filed; the amended declaration does not contain any averment of the relations existing between the Chesapeake & Ohio and the connecting carriers essential to impose liability upon it for a loss sustained before the goods were received by it. The objection would not, indeed, be met if the original declaration is still to be considered as a part of the complaint in the case, for the amended declaration contains seven counts, not one of which makes any reference to the relation under consideration, and there are no means of knowing upon what count the verdict of the jury was founded.

But, apart from the question of pleading, which might have to be disregarded, as objection upon this ground was not made in the trial court, it yet remains that the allegation, if to be considered as sufficiently made, is not supported by the proof.

The evidence relied upon by the defendants in error to support the instruction which was given, imposing upon the plaintiff in error liability for through carriage, consists of the bill of lading, which contains this statement: "Upon all the conditions, whether printed or written, herein contained, it is mutually agreed that the rate of freight from the above named station to destination is to be 15½ cents per 100 lbs., c/o K. D., order F. W. Stock & Sons, notify E. M. Tennis, Phœbus, Va;" and a letter of E. L. Jamison, introduced by plaintiff in error, which is to the following effect:

"J. F. Orndorff, Esq., A. G. F. A., C. & O. Ry., Richmond, Va.—Dear Sir: East Toledo, O., to Phœbus, K. D. way-bill 27, Feb. 11th, covers C. S. R. car 25578, loaded with 100 barrels of flour and 1600 1/16 sacks of flour, from Hillsdale, Mich., consigned to order F. W. Stock & Sons, notify E. M. Tennis, Phœbus. Va. Unfortunately this shipment was caught in a wreck on our line Feb. 13th, and the flour was transferred into N. Y. P. & O. car 44212.

"Our reports indicate that there was a loss of 32 of the small sacks on account of sacks breaking; also one barrel destroyed; and in addition to this there were about ten barrels with their heads out of one end, allowing some of the flour to fall out. We decided to let this shipment as transferred go forward to final destination. There will, of course, be claim for damages which we will have to stand for, and I give you this information in hopes that you handle the shipment to the best advantage possible.

"I trust that the damage as above indicated will cover it, and that you may be able to make delivery and accept claim for our account for the actual damage. Please advise. Yours truly, E. L. Jamison."

In St. Louis Ins. Co. v. St. Louis, etc., R. Co., 104 U. S. 146, 26 L. Ed. 679, it is held that the liability of a railroad company for the safe carriage of goods after their delivery to the next succeeding carrier on the route depends upon whether such company in any form assumed or held itself out to the public as assuming such liability. The carrier is only bound to carry safely to the end of its line, and there deliver to the next carrier in the route. An arrangement between

a dispatch company and sundry railroad companies, whereby the latter separately agreed to carry all goods for the transportation of which the former should contract at the established tariff rates, or at any special rates furnished by the railroad companies, it was held did not involve joint liability upon the part of the railroad companies, or make them partners, either inter sese or as to third persons.

Now, that case is one where it was sought to hold the initial carrier responsible for a loss occurring after the goods had been delivered by it to a connecting carrier, upon the ground that the Erie & Pacific Dispatch Company, in whose custody the goods were when lost, was the agent of the defendant company.

The evidence relied upon in this case does not go further in the direction of establishing an agency among the constituents composing the Kanawha Dispatch than that held to be insufficient in the case just cited. We think that the evidence, as it now stands, is too meager to justify the instruction given.

It is true that what is known as the "scintilla doctrine" has heretofore prevailed in this state, by force of which courts have been required to give instructions, though the evidence by which they were to be supported was such that a verdict founded upon it could not be maintained. In other words, a trial court might, under what is known as the "scintilla doctrine," be reversed for failure to give an instruction which rightly propounded the law, and then be again reversed for sustaining a verdict in obedience to the instruction, because not supported by sufficient evidence. Such a doctrine does not seem consonant with reason, nor promotive of good results in the administration of justice.

The burden, of course, was upon the plaintiffs to make out their case in all its aspects against the defendant, and when it appeared that the loss had occurred before the goods were received by the defendant, the plaintiffs should have shown such relations existing between the road upon which the accident occurred and the plaintiff in error as rendered the latter responsible for the default of the former.

The eleventh assignment of error is a novel one. After the jury had been instructed, plaintiff in error presented the following request to the court:

"The defendant prays the court that, should the hypothesis of the facts whereon the several instructions propounded by it be incorrect, or should the said instructions be inartificially or incorrectly expressed, or should the conclusion of law therein announced be incorrectly stated, that the court will so amend the same as to accord with the facts and law of this case, to the end that the jury may be duly instructed on the phases of the case at bar presented by the said instructions."

Which the court refused, and made upon it the following indorsement:

"The court stands by its action on the instructions as noted thereon (both collectively and generally), in view of the multitude of instructions tendered. The court does not propose to make a summary of them, or to write and give to the jury a dissertation of the law of damages. The court is of opinion that the instructions in this case, as in most similar cases, go beyond the province of instructions, and only tend to confuse the jury, and possibly cause a reversal in the Supreme Court because of error in giving or refusing instructions which do not instruct.

"To which action of the court in so refusing to conform with the said prayer, and the reading of its refusal in the presence of the jury, the defendant, by counsel, excepted, and prays that this, its bill of exceptions, marked 13, may be signed, sealed, and made a part of the record in this cause; which is accordingly done."

This court has held in numerous cases that a trial court is bound to give any instruction asked for by either party which correctly expounds the law upon the evidence before the jury. "But if such instruction does not correctly expound the law, the court, as a general rule, may refuse to give it, and is not bound to modify it, or give any other instruction in its place. This principle is founded on good reasons, and is sustained by much authority. A party cannot, by asking for an erroneous instruction, devolve upon the court the duty of charging the jury on the law of the case. An instruction, as asked for, may be so equivocal that to give or refuse it might mislead the jury; and thus it might have all the effect of an erroneous instruction. In such a case it would be proper for the court to modify the instruction so as to make it plain." Rosenbaums v. Weeden, etc., 18 Grat. 799, 98 Am. Dec. 737; B. & O. R. Co. v. Polly, Woods & Co., 14 Grat. 448; Peshine v. Shepperson, 17 Grat. 472, 94 Am. Dec. 468.

In Keen's Ex'r v. Monroe, 75 Va. 428, the court says: "We are of opinion that, after refusing to give the instruction which the defendant below proposed to the court to give, upon the ground that it did not rightly propound the law, it was not incumbent on the court, unasked, to instruct the jury as to what was the law. If an instruction asked does not correctly expound the law, the court, as a general rule, may refuse to give it, and is not bound to modify it, or give any other instruction in its place, unless the instruction asked for is so equivocal that to give or refuse it might mislead the jury. In such case it would be proper for the court to modify the instruction so as to make it plain." Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791, 22 S. E. 869.

It cannot be doubted that, if the instruction correctly states the law, and there be evidence to support it, it should be given. It is

equally plain that, if it does not correctly state the law, it should not be given. The sole question is as to the duty of the court to amend an instruction offered by counsel. The rule, as stated in Rosenbaums v. Weeden, supra, and approved in numerous decisions of this court, is that when an instruction offered is equivocal, so that either to give or refuse it might mislead the jury, the duty is imposed upon the court so to modify it as to make it plain; that, if it be right, it should be given; if it be wrong, it should be rejected; if it be equivocal, it should be amended. By what test is a court to measure the duty thus imposed, and how is a jury to be misled by an instruction which the court declines to give? An equivocal instruction of course should not be given, because an equivocal instruction is an inaccurate expression of the law, and for that reason should be refused. To say that a jury may be misled by a refusal to give an instruction, and therefore the instruction should be amended and given, is to prescribe a rule so vague and indefinite as to embarrass, rather than to assist, trial courts in the performance of their duty. It is the duty of juries to respect the instructions given them. It is not to be supposed that they have any knowledge with respect to those which the court refuses to give; and, finally, if it be conceded that the offer of instructions, their discussion, and the judgment of the court upon them take place in the presence of the jurors, it is an impeachment of their integrity, or of their intelligence, to assume that they were influenced or misled by what has occurred.

But, however this may be, we know of no authority, in this court or elsewhere, which imposes upon trial courts the burden sought to be placed upon them by the "prayer" under consideration.

The rule which prevails in other jurisdictions is thus stated in Blashfield on Instructions to Juries, § 137, and is supported by the great weight of authority: "In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error. A party cannot complain that the court did not, of its own motion, modify and correct the request, and then give it as corrected. No such duty rests upon the court."

The twelfth assignment of error is to the refusal of the court to set aside the verdict.

As the evidence plainly shows that no damage was sustained by the defendants in error while the goods were in the custody of plaintiff in error, the judgment of the court must, for the reasons herein stated, be reversed, the verdict set aside, and the case remanded for a new trial.

(104 Va. 197)

NATIONAL COUNCIL JUNIOR ORDER UNITED AMERICAN MECHANICS et al. v. STATE COUNCIL JUNIOR ORDER UNITED AMERICAN MECHANICS.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. CONSTITUTIONAL LAW—REVIEW OF STATUTES—CANON OF CONSTRUCTION.

A statute will not be declared unconstitutional unless it is palpably repugnant to the Constitution, and it is not sufficient that it be unjust and oppressive in some of its provisions, or that it violate the natural, social, or political rights of the citizen, unless it is shown that such injustice is prohibited or that such rights are guarantied by the Constitution.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 37, 38.]

2. SAME—IMPAIRMENT OF CONTRACTS—REVOCATION OF CORPORATE POWERS.

Act Feb. 17, 1900, constituting certain persons a body corporate, and giving the corporation so created full and exclusive authority and jurisdiction to grant charters to subordinate councils of a certain beneficial order, and thereby in effect annulling the prior existing right of a foreign corporation to propagate and transact the business of the order within the state, does not impair the obligation of contracts, within the inhibition of the federal Constitution.

3. SAME—POWERS OF STATES—EXCLUSION OF FOREIGN CORPORATIONS—INTERSTATE COMMERCE.

A foreign corporation controlling the subordinate councils of a beneficial association with a state is not engaged in interstate commerce, in such sense as to preclude the Legislature from excluding it from the state.

4. EQUITY—JURISDICTION—PROPERTY RIGHTS.

A charter authorizing a corporation to organize subordinate councils of a beneficial association, to raise funds for the relief of members and their families, and to defray funeral expenses and other cases of distress, gives rise to possible rights of property which are within the protection of a court of equity.

Appeal from Chancery Court of Richmond.

Suit for injunction by the State Council Junior Order United American Mechanics against the National Council Junior Order United American Mechanics and others. From a decree for complainant, defendants appeal. Affirmed.

Meredith & Cocke, J. C. Weckert, and G. W. Crumpecker, for appellants. Frank W. Christian and Samuel A. Anderson, for appellee.

KEITH, P. The bill of appellee avers that the State Council of Virginia, Junior Order United American Mechanics, a corporation, was chartered by act of Assembly in February, 1900; its objects being to maintain and promote the interests of Americans, to assist them in obtaining employment, to encourage them in business, to afford relief to the members and their families in case of accident, sickness, or death, and to defray the expenses of their funerals or such other cases of distress as shall be defined by the constitution, by-laws, rules, and regulations

of the corporation. Before its incorporation it existed as an unincorporated organization, under the same name, and was subject, by virtue of the customs of the order, to the control of the National Council of the Junior Order of United American Mechanics of the United States, in so far as the latter acted within the scope of its objects, charter, constitution, and laws.

In the year 1869 the state councils of Pennsylvania, New Jersey, and Delaware, which were benevolent and patriotic organizations, met and created the National Council, and delegated to it certain rights and powers, within which it should be regarded and respected as the supreme head of the order. The objects of the National Council were, first, to maintain and promote the interests of Americans, and shield them from the depressing effects of foreign competition; second, to assist Americans in obtaining employment; third, to encourage Americans in business; fourth, to establish a sick and funeral fund; fifth, to maintain the public school system of the United States of America, and to prevent sectarian interference therewith, and to uphold the reading of the Holy Bible therein. To these objects, fixed by the charter, and existing also before the incorporation of the order, there was added in the year 1897 the additional objects—sixth—to establish or erect an orphans' home for the orphans of deceased members of the order, and to maintain the same.

The National Council, about the time of its organization, in 1869, adopted a constitution and certain general laws for the promotion of its objects.

The bill then goes on to detail the provisions of the constitution, especially with reference to its amendment, and sets out that in disregard of its fundamental law the National Council had undertaken to ingraft upon it certain features with reference to insurance, to the regalia of the order, to a national judiciary for the final decision of all matters of controversy arising in the order, and for a change of representation. The contention of complainant is that these changes were not made in accordance with the mode prescribed by the constitution for its own amendment, and that they are "unconstitutional, illegal, and revolutionary measures"; that they were adopted without the approbation and against the wishes of the councils of Virginia, both state and subordinate, and against the wishes and approbation of at least two-thirds of the membership of the order; and that complainant has exhausted all lawful means within the order to obtain a redress of its grievances, but without success.

On February 17, 1900, the General Assembly of Virginia gave a charter to the State Council of Virginia, which at a special meeting of that council, called in accordance with the laws of the order, convened in Richmond on March 14, 1900, and, by a vote of 86 in the affirmative to 17 in the negative, accepted the charter and became an incorporated body.

The following are the salient features of the charter: First, it embraces all of the members of the State Council of Virginia, Junior Order United American Mechanics; second, the state council is made the supreme head of the order in Virginia; third, it is given full and exclusive authority and jurisdiction to grant charters to subordinate councils, and to make such constitutions, by-laws, and rules of the order as it may deem just and proper for the government of subordinate councils.

The bill states that certain persons who are named, and others unknown, in March, 1901, at Alexandria, Va., organized a new State Council of Virginia, by substantially the same name as that of complainant. This new organization denies that the plaintiff is the supreme head of the order in Virginia, and the validity of its charter, and is doing everything in its power to destroy the plaintiff and to prevent its successful operation under its charter. It is further stated that the new State Council was organized for substantially the same purposes as those for which the complainant was organized and was afterwards chartered, and for the promotion of the objects which the plaintiff declares to be illegal and unconstitutional, and wholly foreign to the objects of the order; that complainant has adopted a seal; and that the Alexandria organization has adopted substantially the same seal. The prayer of the bill is that the National Council of the Junior Order of United American Mechanics of the United States of North America, E. L. S. Bouton, James R. Mansfield, and a number of other individuals whose names are given, and others described as unknown, may be made parties to the bill; that the Alexandria organization may be declared illegal, and the plaintiff be held valid; and that the defendants may be enjoined from continuing the use of the name State Council of Virginia, Junior Order United American Mechanics of the State of Virginia, etc., and from the use of the seal, and from carrying out the objects for which they were organized; that they may be enjoined from granting charters to subordinate councils and representing themselves to subordinate councils as the head of the order in this state, and from interfering in any way with the pursuance by the complainant of its objects and purposes.

To this bill the defendant the National Council filed its demurrer and answer, in which the private individuals named in the bill unite. The answer traverses all the material averments of the bill, maintains the legality of the changes made in the objects and constitution of the National Council of which the bill complains, and alleges that the act of the Legislature by which the plaintiff was incorporated is in violation of the

Constitution of the United States, in that its effect would be to impair the obligation of a contract, and deprive the defendant of property without due process of law.

We shall not enter into a consideration of the charge made in the bill, and denied in the answer, that the several changes in the objects and the constitution of the National Council were not made in conformity with the mode prescribed by the constitution itself for its own amendment, and are therefore void. They constitute the motive which induced the State Council of Virginia to apply to the Legislature and obtain from it a charter, which, if valid, is conclusive of this controversy. The sufficiency of the motive inducing the plaintiff to apply for the charter is immaterial. It stands upon its charter rights, and must prevail, unless the contention of the defendants that it is repugnant to some provision of the Constitution of the state or of the United States can be maintained.

The rule governing courts in passing upon the constitutionality of a law is no longer to be controverted. A statute is not to be annulled unless its repugnancy to the Constitution be palpable and plain. Upon this all the courts speak with one voice, and none more forcibly than the Supreme Court of the United States.

In Fletcher v. Peck, 6 Cranch, 128, 3 L. Ed. 162, Chief Justice Marshall said: "Whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." See Tucker on Constitutions, vol. 1, § 184; Cooley on Const. Lim. (7th Ed.) p. 228.

So it has been held that a court will not declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guarantied or protected by the constitution. It is true, there are some reported cases in which judges have been understood to intimate a doctrine different from what is here asserted; but it will generally be found on an examination of those cases that what is said is rather by way of argument and illustration, to show the unreasonableness of putting upon constitutions such a construction as would permit legislation of the objectionable character then in question, and to induce a more cautious and patient examination of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent, than as laying down a rule by which courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative powers in directions in which the Constitution had imposed no restraint. Cooley on Const. Lim. (7th Ed.) p. 233.

Nor, says the same author, can the courts declare statutes void "because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution. The principles of republican government are not a set of inflexible rules, vital and active in the constitution, though unexpressed, but they are subject to variation and modification from motives of policy and public necessity; and it is only in those particulars in which experience has demonstrated any departure from the settled practice to work injustice or confusion that we shall discover an incorporation of them in the Constitution in such form as to make them definite rules of action under all circumstances. * * *

"Nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words." Cooley (7th Ed.) p. 237 et seq.

For, "when the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument." People v. Fisher, 24 Wend. 215.

The act which in the case before us we are asked to declare to be an unconstitutional exercise of power appears in the form of a charter granted to the State Council of the Junior Order of United American Mechanics by the Legislature on the 17th of February, 1900. It declares that certain persons therein named shall constitute a body politic and corporate; giving its name and style, and conferring upon it the powers and attributes ordinarily incident to a corporation. By the third section of this charter it is provided that the said corporation shall have full and exclusive authority and jurisdiction to grant charters to subordinate councils, Junior Order United American Mechanics, in the state of Virginia, with power to revoke the same for cause; to make such constitutions, by-laws, and rules of order as said corporation may deem just and proper for the government of said subordinate councils. The charter is prospective in its operation. It does not undertake, as we construe it, to deal with vested rights. It in-

terferes with no right of property. It leaves the whole order of things as it existed with respect to the society known as the Junior Order United American Mechanics unaffected, and all rights of persons and property which had been acquired under that organization undisturbed and unaffected, except that it declares that the corporation created by the act shall have full and exclusive authority and jurisdiction to grant charters to subordinate councils in the state of Virginia.

We have been unable to ascertain what contract right is impaired or what provision of the Constitution, either of the United States or of the state of Virginia is violated, by this charter. It is true that prior to its passage the National Council, the appellant in this case, had authority, by permission of the state, to organize subordinate councils and to transact the business of the order within the limits of the commonwealth; but since the decision of Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357, we had supposed that there was no longer any doubt that a state may exclude a foreign corporation entirely from doing business within its limits, or exact such security for the performance of its contracts with its citizens as, in its judgment, would best promote the public interest.

In that case the plaintiff in error, as agent of a New York insurance company, was indicted in a state court for issuing a policy without license as required by the statutes of the state. The validity of the law having been affirmed by the state courts, a writ of error was awarded by the Supreme Court of the United States. The constitutionality of the Virginia statute was assailed as being in conflict with that clause of the Constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, and to the provision that Congress shall have power to regulate commerce among the several states.

In answer to the first contention, Justice Field, speaking for a unanimous court, and reviewing all the decisions, beginning with Bank of Augusta v. Earle, 13 Pet. 586, 10 L. Ed. 274, concludes that "the privileges and immunities secured to citizens of each state in the several states by the provision in question are those privileges and immunities which are common to the citizens in the latter states, under their Constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation except by the permission, express or implied, of those states. The special privileges which they confer must therefore be enjoyed at home, unless the assent of other states to their enjoyment therein be given. * * * The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta v. Earle 'it must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcements of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy."

Proceeding to the second objection urged to the validity of the Virginia statute, which was founded upon the commerce clause of the federal Constitution, Justice Field said: "At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. * * * This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on. It is general, and includes alike commerce by individuals, partnerships, associations, and corporations. There is therefore nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce, in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties, which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are then local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states, any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

"The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact

conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate, or foreign." Pembina Mining Co., v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650.

We think no argument is necessary to show that the appellant is in no sense an agency or in the employment of the federal government, or that its business does not in any respect appertain to interstate or foreign commerce.

We are of opinion that the charter granted by the Legislature is in no respect repugnant to the Constitution of the United States or of the state of Virginia, but is a valid exercise of legislative power. This conclusion is decisive of the case. Upon it the whole controversy hinges, and in answering it we have disposed of every contention made in the record which requires to be answered.

There is one view of the case, however, urged in the oral argument, to which we shall advert. On behalf of appellants it is urged that equity only protects rights of property, and that in general it leaves it to the courts of law to protect merely personal rights.

On behalf of appellee it is claimed that the inhibitions of the Constitution of the United States apply to contracts which involve rights of property. And thereupon counsel for appellants seek to impale their adversary upon the horns of this dilemma. If property rights are involved, the act of the Legislature impairs a contract with respect to them, and is void; if property rights are not involved, then a court of equity has no jurisdiction, and appellee was wrongfully in court.

Property rights may arise, indeed may have arisen, under the charter granted by the Legislature, and those rights are within the pale of the protection afforded by a court of equity. The exclusive authority to organize subordinate councils, to raise funds for the relief of members of the order and their families in case of accident, sickness, or death, to defray the expenses of their funerals, or such other cases of distress as shall be defined by the constitution, by-laws, rules, and regulations of the corporation, do or may involve rights of property within the protection of a court of equity; but it does not follow that a state may not prohibit a foreign corporation from coming within its borders for such purposes.

We do not understand the decree complained of to interfere with any vested right of person or property, but, in order to put the matter beyond the reach of controversy, we shall so amend the decree as to provide that nothing therein contained shall in any wise affect any such right as may have accrued prior to the 17th of February, 1900; and, as amended, the decree complained of is affirmed.

(104 Va. 14)

REAGER'S ADM'R et al. v. CHAPPELEAR et al.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. ADMINISTRATORS — ACTIONS — PARTIES — JOINDER OF ADMINISTRATOR AND DEBTOR.
A distributee of a decedent's estate may join in one suit the administrator and a debtor of the estate, where both are necessary parties for a settlement of the estate, and the administrator and debtor were on intimate terms with the decedent, who intrusted them with the management of her business, and each of them was indebted to the estate, and the administrator had not charged his own indebtedness nor attempted to collect that of the debtor.

2. EQUITY—PRACTICE—ORDER OF REFERENCE.
Complainant must make out his case, and prove the charges of his bill showing that he has the right to demand an account, in order to entitle him to an order of reference.

3. SAME—HARMLESS ERROR.
The premature entry of an order of reference was harmless where no account was taken thereunder.

4. SAME — PLEADING — ADMISSIONS OF ANSWERS—CONSTRUCTION.
Where an answer is used in support of the bill, the whole thereof must be taken together, and explanations given must be considered in connection with the admissions made.

5. SAME—PLEADING—VARIANCE — FAILURE TO AMEND.
A petition against an administrator and a debtor of the estate alleged that a third person had borrowed money from the decedent and repaid it to the administrator. The administrator, in his answer, denied the receipt of the money. The debtor alleged that the third party handed the money in question over to her, and that she gave it to decedent. The third party testified that he paid the money to the debtor, and that the allegation of the bill was an error. *Held* that, in the absence of an amendment to the bill, there could be no recovery of the sum of money in question.

6. ADMINISTRATORS — DEBTORS OF ESTATE — FAILURE TO COLLECT—LIABILITY.
An administrator cannot be charged with the amount of a debt belonging to the estate which he has never collected, and which has not been established against the debtor so that he can be deemed guilty of laches in having failed to collect it.

Appeal from Circuit Court, Rappahannock County.

Suit by J. A. Chappelear and others against B. M. Latouraudais, individually and as administrator of Mrs. Nancy Reager, deceased, and others. From a decree for complainants, defendants appeal. Reversed in part.

H. G. Moffett and James F. Strother, for appellants. Munford, Hunton, Williams & Anderson, for appellees.

BUCHANAN, J. The appellees, as distributees of the estate of Mrs. Nancy Reager, deceased, filed their bill against the appellants and another, all three of whom were also distributees. One of the appellants is her personal representative, and he and the other were alleged to be debtors to her estate. The object of the suit was to have a further settlement of the accounts of the personal representative, to require the debtor defendants to account for what they owed the es-

tate, and for a distribution thereof between the parties entitled.

The appellants filed a demurrer to the bill, which was overruled, and that action of the court is assigned as error.

The first ground of demurrer, and the one chiefly relied on in this court, is that "there is no such privity of interest between the plaintiffs and defendants as entitled them to bring this suit."

It is well settled that the distributee of a decedent's estate cannot maintain a suit against the personal representative of the decedent and another who is a debtor to the estate, except under special circumstances. Beaty v. Downing, 96 Va. 451, 454, 31 S. E. 612; Conrad v. Fuller, 98 Va. 16, 34 S. E. 893. What constitute such special circumstances as will justify such a joinder have never been limited by any precise and rigid rule. Same authorities. The circumstances usually relied on, and which have been held sufficient to authorize such joinder, are the insolvency of the personal representative, collusion between him and the debtor, and the fact that the debtor was a trustee holding property of the decedent, or his agent. Same authorities and cases cited.

The circumstances relied on in this case to take it out of the general rule are that all the parties defendant were necessary parties in a suit for the settlement of the accounts of the personal representative and a distribution of his decedent's estate; that, while the bill does not expressly charge collusion between the personal representative, B. M. Latouraudais, and his sister and codefendant, Mrs. Miller, the alleged debtor of his decedent's estate, the allegations of the bill taken together do amount to such a charge; that the bill alleges that the administrator and Mrs. Miller lived together very near to the decedent, who was their aunt, and with whom they were on most intimate terms; that the decedent was an old woman, and intrusted the management of her business affairs largely to them, who thus had charge of the collection and handling of money which became due and payable to her from time to time; that they acted together in this capacity as best suited their convenience; that on several occasions, which are specifically stated, sums of money were paid over to one or the other of them, and that each was indebted to the decedent's estate in at least the sum of $1,000; and that the personal representative had not charged himself with any of his said indebtedness to the estate, nor had he attempted to collect what Mrs. Miller owed the estate.

If there had been an allegation in the bill that the personal representative had been requested to sue Mrs. Miller, and had refused to do so, the case would be free from all doubt. Whilst such a request should generally be made, the facts alleged in the bill may be such as to render such a request unnecessary. Hagan v. Walker, 14 How. 29, 14 L. Ed. 312.

The facts and circumstances alleged in the bill were sufficient, we think, to entitle the appellees to bring this suit, especially as all the parties to the suit were necessary parties for the settlement and distribution of the decedent's estate.

The other grounds of demurrer were also properly overruled.

The next assignment of error is to the action of the court in directing one of its commissioners to take an account of all moneys collected by Mrs. Miller and her brother, or either of them, which belonged to Mrs. Reager, because the order of reference was entered upon the allegations of the bill unsupported by any evidence whatever.

It is well settled, as the appellants insist, that an order of reference should not be made to enable the complainant to make out his case, and that he must first make good the charges of his bill, showing that he has the right to demand an account. Millhiser, etc., v. McKinley, etc., 98 Va. 207, 35 S. E. 446; Bresee v. Bradfield, 99 Va. 831, 837, 38 S. E. 196. But, as no account was taken under the order, the error complained of was harmless, and is no ground for reversal. Bresee v. Bradfield, supra.

Upon a hearing of the cause upon the bill, answers of the appellants, replications thereto, and the depositions of witnesses taken by the appellees, the circuit court was of opinion that the said "Latouraudais is indebted to the estate of Nancy Reager, deceased, in the sum of one hundred and thirty-two dollars and fifty cents, with interest thereon from December 31, 1900, and that Mary E. Miller is indebted to the estate of Nancy Reager, deceased, in the sum of four hundred and fifty dollars, with interest from September 1, 1898, for which said sum the said B. M. Latouraudais, administrator, * * * is liable. The court doth adjudge, order, and decree that Commissioner C. H. Keyser take and state a further settlement of the administration account of the said B. M. Latouraudais, * * * taking as correct the settlement made by him in the suit of Reager v. Reager; but said commissioner is directed to charge said administrator with the said sum of one hundred and thirty-two dollars and fifty cents, with interest from December 31, 1900, and the further sum of four hundred and fifty dollars, with interest from September 1, 1898; and the said commissioner is directed to report the parties entitled to the funds as shown by said settlement, and in what proportion."

The appellant Latouraudais, in his own right and as administrator, assigns as error the action of the court in charging him with the sum of $132.50. This sum was the price of certain rent corn belonging to Mrs. Reager, which Mr. Latouraudais, in his answer, admits he received, but states along with

his admission that he paid it over to Mrs. Reager.

If the statements in his answer were the only evidence of his liability, it would have been error to have charged him with that sum; for the whole of the answer upon that question, if used at all in support of the bill, must be used and taken together. Explanations given must be used in connection with the admissions made. Morrison's Ex'rs v. Grubbs, 23 Grat. 342, 349; Clinch River, etc., Co. v. Harrison, 91 Va. 122, 21 S. E. 660.

Answer under oath was expressly waived, and the fact that Mr. Latouraudais had received the price of the rent corn was clearly proved, independent of his admission; and, there being no evidence that he had paid the money over to Mrs. Reager, he was, under all the facts and circumstances proved in the case, chargeable with that sum.

The action of the court in holding that Mrs. Miller was indebted to the estate of Mrs. Reager in the sum of $450, and in decreeing that her administrator should be charged with that sum, is also assigned as error.

In the bill it is charged that a Mr. Huffman borrowed the said sum of $450 from Mrs. Reager, and when it was returned he paid it to Mr. Latouraudais. Mr. Latouraudais, in his answer, denies that such sum, or any part of it, was ever received by him. Mrs. Miller, in her answer, admits that some years before "Mr. Huffman handed respondent about that sum of money, which he had borrowed from Mrs. Reager, as respondent was informed, with the request upon the part of Mr. Huffman that respondent would hand the same to Mrs. Reager," which she did. Mr. Huffman, who was one of the complainants in the cause, testified that he paid the $450 to Mrs. Miller, and that the allegation in his bill that he paid it to Mr. Latouraudais was an error.

Upon the case made no decree could properly be rendered for the $450. In a court of equity, as well as in a court of law, the allegations and the proofs must agree. A recovery will not be allowed in a case, although proved, which differs essentially from that alleged in the bill. Wren v. Moncure, 95 Va. 369, 374, 28 S. E. 588, and cases cited; Millhiser, etc., v. McKinley, etc., supra; note to Harris v. Harris, 2 Rand. 431, in Michie's Va. Rep. Anno., bot. p. 871, where the cases are cited.

When the answers were filed in this case, if the appellees wished to hold Mrs. Miller liable for the $450, they should have amended their bill. Having failed to do this, they can only recover according to the allegations of the bill. They cannot recover upon any new ground which was shown by her answer, of which they did not avail themselves by amending their bill. If Mrs. Miller was to be condemned from the statements of her answer, she ought to have had the benefit of the whole answer. If her answer is to be taken as true as to the fact that Huffman handed her the money for Mrs. Reager, it must also be taken as true that she delivered it to Mrs. Reager. See Judge Brockenbrough's opinion in Eib v. Martin, 5 Leigh, 140–142; Millhiser v. McKinley, supra; Bresee v. Bradford, supra.

The appellees had no right under their bill to recover the $450 from Mrs. Miller, no matter what their proof was, because they had not alleged that she owed it. They had no right to recover it on her answer, because it showed that she was not liable. Neither was Mr. Latouraudais chargeable with it under the pleadings and proofs in the cause, either in his individual or representative capacity. The money was never received by him for Mrs. Reager, and he could not be charged with laches in failing to collect it from Mrs. Miller until it was established that she owed it.

We are of opinion, therefore, that the said decree, in so far as it charges Mrs. Miller and the personal representative of Mrs. Reager with the $450, was erroneous, and to that extent must be reversed and annulled, and in other respects affirmed; and that the decree overruling the demurrer and directing an account must be affirmed.

(104 Va. 154)

ATLANTIC COAST LINE R. CO. v. WATKINS.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. RAILROADS—FIRES — COMBUSTIBLE MATERIAL ON RIGHT OF WAY.

A railroad company owes the duty of keeping its right of way clear of combustible materials liable to ignition by sparks from engines.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1673.]

2. SAME—DUE CARE.

Where a railroad company equips its locomotives with the best known appliances to prevent the escape of sparks, keeps the locomotives in good repair, and keeps its right of way clear of combustible materials, it is, as a general rule, not liable for fires caused by sparks from locomotives.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1657–1676.]

3. APPEAL—REVIEW—QUESTIONS OF FACT.

Though an appellate court will not reverse the jury's finding on an issue of fact unless there has been a plain deviation from the evidence, nevertheless it will not hesitate to do so if satisfied that the evidence is plainly insufficient to support the findings.

4. RAILROADS—FIRES—EVIDENCE.

That a fire started from a spark from a locomotive does not alone justify an inference that the fire originated on the railroad right of way.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1709, 1710.]

5. SAME—SUFFICIENCY OF EVIDENCE.

In an action against a railroad company for damages alleged to have been caused by a fire originating on the right of way, evidence *held* insufficient to justify submission to the jury of the question whether the fire did so originate.

Error to Circuit Court, Chesterfield County.

Action by W. O. Watkins against the Atlantic Coast Line Railroad Company. There was judgment for plaintiff, and defendant brings error. Reversed.

Geo. B. Elliott, for plaintiff in error. J. M. Gregory and C. S. Sands, for defendant in error.

WHITTLE, J. This writ of error brings up for review a judgment in behalf of the defendant in error against the plaintiff in error in an action to recover damages for injury to the land and timber of the former, alleged to have been occasioned by fire which originated on the right of way of the plaintiff in error.

While it is conceded that the fire was caused by sparks emitted by one of the defendant's locomotives, it appears that the engine was equipped with the best mechanical appliance in known and practical use for preventing the escape of sparks. It also appears that the engine was in good repair, and in charge of a competent and experienced locomotive engineer. Therefore the defendant was not neglectful of any of its obligations to the public in those particulars. Tyler v. Ricamore, 87 Va. 466, 12 S. E. 799; Patteson v. C. & O. Ry. Co., 94 Va. 16, 26 S. E. 393; N. & W. Ry. Co. v. Perrow, 101 Va. 345, 43 S. E. 614.

The remaining duty of a railroad company in that connection is to keep its right of way clear of combustible materials liable to ignition by sparks or coals of fire discharged from passing engines and to communicate fire to the property of others. N. Y. P. & N. Ry. Co. v. Thomas, 92 Va. 606, 24 S. E. 264; Tutwiler v. C. & O. Ry. Co., 95 Va. 443, 28 S. E. 597. As a general rule, subject, of course, to exceptions in particular cases, where these responsibilities have been complied with, a railroad company fulfills its duty, and is not liable in damages for the escape of fire. White v. N. Y. P. & N. Ry. Co., 99 Va. 357, 38 S. E. 180; C. & O. Ry. Co. v. Heath (Va.) 48 S. E. 508.

The specific ground of negligence relied on to sustain the verdict and judgment under review is the allegation that the fire originated in dry swamp grass on the defendant's right of way, and was communicated thence to the woodland of the plaintiff; and that is the sole question presented by the record for decision.

In approaching the consideration of that question, the court is mindful of the rule that the case is before it as upon a demurrer to the evidence, and that the inquiry touching the negligent starting or communication of fire to the plaintiff's property involves an issue of fact for the determination of the jury, and that an appellate court may not reverse a judgment founded thereon unless there has been a plain deviation from the evidence. But the converse of the proposition is equally true—that the court will not hesitate to set aside the verdict if it is satisfied that the evidence is plainly insufficient to support it. Kimball & Fink v. Friend, 95 Va. 125, 27 S. E. 901; Reusens v. Lawson, 96 Va. 285, 31 S. E. 528; Marshall's Adm'r v. Valley Ry. Co., 99 Va. 978, 34 S. E. 455; Morien v. N., etc., Terminal Co. (Va.) 46 S. E. 907; Seaboard, etc., Ry. Co. v. Hickey, 102 Va. 394, 46 S. E. 392; Moore Lime Co. v. Johnston's Adm'r (Va.) 48 S. E. 557.

The burden of proof rests upon the plaintiff to show that the fire began on the right of way, for, unless that fact be established, the alleged negligence of the railroad company in suffering combustible matter to accumulate on its right of way was not the efficient and proximate cause of the accident.

Notwithstanding the evidence justifies the primary presumption that the fire started from a spark or coal of fire from the defendant's engine, it does not necessarily follow, and cannot be inferred from that circumstance alone, that it originated on the right of way. The case then presents two hypotheses of equal probability: The one, that the fire started on the right of way, in which event the railroad company would be liable; the other, that it started off the right of way, in which event the company would not be liable. It is incumbent on the plaintiff, therefore, in order to warrant a recovery, to establish the truth of the first hypothesis.

"It is * * * well settled that when damages are claimed for injuries inflicted through the alleged negligence of the defendant, not only is the burden of showing negligence by a preponderance of the evidence upon the plaintiff, but if the injury may have resulted from one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff cannot recover; neither can he recover if it was just as probable that the damage was caused by the one as by the other." C. & O. Ry. Co. v. Heath, supra; N. & W. Ry. Co. v. Poole's Adm'r, 100 Va. 148, 40 S. E. 627; Northington v. Ry. & Light Co., 102 Va. 446, 46 S. E. 475.

There is no direct evidence that the fire started on the right of way, and (independently of the positive evidence of the defendant that it started off the right of way) the circumstances tend to sustain the contrary theory.

The evidence on behalf of the plaintiff may be summarized as follows: On the morning of April 27, 1903, at about 11 o'clock, a short time after a passenger train had passed over the defendant's track, going from Petersburg to Richmond, the plaintiff discovered smoke rising in the woods in the direction of "Phillips' Crossing," on the railroad. The railroad is more than a mile from plaintiff's

residence, and he paid no particular attention to the fire at that time; but afterward, about 3 o'clock in the afternoon, he observed that the wind, which was blowing from the direction of the railroad, was driving the fire towards his premises, and rode over to investigate it. Thereupon he ascertained that the burnt district terminated along an irregular course, extending some distance on the line of the railroad, and in several places three or four feet upon the right of way. A week later the plaintiff, accompanied by a witness, visited the scene of the fire, and determined the distance from the center of the track to the inner margin of the burnt area to be 30 feet, extending along a zigzag line for about 250 feet. The witness also stated, what is matter of common observation, that a forest fire will "eat back against the wind"; and neither he nor the plaintiff could say at what point the fire started. The zigzag line referred to, if broken, might have indicated that fires were set out separately and independently of each other; but it was continuous, a circumstance which rather conduces to the theory that the fire crept back against the wind.

But, however that may have been, it was incumbent on the plaintiff to solve the doubt, for, as recently remarked by this court: "The party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds. The evidence must show more than a probability of a negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. This court has repeatedly held that, when liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being shown by competent evidence, and it is incumbent upon such a plaintiff to furnish evidence to show how and why the accident occurred—some fact or facts by which it can be determined by the jury, and not be left entirely to conjecture, guess, or random judgment, without a single known fact." C. & O. v. Heath, supra.

But the case does not depend entirely upon the plaintiff's evidence. The defendant introduced a witness who testified positively that he discovered the fire within a few minutes after the 11 o'clock train had passed "Phillips' Crossing," and it was burning two or three yards outside the right of way. It is true the plaintiff undertook to contradict this witness, but his alleged discrepancies of statement left unimpaired the explicit declaration that the fire started off the right of way.

It thus appears that the evidence, as a whole, is plainly insufficient to sustain the verdict, and the lower court erred in overruling the defendant's motion to set it aside, for which error its judgment must be reversed, and the case remanded for a new trial.

(104 Va. 79)

WILLIAM R. TRIGG CO. et al. v. BUCYRUS CO. et al.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. SALES — BAILMENTS — DISTINCTION BETWEEN.

Plaintiff contracted to furnish certain pumping machinery, to be installed in the hull of a dredge being constructed by defendant. The contract further provided that plaintiff should install the machinery at its own expense; that defendant should afford the facilities of its yards for such installation, and furnish men and material for that purpose at cost; that defendant should keep the machinery insured for the benefit of plaintiff; and that it should pay one-third of the price when the machinery was delivered, one-third when it was installed on board the dredge, and the balance on completion of the test by the party for whom the dredge was being constructed. *Held*, that on delivery of the machinery, and payment of the first installment of the purchase price, there was a completed sale, and not a mere bailment, of the machinery to the defendant.

2. SAME—CONDITIONAL SALES—RECORDING.

A contract by the United States with a shipbuilding company whereby all parts of machinery paid for by the United States under a specified system of partial payments became thereby the sole property of the United States is not a contract of conditional sale, required to be recorded by Va. Code 1904, § 2462, p. 1219.

3. CLAIMS AGAINST UNITED STATES—INTEREST.

No interest is allowable on claims against the United States unless the government has stipulated to pay interest, or it is given by express statutory provision.

4. SAME—STIPULATION—EFFECT.

Under Rev. St. U. S. §§ 3753, 3754 [U. S. Comp. St. 1901, p. 2530], providing that, whenever any property owned or claimed by the United States shall be attached or held for the security of any claim against such property, the Secretary of the Treasury may direct the Solicitor of the Treasury to cause a stipulation to be entered into for the discharge of such property, to the effect that upon such discharge the person asserting the claim shall be entitled to such rights to the property or its proceeds as he would have had if the possession had not been changed, a stipulation in such a case declaring that its object was to secure to all claimants the fullest possible protection and security did not entitle claimants to receive interest upon the proceeds of the property in the hands of the United States.

Appeal from Chancery Court of City of Richmond.

Action by the Bucyrus Company and others against the William R. Trigg Company and others. From a decree for plaintiffs, defendants appeal. Reversed.

A. W. Patterson, Geo. Bryan, and Bickford & Stuart, for appellants. L. L. Lewis, U. S. Atty., Munford, Hunton, Williams & Anderson, for appellee Bucyrus Co.

HARRISON, J. The bill in this case was filed by certain supply lien creditors of the William R. Trigg Company, shipbuilders, suing on behalf of themselves and all other creditors similarly situated, alleging the insolvency of the defendant company, and

asking the appointment of a receiver to take charge of its assets and administer the same under the orders of the court. Thereupon numerous other supply liens were filed—among them, one for $20,744.08 by the Bucyrus Company, of Milwaukee, Wis.

At the time the bill was filed and the receiver appointed, the Trigg Company was engaged in the construction of a number of vessels for the United States—among them, a certain seagoing suction dredge, at a cost of $252,375. To be used in the construction of this vessel, the Bucyrus Company furnished the Trigg Company, under a contract in writing between the parties, certain pumping machinery, at a cost of $32,050. It is the rights of the parties growing out of this contract that are the subject of the present controversy between the receiver and the supply lien creditors of the Trigg Company, on the one hand, and the Bucyrus Company, on the other; the latter claiming title to the pumping machinery in question, and therefore to the whole of its proceeds, which claim is vigorously controverted by the receiver and creditors of the Trigg Company.

In pursuance of the acts of Congress in such cases made and provided, the United States government filed its stipulation herein, claiming the unfinished vessel and all machinery on hand applicable to its construction; agreeing to protect the creditors of the Trigg Company in any claim they might have in or to the property which was superior to the rights of the government. Thereupon an order was entered directing the receiver to surrender possession of the unfinished dredge and certain materials applicable thereto, including the pumping machinery in controversy, to the United States or their authorized agents. Subsequently a balance of $14,286.67 was ascertained to be due from the United States on this pumping machinery, and it is this sum, in the hands of the government, which is now the real subject of controversy; the decree appealed from having directed its payment to the Bucyrus Company.

The contract, which is dated September 16, 1901, provides that the Bucyrus Company shall construct and deliver the pumping machinery to the Trigg Company at Richmond, Va. It further provides that the Bucyrus Company shall, at its own expense, install the machinery in the hull of the dredge; the Trigg Company, if requested, to afford the facilities of its yards for such installation, and, if requested, to furnish men and material for that purpose at cost. The Trigg Company agree to pay for furnishing and installing the machinery $32,050—one-third thereof when the pumping machinery was delivered at the works of the Trigg Company at Richmond, Va., one-third when such machinery was installed on board the dredge, and the balance on the completion of the government test, and after the machinery was found to be satisfactory to the government engineer. The Trigg Company agreed, at the delivery of the machinery, and until it was accepted and paid for, to keep the same insured against fire and marine risk for the benefit of the Bucyrus Company as its interest might appear, and for the benefit of the United States as their interest should appear. It was further mutually understood that if, for any reason other than the fault of the Bucyrus Company, the dredge should not be ready to receive the machinery within 10 months from the date of the contract, or if, for any reason other than the fault of the Bucyrus Company, it should not be installed as contemplated, or if, for any reason other than the fault of the Bucyrus Company, the completed dredge should not be delivered to or accepted by the government, the Trigg Company should save and hold harmless the Bucyrus Company from all loss and damage resulting therefrom. Section 65 of the specifications, which are made a part of the contract, provides that all parts paid for under the system of partial payments specified shall become thereby the sole property of the United States, but that this provision shall not be interpreted as relieving the contractor (Trigg Company) from the sole responsibility for the proper care and protection of said parts prior to the delivery of the dredge to the United States, or from any other of the provisions of the specifications, and that the contractor shall, at its own expense, properly store and care for the pumping machinery during the period, if any, between delivery and installation. The provisions of the contract to which we have adverted are alone relied on as throwing any light upon the present controversy.

In accordance with the obligations assumed by it, the Bucyrus Company manufactured and constructed the machinery in question, and, prior to the appointment of the receiver, shipped the completed article, consigned to the Trigg Company, and delivered it into the possession of that company at its yards in Richmond. Thereupon the Trigg Company promptly paid the vendor $10,683.33, one-third of the purchase price, as provided for by the contract.

In his brief the learned counsel for the vendor concedes that, if the Bucyrus Company delivered this property to the Trigg Company as purchaser, the title and possession both passed with it. It is, however, contended that it was not delivered to the Trigg Company as purchaser, but as a mere bailee, and that therefore the title and possession both remained with the Bucyrus Company; the general rule relied on as controlling this case being that, when a contract is made for the purchase of an article hereafter to be delivered and paid for, so long as any act remains to be done by the vendor in order to put it in a state of readiness for delivery the property does

not pass to the buyer, but still remains at the risk of the seller. Citing Dixon v. Myers, 7 Grat. 240; Chapman v. Campbell, 13 Grat. 105; Haxall v. Willis, 15 Grat. 434.

As bearing upon the same general subject, Old Dominion S. S. Co. v. Burckhardt, 31 Grat. 664, may be very properly added to this list of cases. See, also, In re Leeds Mills (D. C.) 129 Fed. 922; In re Martin Vernon Music Co. (D. C.) 132 Fed. 983.

The contention is that the delivery of the machinery to the Trigg Company was only for the purpose of enabling the vendor to carry out that provision of the contract which required it to install the machinery in the hull of the dredge; that, for the purpose of being installed, the vendee had to return or redeliver the machinery to the vendor; and that this remaining obligation to install the machinery brings the case within the rule mentioned. The provisions of the contract particularly relied on as tending to show that the title to and possession of this property never passed out of the Bucyrus Company are that the Trigg Company agreed to furnish the facilities of its yards for installing the machinery, and undertook to keep the same insured for the benefit of the Bucyrus Company as its interest might appear, and that the machinery was not to be paid for in full until the dredge was completed and accepted by the government.

We cannot concur in the construction of the contract insisted upon by the vendor. After full consideration of the agreement, the terms of which were reduced to writing by the parties in a carefully prepared paper, we have been unable to discover any element of a bailment in the transaction under consideration.

Story, in his work on Bailments, § 2, says: "A bailment is the delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust."

It would be difficult to bring the transaction before us within the terms of this definition. The transaction under consideration plainly involved the absolute sale of a chattel to be manufactured and delivered by the Bucyrus Company to the Trigg Company at an agreed price, and, when the article was completed and delivered according to contract, the title thereto vested in the vendee, and the right to the purchase price vested in the vendor. The contract contains no reservation of title on its face, nor is there anything in its terms to indicate that the title and possession were intended to be and remain in the vendor after the delivery of the completed machinery to the vendee at Richmond. The machinery was the thing bought and sold under the contract, and when that was finished and delivered to the vendee, and paid for to the extent required by the contract, nothing remained to be done to complete the sale and purchase of the article bargained for, or to vest the vendee with a more absolute title and possession than was then acquired. The vesting of the title in the vendee was not affected by the additional contract of the vendor at some future time to install the machinery in the hull of the dredge, or by the agreement of the vendee to allow the vendor the facilities of its yards for that purpose. This seems quite clear from the contract, for by its sixth clause the obligation is imposed upon the vendee, to save the vendor harmless from all loss or damage, whether the machinery is installed or not, provided the vendor is not responsible for the failure to install. This provision is certainly not in harmony with the idea that the vendee had no interest in the property until it was installed, and was merely holding it as trustee for the vendor.

Nor is the provision of the contract that the vendee should keep the machinery insured for the benefit of the vendor, as its interest might appear, significant, as showing that the title was not to vest in the vendee. This provision only showed that the vendor had an insurable interest in the property, but that circumstance in no way affected the title of the vendee. It is a very common business transaction, where the whole of the purchase money is not paid, to require the vendee to keep the property insured for the benefit of the vendor as his interest may appear.

One-third of the purchase price was paid by the vendee in cash upon the delivery of the machinery, and the provision that the purchase money was not to be paid in full until the dredge was completed and accepted by the government could have no bearing upon the title of the vendee. To the extent that the payment of the purchase money was postponed by the contract, it was a sale on time; and, by the clause of the contract already adverted to, the vendor was protected against unreasonable delay in its payment by the obligation of the vendee to save it harmless, although the dredge should never be completed.

Our view is, therefore, that the case at bar does not come within the influence of the rule invoked, for the article purchased was not only completed, with nothing remaining to be done to put it in a state of readiness for delivery, but it was actually delivered and paid for to the full extent demanded by the contract.

If the terms of the contract were ambiguous, and its proper construction doubtful, it could be subjected to another test which is always entitled to great weight under such circumstances, and that is the construction which the parties have by their acts placed upon it. King v. N. & W. R. Co., 99 Va. 625, 39 S. E. 701; Glenn v. Perpetual B. & L. Co., 99 Va. 695, 40 S. E. 25. The result of this test shows that the view we have taken of the contract is fully sustained by

the construction which the parties by their acts have placed upon it.

The vice president and receiver of the insolvent vendee, who had been active in the management of its affairs, and was well acquainted with its assets, when directed by the order of December, 1902, to take possession of all the property, real and personal, in the possession of the Trigg Company, or to which it was entitled, and to make an inventory of all such assets, took possession of the machinery in question, and inventoried it as the property of the Trigg Company. No suggestion was made by him that the machinery was only a bailment, and should be, therefore, turned over to the Bucyrus Company, from whom it came. Nor did the vendor then make any such claim. On the contrary, two weeks after the appointment of the receiver it had recorded in the chancery court of the city of Richmond a supply lien, claiming that the machinery in question constituted supplies furnished by it to the Trigg Company under the contract of September 16, 1901; that there was a balance of $20,744.08 still due and owing by its vendee on account of such supplies, and, as security therefor, claiming the lien provided by statute against all of the assets of the vendee. The truth of the facts set forth in this claim of lien was sworn to by the manager of the Bucyrus Company, who was one of its general officers. This act of the vendor is conclusive of its construction of the contract at the time, and cannot be reconciled with its present pretension, made six months afterwards, that it had not parted with the title to or possession of the machinery, but that it was held by the Trigg Company as a mere bailee.

We have given careful consideration to the decisions of this court relied on to sustain the contention of the vendor. They discuss the general principles of law bearing upon this class of cases, though in each the facts are wholly different. So far as the principles there announced are applicable, they are certainly not opposed to the conclusion reached in this case—that the transaction here involved was an absolute sale, that the possession and title to the property sold vested in the vendee, and that the vendor has no claim thereto, except as creditor in common with others who must suffer by the insolvency of the vendee.

The $14,266.67 now in the hands of the United States government, the balance still due on this machinery, must be paid over to the receiver of the William R. Trigg Company, as part of the general assets of that concern, to be distributed under the orders of the court to those entitled thereto.

Under the contract between the United States and the Trigg Company, all parts of the machinery paid for by the government under the specified system of partial payments became thereby the sole property of the United States, and, as already pointed out, this provision formed a part of the contract of the Trigg Company with the Bucyrus Company. The appellants contend that the title to the machinery did not vest to any extent in the United States as against the creditors of the Trigg Company, because the contract under which the government claims was not recorded as required by section 2462, p. 1219, of the Virginia Code of 1904.

Without expressing any opinion upon the question whether or not the contracts of the United States come within the recording acts of Virginia, it is sufficient to say that this case does not come within the category of contracts which are required to be recorded by the section mentioned. No title was reserved in the contract, and there is no element of a conditional sale about the transaction.

It is further contended by the appellants that the United States should be required to pay interest on the balance ascertained to be due by it on account of the machinery in question.

It is well settled by the decisions of the Supreme Court that in no case is interest allowable on claims against the government unless the government has stipulated to pay interest, or it is given by express statutory provision. Tillson v. United States, 100 U. S. 43, 25 L. Ed. 543; Angarica v. Bayard, 127 U. S. 251, 8 Sup. Ct. 1156, 32 L. Ed. 159. In the case last cited, after stating the facts, the court says: "The case therefore falls within the well-settled principle that the United States are not liable to pay interest on claims against them in the absence of express statutory provision to that effect. It has been established as a general rule in the practice of the government that interest is not allowed on claims against it, whether such claims originate in contract or tort, and whether they arise in the ordinary business of administration, or under private acts of relief passed by Congress on special application. The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."

In the case at bar, neither the stipulation filed by the learned counsel for the government, nor the act of Congress under which the stipulation was filed, contains any recognition of a liability on the part of the government to pay interest. It is true, the stipulation declares that its object is to secure to any and all claimants the fullest possible protection and security in and to their respective rights and claims. The fullest security possible was that given by sections 3753 and 3754 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2530], under which the stipulation was filed. The intention and effect of the stipulation was to conform to the act of Congress, and, if it

had contained any provisions not authorized by the act of Congress, such additional provisions would have been without legal effect. It follows, from the authorities cited, that the fund held by the United States government, awaiting the determination of its rightful owner, does not bear interest against the government.

The decree appealed from, of July, 1904, after directing the payment to the Bucyrus Company of the balance of $14,266.67 in the hands of the government, provides that upon its payment the title of the Bucyrus Company in the pumping machinery shall vest in the United States. Counsel for the government calls attention to the fact that upon the surrender of the property in question, under the stipulation which was filed, the title vested by operation of law in the United States, and that the provision of the decree that it should vest when the money was paid to the Bucyrus Company was therefore error, and asks that the decree be corrected in that respect.

The point is well taken, but, as we have held that the Bucyrus Company has no title to the property, the error is harmless. The error can, however, be avoided in the decree to be hereafter entered.

For these reasons, the decrees appealed from must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

(104 Va. 73)

ROBERTSON v. CITY OF STAUNTON.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMITATION—STATUTE—CONSTRUCTION.
Code 1887, § 1039 [Va. Code 1904, p. 501], providing that it should not be lawful for any city or town to create at any time an indebtedness in excess of 17 per cent. of the assessed value of its real estate and 15 per cent. of its personal property, was not an authorization of cities and towns to contract indebtedness, but a limitation on their power.

2. SAME.
Code 1887, § 1039 [Va. Code 1904, p. 501], was applicable as a limitation on the power of cities whose charters contained no provision on the subject of indebtedness other than that the council might contract loans, and providing that such loans should not be irredeemable for a period greater than 34 years, notwithstanding the proviso of such section that it should not apply to any city whose charter already determined the limit of aggregate indebtedness allowed to be created by it.

3. SAME—CONSTITUTIONAL LAW.
Code 1887, § 1039 [Va. Code 1904, p. 501], is repugnant to Const. art. 8, § 127 [Va. Code 1904, p. ccxliii], providing that no city shall issue any bonds or other interest-bearing obligations for any purpose or in any manner to an amount which, including existing indebtedness, shall at any time exceed 18 per cent. of the assessed value of the real estate in the city subject to taxation.

4. SAME.
A city whose charter contained no provision on the subject of indebtedness other than that the council might contract loans, but that such loans should not be irredeemable for a period greater than 34 years, is powerless under Const. art. 8, § 127 [Va. Code 1904, p. ccxliii], to contract debts in excess of 18 per cent. of the assessed value of the taxable real estate therein, notwithstanding the proviso that section 127 shall not apply to cities whose charters existing at the adoption of the Constitution authorize a larger percentage of indebtedness.

5. SAME — SELF-EXECUTING PROVISION OF CONSTITUTION.
Const. art. 8, § 127 [Va. Code 1904, p. ccxliii], is self-executing.

Appeal from Corporation Court of Staunton.

Suit by Alexander F. Robertson against the city of Staunton. From a decree in favor of the defendant, complainant appeals. Reversed.

S. D. Timberlake, Jr., for appellant. Braxton & McCoy, for appellee.

KEITH, P. This cause originated in a bill filed by the appellant, Alexander F. Robertson, in the corporation court of the city of Staunton, praying an injunction against the issue by the city of five bonds of the denomination of $100 each, which were to be sold and the proceeds applied to improving the streets and alleys of that city.

At the time of the adoption of the ordinance providing for the issue of these bonds, the outstanding interest-bearing bonds of the city of Staunton aggregated, in round numbers, $578,000, or nearly 21 per cent. of the assessed value of all the real estate within the city subject to taxation. The injunction was prayed for upon the ground that the issue of the bonds would be illegal, and in contravention of the limitation imposed upon municipalities, in respect to the creation of indebtedness, by section 127 of the Constitution of the state.

A temporary injunction was awarded, and the city filed its answer to the bill. It admitted that its bonded indebtedness was already largely in excess of 18 per cent. of the assessed value of the real estate within the city subject to taxation, but claimed that it came within the proviso of section 127 of the Constitution, because its charter authorized the city to contract debt and issue bonds without limit, and that it was therefore authorized by its charter, within the meaning of section 127 of the Constitution, to issue bonds without any limitation or restriction. So much of the charter of the city of Staunton as is pertinent to this inquiry is as follows:

"The city council may, in the name of and for the use of the city, contract loans, or cause to be issued certificates of debt, or bonds; but such loans, certificates, or bonds, shall not be irredeemable for a period greater than thirty-four years; provided, however, that said council shall not contract such loans, or issue such certificates of debt, or bonds, for the purpose of subscribing to the stock of any company incorporated for a

work of internal improvement, or other purposes, without being first authorized so to do by three-fourths of the legal voters of the city voting on the question; and the council shall, when such debt or loan is created, provide a sinking fund for the payment of the same; and provided further, that the said council shall not endorse the bonds of any company whatsoever without the same authority."

On March 20, 1875, the Legislature passed an act, as follows:

"It shall not be lawful for any city or town to create, at any time, an indebtedness in excess of seventeen per cent. of the assessed value, under the state assessment laws, of its real, and fifteen per cent. of its personal property: provided, that this section shall not apply to any city or town whose charter already determines the limit of aggregate indebtedness allowed to be created by it, except the town of Danville." Acts 1874–75, p. 176, c. 179.

This act was carried into the Code of 1887 as section 1039 [Va. Code 1904, p. 501].

Section 127, art. 8, of the Constitution [Va. Code 1904, p. ccxliii], is as follows:

"No city or town shall issue any bonds or other interest-bearing obligations for any purpose, or in any manner, to an amount which, including existing indebtedness, shall at any time exceed eighteen per centum of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes: provided, however, that nothing above contained in this section shall apply to those cities and towns whose charters existing at the adoption of this Constitution authorize a larger percentage of indebtedness than is authorized by this section."

Appellant contends that section 1039 of the Code [Va. Code 1904, p. 501] was repealed by the Constitution. It was certainly repealed by the Legislature. Acts 1902–3–4, pp. 412, 891, cc. 269, 556. It applied, while in force, to the city of Staunton. It did not confer the power to create indebtedness, but operated as a limitation upon the power conferred by the charter. As it was lawful by its terms, at any time, for a city or town to create an indebtedness not in excess of 17 per cent. of the assessed value of its real, and 15 per cent. of its personal, property, it was plainly in conflict with section 127 of the Constitution, which imposed a limit upon the issue of bonds by a city or town, for any purpose, in excess of 18 per cent. of the assessed value of the real estate in the city or town subject to taxation. Upon the adoption of the Constitution, therefore, the act perished on account of its repugnancy.

It is important to observe that section 1039 was not, and was never intended to be, a source of power to issue bonds to the extent of 17 per cent. upon realty and 15 per cent. upon personalty subject to taxation, but merely imposed a limit upon all cities and towns to which it applied; that is to say, to all cities and towns of the commonwealth except those whose charters fix the "limit of aggregate indebtedness allowed to be created by it except the town of Danville." If section 1039 could be treated, as the source of power, as authorizing cities and towns to issue bonds up to the limit which it imposes, and as entering into the charters of cities and towns existing at the time of the adoption of the Constitution, then section 127 of the Constitution would be practically inoperative. It limits the issue of bonds to 18 per cent. of the assessed value of real estate, while section 1039, if to be regarded as a source of power, limits the city or town to 17 per cent. upon realty and 15 per cent. upon personalty, so that the aggregate indebtedness authorized by the act would necessarily exceed 18 per cent. of the assessed valuation of real estate in a town in which the value of personalty constituted more than one-eighteenth of the value of the realty—a construction which would render section 127 practically nugatory.

We think that by a proper construction of section 127 of the Constitution it is to be taken as dealing with the several legislative charters of cities and towns of the state, and that the general laws, by which cities and towns are regulated, perished with the adoption of the Constitution, if repugnant to it, or were left by that instrument to be dealt with by the Legislature in the ordinary course of legislation; and that the limitations of section 127 apply to the charters of all cities and towns which do not in terms authorize a percentage of indebtedness larger than that named in the section; that is to say, 18 per cent. of the assessed valuation of real estate in the city or town subject to taxation.

It is proper for us to consider whether or not the section of the Constitution to which we have referred is self-executing, or requires legislative action to render it operative.

Provisions of a constitution of a negative character are generally, if not universally, construed to be self-executing. The fifteenth amendment of the Constitution of the United States illustrates this rule. It provides that the right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude. "To this extent," says Mr. Cooley (Cooley on Constitutional Lim. [7th Ed.] p. 120), "it is self-executing, and of its own force it abolishes all distinctions in suffrage based on the particulars enumerated. But when it further provides that 'Congress shall have power to enforce this article by appropriate legislation,' it indicates the possibility that the rule may not be found sufficiently comprehensive or particular to protect fully this right to equal suffrage, and that legislation may be found necessary for that purpose. Other provisions are completely self-executing, and manifestly contemplate no

legislation whatever to give them full force and operation."

"And generally," says Cooley (page 121), "a constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."

If we have rightly construed section 127, there can be no doubt that it operates proprio vigore. As was said by the Supreme Court of the United States, in Doon Tp. v. Cummins, 142 U. S. 366, 12 Sup. Ct. 220, 35 L. Ed. 1044, "No legislation can confer upon a municipal corporation authority to contract indebtedness which the Constitution expressly declares it shall not be allowed to incur."

So far, therefore, from this provision requiring legislative authority to make it operative, it would of its own inherent force have rendered of no avail a statute which undertook to authorize what it has prohibited.

We are of opinion that there is error in the decree of the corporation court, for which it must be reversed.

(104 Va. 140)

LAWLER et al. v. FRENCH et al.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. DEED OF TRUST—RIGHT TO SELL—NONPAYMENT OF TAXES.

The right under a deed of trust to secure a loan, authorizing foreclosure if the borrower neglect to pay his taxes within ten days after they are due, is not waived by failure to sell till after the taxes have been due for three years, and the lender has paid them.

2. SAME—SETTING ASIDE SALE—CONTENTIONS NOT MADE IN BILL.

The contentions in a suit to set aside a sale under a trust deed given to secure a loan by an association that the trustees made the sale without a written request from the association, and that therefore it was unlawful, and that in fact the instrument of security was a mortgage, because one of the trustees was a stockholder, and so entitled the maker to redeem, not having been made in the bill, and no facts having been alleged on which they can be based, cannot be considered.

Appeal from Corporation Court of Alexandria.

Suit by Robert W. French and others against Martin Lawler and others. Decree for complainants. Defendants appeal. Reversed.

C. C. Carlin and Edmund Burke, for appellees.

BUCHANAN, J. The object of this suit was to enjoin the appellant Lawler from prosecuting an action of unlawful detainer to recover the possession of a house and lot purchased by him from the trustees in a deed of trust executed to secure the payment of money loaned or advanced by a building and loan association to Robert W. French, one of its members, together with the dues and premiums on the borrower's stock, fines for the nonpayment of such dues and premiums, and all taxes and assessments on the trust property during the continuance of the advancement, to set aside the sale and conveyance made by the trustees, and to have an accounting between the association and the borrowing member. The court, upon the hearing of the cause, granted the relief prayed for, and from that decree this appeal was allowed.

The grounds stated in the bill for having the sale and conveyance made by the trustees set aside are: (1) That at the time of the sale the complainant was not three months in arrears in the payment of dues, fines, interest, or installments payable to the association. (2) That the sale was ordered without notice to him, or demand upon him for the payment of any dues, fines, or interest, and was in fraud of his rights and contrary to the covenants and terms of the deed of trust. (3) That there were only four persons present at the sale besides the inmates of his house. (4) That his sister-in-law was present at the sale, and instructed and directed a friend who was near her to make a bid in excess of the price at which the property was knocked off, which she thought had been communicated to the auctioneer, but, by some mistake or misunderstanding, was not cried. (5) That the price at which the house and lot were sold was grossly inadequate, and a fraud upon the complainant's rights, as the property was worth more than double the amount for which it was sold. (6) That the complainant believes and charges that there was fraud and collusion between the purchaser and the trustees, both conniving at the sale at small figures, and, although the complainant protested against the sale and offered to reimburse the purchaser, he declined to accept the money he paid for the property, and that the whole transaction, so far as the purchaser and the trustees were concerned, was concluded in less than two days after the sale.

The trustees and purchaser demurred to and answered the bill. In their answers they deny all the material allegations relied on as grounds for setting aside the sale and conveyance, except the statement in the bill that the complainant was not three months in arrears on his monthly dues, fines, interest, or installments. While the answers of the trustees admit that the complainant was not three months in arrears on account of his dues, etc., they aver that he had not paid the taxes upon the property for several years, and that immediately prior to advertising the property for sale by the trustees the building association had been required

to pay and did pay the said taxes and assessments, amounting to the sum of $398.54, which the complainant, although often requested, had refused to refund. The trustees further state in their answer that, after the sale and conveyance sought to be set aside, the said French had ratified the sale by giving an order upon them for the balance of the proceeds of sale after satisfying the debt secured by the trust deed, and that they paid over the same to the assignee, and had settled their accounts before the commissioner of accounts.

The complainant failed to prove the material allegations of his bill. There is not the slightest evidence of fraud or collusion on the part of the trustees and the purchaser. Although there were but few persons present at the sale, it was advertised in the manner prescribed by the trust deed in a newspaper of the city, of large circulation. The auctioneer bid on the property for the association a sum in excess of its debt, which was more than another person who had gone there to bid was willing to give for it. It was sold to the purchaser, Lawler, as the highest and best bidder. There was nothing in the condition of the weather to prevent persons from attending the sale, so far as the record shows. While the proof shows that the house and lot cost much more than they were sold for, it further appears that their location is a very undesirable one, and that such residential property in that part of the city does not sell for anything like its original cost. It is by no means clear that the property, if offered for sale again, would sell for much, if any, more than the price at which it did sell. At least, there is no such inadequacy of price shown as would justify the court in setting aside the sale on that ground.

The clear preponderance of evidence is that the sister-in-law of the appellee, French, who was present at the sale, did not bid or authorize any one else to bid for her.

The allegation of the bill that Mr. French, who was present at the sale, protested against the sale, is not only not sustained by the proof, but after the sale he assigned to a Mr. Andrews, one of his creditors, so much of his interest in the proceeds of the sale as was necessary to pay that creditor's debt. It is true that he and his assignee testify that the order on the trustees was not understood to be an assignment, but was given merely to secure the creditor, and that the paper was not intended to be a ratification of the sale. The conduct of both complainant and the assignee is in direct conflict with this contention, and in accordance with the plain provisions of the assignment, which was written by an attorney and acknowledged before a notary, for, when the trustees, pursuant to the terms of the assignment, paid the money to the assignee, he received it without any claim that the order did not entitle him to receive the money, but was a mere security for the debt; and Mr. French himself, after the assignment had been given, made an effort to collect a part of the said proceeds from the trustees, and, when shown his assignment to Mr. Andrews, he said he had forgotten all about it.

The contention of Mr. French that the trustees in the deed of trust advertised and made sale of the property before there had been any breach of the bond for the money loaned, or the deed of trust securing the same, is not borne out by the record. By the terms of the trust, the by-laws of the association of which the complainant was a member (article 9, § 6) expressly provide that "If any person who has received an advance neglects to pay interest, dues or monthly payments thereon for a period of three months from the time the same shall be due, or if he neglects to pay his insurance or taxes within ten days after they fall due, or to perform any condition or requirement contained in the obligation or security for such advance, then the whole principal mentioned in the mortgage, note or bond shall at once become due and payable without further notice, and proceedings may be commenced forthwith to foreclose said mortgage or to collect said bond or note, in such manner as the law directs, or as the board of directors may deem best for the interests of the association."

When the sale was advertised, the complainant had failed to pay his taxes for several years, and they had been paid by the association. This failure to pay his taxes was a violation of his contract with the association, and gave it the right to have the property sold. The fact that the association had not earlier exercised that right was not a waiver of the right to have it sold for their nonpayment.

Neither does the evidence sustain the contention that the association had agreed, when Mr. French paid up his other dues, to give him a longer time within which to pay his taxes than was given.

The appellee French asserts in his brief that the trustees made the sale without any request to them in writing by the building association, and their sale was therefore an unlawful exercise of the powers conferred upon them by the deed of trust. He further contends in his brief that the conveyance under which the sale was made was in fact a mortgage, and not a deed of trust, and that he is entitled to redeem the property. The ground upon which it is claimed that the conveyance is a mortgage, although in form a deed of trust, is that one of the trustees was a stockholder and an officer in the building association.

Neither of these contentions was made in the bill, and no facts alleged upon which they can be based. These questions, not having been put in issue by the pleadings, cannot be considered by the court.

Without discussing further the grounds re-

lied on for the relief sought, it is sufficient to say that we are of opinion that the case made did not warrant the court in setting aside the sale. Its decree must therefore be reversed, the injunction dissolved, and the bill dismissed.

(104 Va. 90)

CHESAPEAKE & O. RY. CO. v. WHITLOW.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. TRIAL—INSTRUCTIONS—CONSISTENCY.

In an action against a railroad for permitting filth to accumulate upon its right of way, thereby causing malaria in plaintiff's family, a charge to find for defendant if the sickness may have resulted from other causes than from stagnant water on the right of way, unless such stagnant water was the principal and substantive cause of the injury complained of, in which case they should find for plaintiff, even though other causes may have contributed to a lesser extent, was contradictory of a charge that if plaintiff by his own negligence permitted stagnant water to remain upon his premises which contributed to cause the sickness complained of, the jury must find for defendant, and inconsistent with an instruction to find for defendant if it used reasonable care to keep its right of way drained, and thus gave rise to an error which could not be cured by other instructions.

2. RAILROADS—CARE OF RIGHT OF WAY—ACCUMULATIONS OF FILTH—ACTIONS FOR INJURY—BURDEN OF PROOF.

In an action against a railroad for permitting filth to accumulate upon its right of way and thereby causing malaria in plaintiff's family, where there was evidence that plaintiff's own premises were in an unsanitary condition which might have caused the illness complained of, it was incumbent on plaintiff to show by a preponderance of evidence that such illness was caused by the railroad's negligence, and it was insufficient to show that it might as well have been caused by defendant's negligence as by his own.

3. SAME—INSTRUCTIONS.

In an action against a railroad for permitting filth to accumulate upon its right of way and thereby causing malaria in plaintiff's family, where there was evidence that plaintiff's own premises were in an unsanitary condition which might have caused the illness complained of, a charge to find for defendant if such illness may as well have resulted from other causes as from stagnant water on defendant's right of way was proper as it stood, and should not have been modified by adding thereto the clause, "unless * * * said stagnant water was the principal and substantive cause of the injury complained of, even though other causes may have contributed to a lesser extent, in which case" the finding should be for plaintiff.

Error to Circuit Court of Fluvanna County.

Action by George W. Whitlow against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

D. Harmon and Beasley & Moon, for defendant in error.

CARDWELL, J. This action was brought by George W. Whitlow against the Chesapeake & Ohio Railway Company to recover damages caused by the negligence of the defendant company, the specific cause of complaint alleged being that the defendant company negligently allowed stagnant water, decayed vegetation, mud, etc., to accumulate and remain upon and along its right of way where it passes through the farm on which the plaintiff resides in the county of Fluvanna, in consequence whereof the plaintiff and his family became sick with malaria, etc.

There was a verdict in the lower court in favor of the plaintiff for $800, and a judgment thereon, which we are asked to review and reverse because of the action of the trial court in overruling the demurrer to the declarations filed by the plaintiff, for misdirection of the jury in the instructions given, and refusing the defendant company a new trial on the ground that the verdict is contrary to the law and the evidence.

The plaintiff, with his family, consisting of his wife and seven children, moved upon a farm in Fluvanna county in 1898, and has since occupied it, the legal title to the farm being in the wife. The defendant company is the successor of the Richmond & Alleghany Railroad Company, and as such succeeded to the ownership of the property and franchises of the James River & Kanawha Canal Company, including the old canal which passes through the farm upon which the plaintiff resides, upon the towpath of which the railroad track is laid, the residence of the plaintiff being about 100 to 140 yards therefrom. By the act of assembly (Acts 1878–79, p. 119, c. 139) authorizing the Richmond & Alleghany Railroad Company, the predecessor in title of the defendant company, to acquire the canal and convert it into a railroad, there was imposed upon the railroad company the duty to so drain the same as not to leave stagnant water by which the health of citizens along the line of the canal might be injuriously affected. That this duty was incumbent upon the defendant company is not denied, nor is it claimed by the plaintiff that prior to 1901 that duty was neglected.

In July and August, 1901, that year and the two years following being very wet, the plaintiff's wife complained to the employés of the defendant company that the canal was not properly drained, and that her family were made sick with malaria in consequence of such negligent drainage, and thereupon the supervisor of that part of the railroad track had it gone over and drained properly, as he thought, but not sufficiently, as the plaintiff claims. Wherefore the plaintiff brought suit covering the period from August 11, 1901, to August 11, 1902, and subsequently brought another suit covering the period from November 11, 1902, to November 11, 1903, and by consent these suits were merged into one, so as to embrace these two periods, and tried as one case, with the result above stated.

The demurrer to the declarations was not urged in the oral argument here, and we deem it only necessary to say with reference thereto that the court is of opinion that

the declarations, and each of the counts contained therein, set out sufficiently and clearly a good cause of action.

Upon its plea of not guilty, the defendant company relied upon the theory, which appears to be a concession in the case—at all events, the evidence in support of the theory is not contradicted—that malaria is caused by the bite of a mosquito of the genus anopheles, which itself must have become infected by sucking the blood of a patient suffering from the disease, thereby taking into its system the malarial parasite, and that, at least, the insect itself might just as well have been propagated on the premises of the plaintiff as in the old canal bed.

While the evidence showed that the plaintiff and his family suffered from malaria during the periods mentioned, and had suffered from it before, and that the conditions in the canal bed were sufficient for the propagation of the malarial insect, it also tended to show that the conditions on the plaintiff's own low grounds about his spring and about an excavation made near his dwelling for an icehouse were equally, if not more, favorable for the development of the malarial mosquito, than the conditions about the canal bed.

The defendant company asked for five instructions, all of which were given as asked, except the third, and this was also given with a modification, this modification constituting the defendant company's first bill of exceptions. This instruction, as given, is as follows, the modification or addendum appearing in italics:

"The court instructs the jury that if they believe from the evidence that the sickness which the plaintiff claims to have suffered may as well have resulted from other causes as from stagnant water in the canal bed, then they must find for the defendant, *unless they should believe from the evidence that the said stagnant water was the principal and substantive cause of the injury complained of, even though other causes may have contributed to a lesser extent, in which case they shall find for the plaintiff.*"

Among the other instructions given for the defendant company is No. 5, which is as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff, by his own negligence, suffered or permitted stagnant water to remain in upon his own premises, which did contribute in any degree to cause the sickness of which he claims to have suffered, then they must find for the defendant."

The jury were also instructed that if the defendant company had used reasonable and prudent means to keep the canal bed drained, and to prevent the accumulation of stagnant water therein, they should find for the defendant, even though they may believe that by the exercise of greater care and skill better and more efficient methods might have been employed to accomplish such purposes. So that we have, as it appears to us, in instruction No. 3, as modified, an instruction not only inconsistent with other instructions, but directly contradictory of instruction No. 5, thus constituting an error which may not be cured by other instructions given, as it cannot be said in such a case whether the jury were controlled by the one or the other. N. & W. Ry. Co. v. Mann, 99 Va. 187, 37 S. E. 849; Winchester v. Carroll, 99 Va. 745, 40 S. E. 37; Va. & N. C. Wheel Co. v. Chalkley, 98 Va. 62, 34 S. E. 976; Richmond Pas. & Power Co. v. Steger, 101 Va. 319, 43 S. E. 612, and authorities there cited.

Instruction No. 3, as asked, was a plain statement of the law applicable to one aspect of the company's evidence not covered by other instructions, and the modification or addendum thereto is a misapplication to the case of the doctrine of concurrent negligence, viz.: Where concurrent negligence of two persons injures a third person, the person injured can recover of either or both; or, if the concurrent or successive negligence of two persons combined results in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. As illustrative of the application of this doctrine to the case at bar, counsel for the plaintiff say that "if two parties, acting entirely separately and independently, each create a separate pond of stagnant water, both of which concur in causing sickness to a third party, then either separately or both jointly are liable for the injury sustained, and in an action against one alone he could not plead in defense the concurrent act of the other."

The doctrine invoked is undoubtedly well established, and the deduction drawn therefrom is, in the abstract, sound, but neither is applicable to this case.

The case here falls under that class sanctioning the rule, as stated by all text-writers, that where damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible, and for the other of which he is not responsible, the plaintiff must fail if his evidence does not show that the damages are produced by the former cause. And he must also fail if it is just as probable that the damages were caused by the one as by the other, since the plaintiff is bound to make out his case by a preponderance of the evidence. N. & W. Ry. Co. v. Poole's Adm'r, 100 Va. 148, 40 S. E. 627, and authorities there cited. A fortiori he must fail if the damages resulted wholly from his own negligence; and if from his negligence, of a greater or lesser degree, concurring with that of the defendant, the law will not recognize a gradation of the fault and he still must fail.

Conceding the negligence of the defendant company in not keeping the old canal bed properly drained, thereby causing conditions from which malaria might be contracted, there was, as we have seen, evidence tending to show that the conditions on plaintiff's own premises were such that the sickness of which he complains may as well have been caused thereby as by the conditions in or along the old canal bed; yet instruction No. 3, as given, authorized the jury to find for the plaintiff even though they believed that such was the condition of plaintiff's premises, thus directing them to balance the negligence of the parties and to determine which was the more at fault, leaving them to "conjecture, guess, or random judgment upon mere supposition."

"The court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most in fault. The law recognizes no gradation of fault in such cases." Richmond Traction Co. v. Martin's Adm'r, 102 Va. 209, 45 S. E. 886.

It is not sufficient that the plaintiff show that the malaria causing himself and family sickness may as well have been caused by the condition of the old canal bed as by the conditions existing upon his own premises. If the evidence, as the jury might have concluded, showed that it is just as probable that the damages were caused by the condition of his own premises, the plaintiff could not recover, since by a preponderance of the evidence showing that the defendant company's negligence caused the injury he must alone recover, and not by conjecture or inference on the part of the jury as to whether the malaria causing the same arose from the canal or from the premises of the plaintiff.

"An inference cannot be drawn from a presumption, but must be founded upon some fact legally established."

"Every party to an action at law has a right to insist upon a verdict or finding based upon the law and the evidence in the case, and not, in the absence of evidence, upon mere inference and conjecture, when liability depends on carelessness or fault." So. Ry. Co. v. Hall's Adm'r, 102 Va. 135, 45 S. E. 867.

It follows from what has been said that instruction No. 3, as asked by the defendant company, correctly stated the law, and should have been given without the modification or addendum thereto; and, having reached this conclusion, it is unnecessary to consider the other assignment of error as to the sufficiency of the evidence to sustain the verdict.

The judgment of the circuit court will therefore be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had in accordance with this opinion.

(104 Va. 170)

BEACH et al. v. BELLWOOD et al.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. ESCROW—SURRENDER OF DEED AND AGREEMENT—EQUITY JURISDICTION.

Where complainant took an absolute conveyance of land, and went into possession thereof, with the intention of retaining title unless the title was acquired by a certain electric railway or land company in which he was interested, and, to effectuate that intention, conveyed the land to a third person in escrow, with the understanding that, in case the electric railway project fell through, the title to land should not pass, and the escrow agreement was, by mutual mistake of the parties, so drawn as to omit the understanding, and, on the falling through of the electric railway project, the depositary refused to deliver the deed to the grantor, equity had jurisdiction to compel the delivery thereof and the surrender of the escrow paper.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 161; vol. 19, Cent. Dig. Equity, §§ 14–19.]

2. MUTUAL MISTAKE—PAROL EVIDENCE.

Where the omission of material provisions from an instrument is alleged to be due to the mutual mistake of the parties, parol evidence is admissible to show the real intention of the parties, even though it varies the terms of the instrument.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1993.]

Appeal from Law and Equity Court of City of Richmond.

Suit by James Bellwood against Ferdinand Beach, John C. Short, William L. Royall, and others, to compel the delivery of a deed deposited by the complainant in escrow with Royall. From a decree in favor of complainant, defendants Beach and Short appeal. Affirmed.

Jo. Lane Stern and James Parker, for appellants. Wm. L. Royall, for appellees.

CARDWELL, J. The facts out of which this controversy arises are as follows: Appellee (complainant in the court below) James Bellwood was in the early part of 1898 the owner and occupant of a large farm situated in Chesterfield county, immediately on the Petersburg turnpike, about seven or eight miles from the city of Manchester; and between appellee's farm and the city of Manchester there is a tract of 435 acres, then owned by one George A. Madill, of St. Louis, Mo., which latter tract will be spoken of here, as in the record, as the Madill tract. The Madill tract fronts about one mile upon the turnpike, extending back to James river, and includes the famous and historical spot called "Drewry's Bluff." For some years Bellwood had desired to become the owner of the Madill tract, as one that would make a most valuable addition to his own farm, by giving it especial advantages, independent of its mere intrinsic value, and accordingly he had negotiations with Madill in reference to its purchase; and, in consideration of his agreeing to exercise a supervision over

it, Madill agreed that he could have a preference over all others in purchasing it in case he (Madill) resolved to sell it.

In the spring of 1898, Corbin Warwick, of the city of Richmond, conceived a scheme for building an electric railroad along said turnpike from Manchester to Petersburg, and laid his plans before William L. Royall, of the same city, who joined with him in the undertaking; and these two took into conference one John C. Short, of the city of New York, who represented to them that he was a broker of that city, and connected closely with strong financial people, amongst whom he could easily raise the necessary money for the enterprise if a charter of incorporation was secured. Thereupon an agreement was entered into between Warwick, Royall, and Short that Warwick and Royall should secure a charter for the enterprise, and Short was then to secure the necessary money; and whatever was realized as profits from the enterprise was to be divided into halves, of which Short was to have one half, and Warwick and Royall were to have the other half, to be divided equally between them. Warwick and Royall obtained the charter from the Legislature, incorporating the Richmond & Petersburg Electric Railway Company. Warwick's plan for the electric railroad contemplated the acquisition of the Madill tract, and the conversion of Drewry's Bluff into an ornamental pleasure ground, to which the electric road would carry hundreds of thousands of visitors each year. Warwick considered this park the most attractive feature of the scheme, and the one that would most surely make the enterprise a paying one from the beginning, and in this view both Royall and Short concurred; the latter considering it the pivot upon which the whole enterprise was to turn. In connection with that view, Short, in a letter to Bellwood of April 3, 1899, referring to proceedings by the Richmond, Petersburg & Carolina Railroad Company to condemn a right of way through the Madill tract, says: "I am glad you notified the man who accompanied the sheriff, that he had better notify his railroad company that the Madill land had been purchased for a public park, and that it was the corner stone of the whole enterprise, and the carrying out of the plans would cost several hundred thousand dollars." Bellwood was of opinion that an electric road upon the pike from Manchester to Petersburg would be a paying one, and of the greatest value and importance to those who resided upon its line, and that it would be of the very greatest value and importance to himself; and he was willing to contribute of his time, labor, and money to secure its construction.

Warwick solicited Bellwood to obtain from Madill, for him (Warwick), an option to purchase the Madill tract, which Bellwood applied to Madill for, but he (Madill) refused to give Warwick the option. Thus matters stood until February, 1899, when Short came to Richmond, and he and Warwick went together to visit Bellwood and the Madill tract; and, as there had been so much talk about the acquisition of the Madill tract, Bellwood concluded the time had arrived when he must buy it; and he had a few days before this written to Madill concerning its purchase, and had received from him an offer to sell him the land for $5,000; $1,000 to be paid in cash; the rest in three annual notes, secured by deed of trust on the land; the purchase to be closed by February 20th. Bellwood showed this offer, which was in a letter from Madill, to Short and Warwick when they were on the visit to him just mentioned; and he told Short that, if he was going to build the electric road, he would let him have the land, to be converted into a park in connection with the road, and also told him he had long wanted the land as an addition to his farm, and would not allow it to go for anything or to anybody except the electric road. This was understood by Short at the time, and he agreed that the land should be taken as a part of the electric road scheme; saying that he would commence to build the road within 30 days, and have it completed in 90 days, and that he would spend $60,000 on the park, etc. It was then further agreed that Short would put up the $1,000 cash payment; that Bellwood would buy the Madill land in his own name, giving his three notes for the deferred payments, and deed of trust on the land to secure them; and on this understanding Madill was notified by Bellwood that his offer was accepted, and was asked to send a deed to the property to a bank or trust company in Richmond, in order that the purchase might be closed. Short got the $1,000 from his son-in-law Ferdinand Beach, and, in the interval between closing the contract and settling for the land, there was some discussion about how the title of the land was to stand; there being some disagreement between Short, Warwick, and Royall upon this point. Short and Warwick wanted a separate land company to hold the land, so that it would not be covered by the railroad mortgage, while Royall wanted the land conveyed directly to the railroad company, so as to make that enterprise as strong as possible. It was finally agreed that there should be a land company to hold the land, and in the meantime Short wanted the title conveyed to his son-in-law Beach; but Bellwood raised the point that, if this was done Beach might cut and remove the timber, the railroad scheme might fall through, and he be left to pay for and take the land with the timber gone. To meet this suggestion, it was proposed by Royall that the land be conveyed to Beach by a deed held in escrow till Bellwood's notes were paid, which proposition was satisfactory to Short, except that he wanted to form the land company at once, and get possession of the land; and, to accomplish this, it was agreed a provision

should be inserted in the escrow that if the land company was formed, and issued its bonds, not to exceed $100,000, on depositing $8,000 of these bonds as collateral security to Bellwood the deed might be delivered to Beach, and with this understanding Bellwood was satisfied; he also understanding, as did the other parties to these negotiations, that the proposed land company and the electric railroad were to be under the same management and control. This understanding being reached—Warwick being in possession of Beach's certified check for $1,000—Warwick and Bellwood and wife met at Royall's office to complete the transaction. Bellwood, having entire confidence in Royall, left to him the preparation of all papers necessary to carry out the agreement between the parties. Madill's deed conveying the property to Bellwood had been deposited with the State Bank, together with the deed of trust that Madill wanted, securing the deferred payments; and Royall prepared a deed conveying the Madill tract in fee simple to Beach, and also prepared an escrow paper, addressed to the State Bank, which was expected to hold the deed; directing it to deliver the deed to Beach when he paid Bellwood's notes. The bank refused to hold the deed in escrow, and, by agreement between the parties present, it was left in the possession of Royall.

The escrow paper referred to is as follows:

"To William L. Royall, Esq.: We herewith deposit with you a deed conveying the Drewry's Bluff tract of land on James river in Chesterfield county, Virginia, to Ferdinand Beach, of New York, to be held by you until the notes of James Bellwood for $4,000, payable to George A. Madill and given for the deferred payments on said land, are paid by the said Ferdinand Beach. But if John C. Short, of New York, and his associates, shall organize the Drewry's Bluff Land Company, as proposed by them, and shall create a first mortgage subject to present deed of trust, on said Drewry's Bluff tract of land, to secure the payment of not more than $100,000 of bonds, then if they deposit with you $8,000 of said first mortgage bonds as collateral security to me that said Beach will pay or cause to be paid said notes, you will be at liberty to deliver said deed to said Beach, and the said Short and associates will be at liberty to withdraw $2,000 of said bonds whenever they pay $1,000 of said notes. James Bellwood. Helen E. Bellwood. April 14th, 1899."

Royall had been one of the interested parties in the transaction. He had been a party to all the negotiations, and knew them in all their details. He knew that Bellwood's position was that Short, Warwick, and Royall might have the land if they built the road, but that he allowed them to have it only upon the condition that the road was built, and reserved the land to himself unless the whole scheme—road and park together—was put into force and effect in conjunction, and as one enterprise, and that it was never contemplated by Bellwood that Short, Warwick, and Royall, or anyone else, should have the land as a real estate speculation, or for any purpose other than for a park in conjunction with the electric road they had agreed to build. Bellwood having given Royall no specific instructions, except that his rights, as he knew Royall understood them, were to be protected, signed all the papers that Royall told him to sign, including the escrow paper; and Royall, instead of setting out the whole understanding as he knew it to exist, drew the papers in the form in which they now stand.

Upon the deed from Bellwood to Beach and the escrow paper being deposited with Royall, things drifted along, Short keeping up his promises that he would soon have the money; but finally it became plain that he had no money, and had access to none, with which to build the road. In the meantime Bellwood's first note for the deferred payments for the Madill tract, due in March, 1900, was about maturing; and he wrote Short, and asked him what was to be done. Short replied that he was unable to pay the note, and said to Bellwood, "If you will pay it, I will give you a $1,000 bond of the electric road." Whether Bellwood paid any attention to this offer, or not, does not appear; but, being bound for the note, he paid it at maturity. Some time thereafter all hope of the electric road being built through the efforts of Short, Warwick, and Royall vanished; and they sold out all of their interest in the enterprise to one Haner, representing some Ohio capitalists, in December, 1900, when the charter had only about three months to run. Royall and Warwick concede that Haner & Co. got all their rights in the Madill land, but Short claims that he only sold his rights in the road, and reserved his rights in the land.

This state of things having come about, Bellwood demanded that Royall return to him the escrow paper and the deed to Beach for the Madill tract, so as to make his title to the land complete, but Short objected; and Royall declined to deliver the papers to Bellwood, and told him that he must wait until the charter expired. Thereupon Bellwood filed his bill in this cause to compel Royall to surrender the escrow paper and deed to him, in order to quiet the title in him to the Madill tract.

The bill, after setting out at length and in detail the facts and circumstances hereinbefore stated, proceeds as follows: "But your orator wishes to make this point clear: That he did not direct Royall to draw up the instructions [escrow paper] as they appear He knew that Royall was cognizant of all of the facts in the case and approved of the arrangement. He had entire confidence in the integrity of Royall, and he instructed him

generally to prepare the papers in such form as to protect him; and that was the whole of the instructions given. If Royall had carried out your orator's instructions literally, he would have written a paper which recited all the facts as they have been detailed here. But believing, as your orator did, that Short had secured the money for the enterprise, he wrote only so much of your orator's instructions as he thought necessary for your orator's protection as the matter then stood.

"Your orator wishes now to charge distinctly and categorically that there was a perfect understanding between Short, Royall, Warwick, and your orator that in thus acquiring this Madill tract it was acquired for the purpose of being an integral part of the proposed electric road, and that Royall, Short, and Warwick perfectly understood that your orator took the part he did in the transaction to make said tract an integral part of said road, and that he would never have permitted that tract to have passed away from himself, except to be an integral part of said road. Short, Warwick, and Royall all understood this perfectly, and all assented and agreed to it. To make this clear, Dr. Ferdinand Beach wrote Short a letter, of which a copy is filed as a part of this bill, marked as Exhibit No. 3, and Short deposited that letter with Royall, who holds it now. In a proceeding to condemn a right of way through this Madill tract, Short appeared as a witness, and testified that the tract was to be an integral and most important part of the road.

"It is true that while Short, Royall, and Warwick were the equitable owners of the proposed road, they sometimes contemplated having a separate land company to own the park, and sometimes contemplated that it should be owned by the Old Dominion Construction Company, and sometimes contemplated that the railroad company should own it directly, and your orator knew of these changes in their purposes. But he also knew that Royall, Short, and Warwick would be the owners of whichever company held the park and the said railroad company also, and he was indifferent to the form in which they held the park, so long as both road and park were owned by the same parties. In point of fact, the last resolution upon the subject reached by Short, Royall, and Warwick was come to in the summer of 1899, and they then determined that the park should belong to the railroad company directly, and this resolution has never yet been altered by them; and it would be a serious and irreparable injury to your orator, in violation of your orator's rights, if he lost this tract of land by its going to any one but an electric railroad such as he has taken part in securing."

In the letter filed as Exhibit No. 3 with the bill, written by Ferdinand Beach, addressed to Short, the writer says: "I am in receipt of your letter of the 24th instant advising me that by the terms of the contract you have recently signed for the construction and equipment of the Richmond & Petersburg Electric Railway, it is provided that the tract of four hundred and thirty-five (435) acres of land at Drewry's Bluff, which was purchased by Mr. James Bellwood in the interest of the railway company, but was conveyed to him, and by him to me in the same interest, and which conveyance was taken by me in trust, to be conveyed in due time to a land company to be organized for the creation and improvement of a park at Drewry's Bluff, on the line of the Richmond & Petersburg Railway, is to be conveyed in due time to the said railway company. The deed of conveyance from Mr. Bellwood to me is now held in escrow by Mr. W. L. Royall of Richmond, for delivery to me on my order, in accordance with the terms upon which it is held in escrow.

"I therefore hereby make this declaration: The said land was purchased in the interest of the Richmond & Petersburg Electric Railway Company, and that Mr. W. L. Royall, holding Mr. Bellwood's deed to me, holds the same in the interest and for the benefit of said railway company, and that in due time the title of said land is to be conveyed to the railway company, either by the surrender to Mr. Bellwood of the deed I now hold, and the making of a deed by Mr. Bellwood direct to the railway company, or as an alternative the Bellwood deed to me is to be recorded and a deed is to be made directly from me to the railway company, as you as president of the Old Dominion Construction Company, may deem best and direct."

The bill makes the further averment that "your orator is informed that the said John C. Short, after having been nothing but a burden upon and embarrassment to this enterprise from the beginning, claims now that the said Madill tract must pass under his control. Your orator recently demanded of the said Royall that he surrender to him the said deed held by him in escrow, but the said Royall refused to do so unless authorized thereto by said Beach and said Short. Your orator thereupon visited New York, saw J. C. Short, and tendered to him as agent for Dr. Beach the $1,000 advanced by him, with interest to the time of its tender, but the said Short as Beach's agent refused to receive the same, and set up a claim to the said property for himself and associates.

* * * * * *

"There was no written agreement between your orator and Ferdinand Beach, or between your orator and Short, and any one else, nor any memorandum or note in writing signed by your orator or his agent, whereby your orator agreed to sell this property to Beach or Short, or to the said electric railway company, or to any one else.

"So that your orator claims that he has never made any contract with any person or corporation whereby he has bound himself to part with this tract, and that the said

Short vainly asserts that your orator is under any obligation of any sort in respect to the same, and that your orator's sole obligation is the equitable one to return to Dr. Ferdinand Beach his $1,000, with interest, and this he is ready to do; and he prays the court that he may be allowed to bring the same into court, and deposit it subject to the said Beach's order, as the court may allow him to have it. * * *"

Making Short, Warwick, Royall, Beach, and others deemed necessary parties to this suit, defendants thereto, the bill concludes: "Your orator shows that all of these facts and circumstances constitute a cloud upon his title to the said Madill tract of land, and he therefore prays that * * * your honor will decree that none of them [the defendants] have any such or any other claim upon the said tract of land; and that said decree shall bar each and every one of them forever from setting up a claim of any sort in, to, or upon said tract of land; that your orator may be permitted to deposit $1,000 and interest in this honorable court for the said Dr. Ferdinand Beach; and that therefore the said William L. Royall may be required to surrender to your orator the deed and declaration held by him as aforesaid in escrow," etc.

To this bill Short and Beach filed a joint and several demurrer and answer, and other parties named defendants, including the Richmond & Petersburg Electric Railway Company, filed answers also; but it is not necessary for us to refer further to the answers, other than that of Short and Beach, they being the only parties appealing upon the decree of the lower court.

The answer of Short and Beach admits the correctness of many of the statements made in the bill, and, with a general denial of all other allegations of the bill not admitted to be true, they make an elaborate and detailed statement of the facts and circumstances out of which this controversy arises. Among the statements contained in their answer is the following with reference to the purchase of the Madill tract of land: "Said Madill to make a deed in fee simple to the complainant for the consideration of $5,000, payable $1,000 in cash, for the balance of said purchase price complainant to give his three notes, for $1,333.33⅓ each, payable to said Madill one, two, and three years from date, with interest at six per cent. per annum, and execute a deed of trust upon said Madill tract to secure the payment of said notes; said respondent Ferdinand Beach to make the cash payment of one thousand dollars and agree to pay said notes, and complainant and wife to make a deed in fee simple of said Madill tract to said Beach, and deliver the same to the State Bank of Virginia, at Richmond, to be held by it until said Beach should pay said notes according to the terms of said deed of trust, and, when said notes were so paid, said bank was to deliver said deed to said Beach."

With reference to the letter (Exhibit No. 3 with the bill) written July 25, 1899, the answer says it was written long subsequent to the purchase of the Madill tract and to the execution of said deed, deed of trust, and said notes, and when the control of both the railway company and the construction company was exclusively in Short, Warwick, and Royall, and when it was not contemplated that such control would pass to outside parties. "And respondents further emphatically allege that said letter was written for the purpose of being used before the commissioners appointed in the proceedings instituted by said Richmond, Petersburg & Carolina Railway to condemn the right of way through the Madill tract, and for no other purpose whatever; and that, having served its purpose, and the conditions under which it was written having entirely changed, it has no bearing upon, and is not applicable to, the present condition of things."

In other words, these respondents admit in that letter all that the complainant, Bellwood, claims with reference to what was the real contract between them as to the Madill tract, but now say this was done for the purpose of misleading the commissioners appointed to assess damages to the property by building the line of the Richmond, Petersburg & Carolina Railway through the Madill tract, and should not be regarded as any admission from these respondents of the correctness of the complainant's position with reference to the Madill tract in a controversy in which they are claiming, or at least Beach claims an exclusive right to the Madill tract in the face of what was the real agreement between these respondents and Bellwood. Short, in his joint answer with Beach, notwithstanding the assertions theretofore made of his rights in the Madill tract, which were instrumental in preventing the delivery back to the complainant of the deed and escrow deposited with Royall, says that he has no claim or title whatever to said Madill tract, or any part thereof, while Beach alleges and claims that he is the owner in fee simple of the whole of said Madill tract, subject only to the obligation assumed by him to pay the whole of said notes, with interest, etc.

Upon the hearing of the cause upon the bill of complaint, the exhibits therewith, the demurrer thereto, and the answers of Short and Beach and others, the voluminous testimony introduced by both parties, consisting of depositions and numerous letters and other writings, the court below overruled the demurrer and granted the prayer of the complainant; the decree directing the defendant Royall to deliver to Bellwood the deed from him and wife to Beach for the Madill tract, and the escrow paper herein before referred to, and further decreeing

that each and every defendant to the cause be forever barred and enjoined from asserting any claim or demand whatever upon and against the Madill tract of land, but, before Royall was authorized to surrender said deed and escrow paper to Bellwood, and before Bellwood could have any advantage whatever under the decree, he, or some one for him, should deposit in the Union Bank of Richmond, to the credit of the court, in this cause, the sum of $1,000, with interest thereon from April 14, 1899, until the day of such deposit, less the cost of this suit, etc. From this decree Beach and Short alone appeal to this court.

The bill filed by appellee Bellwood avers that he took a conveyance of the tract of land (Madill tract), and went into the possession thereof, and makes the deed a part of the bill, which deed conveys to Bellwood a fee-simple title, and the other averments of the bill, the material parts of which we have already stated, make a case for the jurisdiction of a court of equity to grant the relief prayed; and therefore the demurrer of appellants to the bill was properly overruled.

The main question presented is whether or not parol evidence is admissible to prove the case stated, and it is contended for appellants that the bill is not sufficient to entitle Bellwood to the relief he seeks on the ground of mistake. It is a settled rule of law that the decree must be restricted to the case made by the pleadings, and it is equally well settled that, where relief is sought on the ground of mistake or fraud, the mistake or fraud, as the case may be, must not only be charged, but must be proven by clear and satisfactory proof. When mistake or fraud is relied on, the ground of relief should be charged by setting forth the particular manner in which the mistake was made or fraud was committed, and the end or design to be accomplished. Where the facts stated in the bill show what was the real agreement between the parties, and that a material part was by mistake omitted when the agreement was reduced to writing, the bill is sufficient to entitle the party injured to a reformation of the written instrument under the prayer for general relief.

The court is of opinion that the bill sets out a state of facts showing a mistake—a mutual mistake—in the making and execution of the escrow paper filed with W. L. Royall. If the proofs, however, are doubtful and unsatisfactory to show that there has been the mistake averred in the bill, equity will withhold relief upon the ground that the written paper ought to be treated as the full and correct expression of the intent of the parties; but equity interferes in case of written instruments where there has been an omission of a material stipulation, contrary to the intention of the parties, and under a mutual mistake. Story on Equity, 152, 155.

The rule relied on by appellants is thus stated in Greenleaf on Evidence, § 275: "Where parties have deliberately put their engagements into writing, in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or conversation and declarations at the time it was completed or afterwards, is rejected."

If there were no qualifications to this rule, there would be no such thing as reforming a written contract, but the qualifications to the rule are as clearly established as the rule itself.

In section 866, Beach on Mod. L. of Con., the author says: "When an agreement is made and reduced to writing, but, through mistake, inadvertence, or fraud, the writing fails to express correctly the contract really made, a court of equity will reform the instrument in conformity with the real intention of the parties. Accordingly, where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement." See, also, to same effect, Kerr on Fraud & Mistake, p. 418.

In Slaughter v. Smither, 97 Va. 202, 33 S. E. 544, it was sought to set up by parol evidence a contract between the parties inconsistent with the written agreement entered into by them and upon which they had acted, without averment or proof of fraud or mistake in the preparation of the written agreement.

All that is held in Towner v. Lucas, 13 Grat. 705, applicable to the case under consideration, is that parol evidence will not be permitted to add a parol agreement to a written contract which is inconsistent with and contradictory of it. That is not this case.

In Mauzy v. Sellars, 26 Grat. 641, the syllabus is: "A court of equity will correct a mistake clearly proved by parol evidence, in an agreement for the sale and purchase of real estate; and this whether the contest is between the vendor and purchaser, or the vendor and creditors of the purchaser." In the opinion by the learned Judge Staples, reviewing both the American and the English decisions as to the power of a court of equity to give relief against any deed or contract in writing founded on mistake or fraud, it

is said: "These and a multitude of other cases which may be cited show it is the constant practice of the equity courts to admit parol evidence of mistake of fact, and though such evidence is in direct contradiction of the express terms of the deed or other writing. Kerr on Mistake & Fraud, 418, 423. The only limitation on this doctrine is that the evidence in all such cases must be very strong and clear—such as to leave no fair and reasonable doubt upon the mind—that the writing does not correctly embody the intention of the parties. If, therefore, the controversy here was between the vendor and purchaser, parol evidence is clearly admissible to establish the alleged mistake in the written agreement, even against the answer of the purchaser."

The opinion quotes from 1 Story's Eq. Jur. § 152, as follows: "One of the most common classes of cases in which relief is sought in equity on account of mistake of fact is that of written agreements, either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended. Sometimes it contains more. Sometimes it simply varies from their intent by expressing something different in substance from the truth. In all such cases, if the mistake is clearly made out by proof entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties.

"A court of equity would be of little value if it could suppress only positive fraud, and leave mutual mistakes, innocently made, to work intolerable mischief, contrary to the intention of the parties. It would be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice under the shelter of a rule framed to prevent it. In a practical view, there would be as much mischief done by refusing relief in such cases as there would be introduced by allowing parol evidence in all cases to vary written contracts." See, also, Alexander v. Newton, 2 Grat. 266.

The quotation from Story is peculiarly applicable to the case we have under consideration.

We shall not attempt to review the evidence at length. The greater portion of it is immaterial. The real agreement between the parties (Bellwood, on one hand, and the appellants on the other) appears from the averments of the bill, which we have very fully set out, and which are sustained by the testimony of Bellwood, Warwick, and Royall, by letters and documents, and is practically not contradicted by any one except Short, whose testimony is not only inconsistent with, but contradictory in many respects of, statements made by him orally and in writing prior to the institution of this suit. That Royall was expected to set out Bellwood's rights by embodying the real agreement as to the Madill tract in the escrow paper, and that it was Royall's neglect or carelessness that this was not done, is testified to by both Bellwood and Royall, and there is no testimony to the contrary. It was understood, not only as between Bellwood, Short, Warwick, and Royall, but by Beach himself, that Bellwood was not to part with the title to the Madill tract until Short fulfilled his promise and undertaking, and not only provided money with which to build the electric road from Richmond to Petersburg, but to pay for the Madill tract, which was then to become an integral part of the electric road enterprise. That Beach so understood—that this was the real agreement, embodying the only terms upon which Bellwood was to part with the title to the Madill tract—is clearly disclosed by the letter written by Beach to Short, which is filed as Exhibit A with Bellwood's bill, and which we have set out in full. In his testimony, Short admits that he not only dictated, but wrote, that letter for Beach to sign; and this conclusively shows that the real contract with Bellwood with reference to the Madill tract, and for which Bellwood is now contending, was not only understood by Short, but was understood and acquiesced in by Beach, so that any paper setting out the terms and conditions upon which a deed from Bellwood to Beach for the Madill tract was to be delivered to Beach, and which omitted the stipulation that Bellwood was not to part with the title to the property except in the event that Short, Warwick, and Royall built the electric road and the land became an integral part of that enterprise, was a mistake—a mutual mistake—which, if not corrected, would be a manifest injustice to Bellwood.

It may be that Beach "was not in this matter for his health," as his counsel puts it, but it is clearly the case that he had no connection with it except to advance, at the instance of his father-in-law, Short, the $1,000 which was paid on the Madill tract, and which he understood was to be purchased and held in accordance with what was the real agreement between the parties concerned; and neither he nor Short ever suggested anything to the contrary of Bellwood's contention as to what the agreement was until long after Short had failed to provide the money with which to build the electric road and pay for the Madill tract, and the road had been built, or was in the process of being built, by other parties, so that it became very desirable for Beach and Short to acquire title to the Madill tract for speculative purposes.

It would be almost, if not quite, absurd to say that Bellwood paid his first note for the deferred payments on the Madill tract because induced to do so by the offer of Short to give him a $1,000 bond of the electric road, when Short had no interest in such a road in process of being built, and Bellwood, as well as Short, then well knew that

it would not be built as the result of any efforts of Short. The facts are that Beach had then no expectation that the conditions upon which the Madill tract was to be conveyed to him would ever come about, and, relying upon getting back his $1,000 out of the Madill tract, he simply abandoned all connection with the purchase of the property, and Bellwood, who was not only bound for the notes he had given, but was in possession of the property and paying taxes thereon, naturally went forward and paid the note; and, when it was clearly seen that the conditions upon which he alone was to part with the title to the Madill tract would never be brought about, he, also very naturally, demanded of Royall the return of the deed deposited with him, in order that his title to the Madill tract might be made clear.

Upon the whole case, we are of opinion that there is no error in the decree complained of, and it must therefore be affirmed.

(104 Va. 189)

WRIGHT v. AGELASTO.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. CORPORATIONS — STOCK SUBSCRIPTIONS — CONDITIONS.

A condition attached to a corporate stock subscription, that $15,000 bona fide subscriptions should be obtained, could be waived by the subscriber.

2. SAME — ACTIONS — INSTRUCTIONS.

In an action on a corporate stock subscription, conditioned on the corporation obtaining $15,000 bona fide subscriptions, which it had not obtained, an instruction that, though defendant applied for a charter for the corporation, was named as one of the incorporators, participated in the proceedings and acted as a director, yet if at the time he did so he did not know that bona fide valid subscriptions to such amount had not be obtained, his acts would not constitute a waiver of the condition, was properly refused without a qualifying requirement that defendant did not intend by such acts to waive the condition.

3. SAME — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

Where defendant had knowledge of certain testimony before the trial which became material during the trial, when he caused a summons to be issued for the witness, and, on his being reported absent from the city for the day, defendant made no request to the court to delay the trial, the evidence of such witness was not newly discovered so as to justify a new trial.

Error to Law and Chancery Court of City of Norfolk.

Action by P. A. Agelasto, as trustee in bankruptcy of the Chesapeake Furniture & Woodworking Company, against Peter Wright. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

White, Tunstall & Thom (J. W. Willcox, of counsel), for plaintiff in error. Edward R. Baird, Jr., for defendant in error.

KEITH, P. The defendant in error, Agelasto, as trustee in bankruptcy of the Chesapeake Furniture & Woodworking Company, sued Peter Wright in the court of law and chancery of the city of Norfolk to recover a subscription to 15 shares of stock of the Norfolk Furniture Company, of the par value of $100 per share, subscribed to upon the condition "that $15,000 bona fide subscriptions are gotten."

The defendant pleaded non assumpsit, and a jury, being impaneled, found a verdict for the plaintiff, and assessed his damages at $1,500. The defendant moved the court to set aside the verdict and grant a new trial, on the ground that it was contrary to the law and the evidence, that the jury had been misdirected by the court, and of after-discovered evidence. The court refused the motion to set aside the verdict, entered judgment for the plaintiff, and thereupon Peter Wright obtained a writ of error from this court.

During the progress of the trial exceptions were taken to the admission of certain testimony, but this exception has been very properly abandoned in this court.

The first assignment of error upon which reliance is placed is that with respect to the refusal of the court to give the following instruction:

"The court instructs the jury that, even though they may believe from the evidence that the defendant applied for a charter for the Chesapeake Furniture & Woodworking Company, was named as one of the incorporators thereof, participated in the proceedings of its stockholders, and acted as a director of the company, yet if they further believe from the evidence that at the time of such action and participation in said meetings he did not know that bona fide, valid subscriptions to the amount of $15,000 had not been obtained, such action and participation cannot be construed as a waiver of the condition on which his subscription was made, and they must find for the defendant."

It is certain that the plaintiff in error, having subscribed to the stock conditionally, was not bound by the contract of subscription until the condition upon which it was entered into had been performed, or been waived by him, or he had by his conduct placed himself in a position which estopped him from relying upon the condition. It is equally certain that such conditions may be waived.

This proposition is not disputed, and needs no citation of authority in its support.

It is also true that no man can be bound by a waiver of his rights unless it be distinctly made with full knowledge of the rights which he intends to waive, and the fact that he knows his rights and intends to waive them must plainly appear.

The instruction under consideration concludes with the direction that, if the jury shall believe from the evidence the facts which it recites, they must find for the defendant.

It is well settled in this court and else-

where that an instruction which directs a verdict must be predicated upon all the material facts which the evidence introduced before the jury proves or tends to prove. If, as recited in the instruction, "the defendant applied for a charter for the Chesapeake Furniture & Woodworking Company, was named as one of the incorporators thereof, participated in the proceedings of its stockholders, and acted as a director of the company," such acts were an unequivocal recognition of the existence of the corporation and his membership in it. If, indeed, he did these things in ignorance of the fact that valid subscriptions to the amount of $15,000 had not been obtained, and did not thereby intend to waive the benefit of that condition, he should not be held bound. But it may very well be, and we think there is evidence in the record tending to show, that by these acts he intended to be bound, regardless of the condition upon which his subscription had been made, and it was therefore incumbent upon him to negative this view. The instruction should have stated that "if the jury believe from the evidence that the defendant * * * was named as one of the incorporators, participated in the proceedings of its stockholders, and acted as a director of the company, and that at the time of such action and participation in said meetings he did not know that bona fide, valid subscriptions to the amount of $15,000 had not been obtained, and did not intend by such acts to waive the benefit of the condition, such action and participation cannot be construed as a waiver of the condition on which his subscription was made, and they must find for the defendant."

As the instruction was prepared and presented to the court, every fact which it states may have been true, and yet the defendant have been bound by his contract of subscription, and the plaintiff in the court below entitled to a verdict against him. He had the same opportunity of knowing that the subscription had not been obtained, if such was the fact, as any one else enjoyed. He may have known it, or he may have been in ignorance of it, and either with knowledge that the stipulated amount had not been subscribed, or in ignorance of the fact, he may have concluded that he would in any event be bound by his subscription.

We are therefore of opinion that the court did not commit an error in refusing the instruction prayed for.

Nor do we think the court erred in overruling the motion for a new trial. There was evidence which strongly tended to prove that the condition upon which the subscription was made had been performed, and, as we have said, there is evidence which tends to show that the plaintiff in error had determined not to rely upon the condition, whether it was performed or not. Nor do we think the court erred in refusing to set aside the verdict because of after-discovered evidence. There was in truth no after-discovered evidence, in any proper sense of the term. Giving to the affidavits all the force and effect which can be imputed to them, it appears that the evidence now relied upon was known to the plaintiff in error before the case was submitted to the jury. It is true that the affidavit of plaintiff in error states that as soon as he ascertained from the evidence of Page, given in the trial, that the testimony of a witness would be material, he caused a summons to be issued for him, and the sergeant reported him absent from the city. It was the duty of plaintiff in error under those circumstances to have asked the court for such delay as might be necessary to secure the testimony of the witness in question. If the circumstances were such as would have entitled the defendant, after judgment, to ask for a new trial upon the ground of the absence of the witness, it needs neither argument nor authority to show that those facts and circumstances, brought to the attention of the court at any time prior to the rendition of the verdict, would have been sufficient to induce—indeed, to require—the trial court to give the defendant opportunity to secure the witness. In this case, as the event proved, a brief delay would have sufficed; for it appears that the witness returned to the city on the next day, and his affidavit was procured.

Upon the whole case, we are of opinion that the judgment should be affirmed.

(104 Va. 58)

CITY OF NEWPORT NEWS v. WOODWARD.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

MUNICIPAL CORPORATIONS — POLICE FORCE — REMOVAL — POWER OF MAYOR — CONSTITUTION — SELF-EXECUTING PROVISIONS.

Const. art. 8, § 117 [Va. Code 1904, p. ccxxxviii], provides that the charters of all cities and towns are amended to conform to the Constitution, and section 120 [Va. Code 1904, p. ccxxxix] provides that the mayor shall have power to suspend officers and members of the police and fire departments. At the time of the adoption of the Constitution, the police board of the city of Newport News, under its charter (Acts 1895–96, p. 86, c. 64, § 62) had the power of suspending police officers. The former Constitution (article 6, § 20) provided that the mayor should have power to suspend or remove city officers—which was held not to include policemen—such section appearing with other provisions relative to cities and towns, and containing the provision that the General Assembly should pass such laws as might be necessary to give effect to the provisions. *Held*, that section 120 of the new Constitution was not self-executing, and did not alone give the mayor of Newport News authority to suspend a police officer.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 32–34.]

Error to Corporation Court of Newport News.

Action by J. W. Woodward against the city of Newport News. Judgment in favor of plaintiff, and defendant brings error. Reversed.

J. A. Massie, City Atty., for plaintiff in error. Ashby & Read, for defendant in error.

CARDWELL, J. On August 26, 1902, J. W. Woodward, defendant in error, a police officer of the city of Newport News, was, upon charges preferred, and after a hearing had, suspended from office for a period of 30 days; at the end of which term of suspension he was again assigned to duty, and served for a few days, when he was again suspended upon other charges preferred, after a hearing, for another period of 30 days, which was afterwards reduced to 15 days. On the 14th day of November, 1903, Woodward instituted this suit in the corporation court of the city of Newport News against the city to recover $90, the amount of salary that he claimed was due him during the term of his suspension; and on April 18, 1904, a jury having been waived, and all questions of law and fact submitted to the court, judgment was rendered against the city for the sum of $60. It was the opinion of the court below that the police board of the city of Newport News did not have power to suspend policemen at the time that the defendant in error was suspended, by reason of sections 117 and 120 of the present Constitution, which took effect July 10, 1902, which was prior to the date of this suspension.

These sections of the new Constitution, as far as they are pertinent to the issue in this case, are as follows:

Art. 8, § 117 [Va. Code 1904, p. ccxxxviii]: "Cities and towns of the state having at the time of the adoption of this Constitution a municipal charter, may retain the same, except in so far as it shall be repealed or amended by the General Assembly; provided, that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations and powers set forth in this article, or otherwise provided in this Constitution."

Art. 8, § 120 [Va. Code 1904, p. ccxxxix]: "The mayor shall see that the duties of the various city officers, members of the police and fire departments, whether elected or appointed in or for such city, are faithfully performed. He shall have power to investigate their acts, have access to all books and documents in their offices, and may examine them and their subordinates on oath. The evidence given by persons so examined shall not be used against them in any criminal proceeding. He shall also have power to suspend such officers and the members of the police and fire departments, and to remove such officers, and also such members of said departments when authorized by the General Assembly, for misconduct in office or neglect in duty, to be specified in the order of suspension or removal; but no such removal shall be made without reasonable notice to the officer complained of, and an opportunity afforded him to be heard in person, or by counsel, and to present testimony in his defense. From such order of suspension or removal, the city officer so suspended or removed shall have an appeal of right to the corporation court," etc.

Unless superseded by the provisions of the new Constitution above cited, the police board of the city of Newport News, by virtue of the charter of the city, section 62 (Acts 1895–96, p. 86, c. 64), had at the time of the suspension of defendant in error absolute control and authority over the police force of the city. See, also, Johnson v. Barham, J., 99 Va. 305, 38 S. E. 136.

The sole question to be considered, therefore, is whether or not section 120 is self-executing, or required legislative action to render it operative. If self-executing, section 117 operated to repeal so much of the charter of the city of Newport News as is repugnant thereto.

The Legislature of Virginia enacted the following provision in relation to cities and towns (Acts 1902–04, p. 422, c. 296):

"Sec. 1033. Mayors of cities; how chosen; their duties; appeals from their decisions; how removed for malfeasance, etc.—In every city there shall be elected by the qualified voters thereof a mayor. * * * The mayor shall see that the duties of the various officers, members of the police and fire departments, whether elected or appointed,

in and for such city, are faithfully performed. He shall have power to investigate their acts, have access to all books and documents in their offices, and may examine them and their subordinates on oath. The evidence given by the person so examined shall not be used against him in any criminal proceeding. He shall also have power to suspend such officers and the members of the police and fire departments, and to remove such officers for misconduct in office or neglect of duty, to be specified in the order of removal; but no such removal shall be made without reasonable notice to the officer complained of, and an opportunity afforded him to be heard in person or by counsel, and to present testimony in his defense. From such order of suspension or removal, the city officer so suspended or removed, or the member of the police and fire department so suspended, unless the charter of the city provides for an appeal to the board of police commissioners, or to the board of fire commissioners, shall have an appeal of right to the corporation court," etc.

It was unquestionably the purpose of the convention in enacting section 120 of the Constitution to take from the police board of the several cities of the commonwealth, or wherever the power and control was theretofore conferred, the control and supervision over the police force of the several cities and confer it upon the mayor; but was it intended to confer this power and control upon the mayor without reserving to the Legislature supervisory authority over the exercise of the power? It was, as is conceded, plainly not so intended as to the power of removal.

It is well recognized in treatises on constitutional limitations and the decided cases that, if the nature and extent of the right conferred by a constitutional provision is fixed by the provision itself, so that the same can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing. The question is one of intention in every case, and, if it is apparent that no subsequent legislation is necessary to carry such provision into effect, then such provision is self-executing.

Says Cooley in his work on Constitutional Limitations, p. 121: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

In Illinois Cent. R. R. Co. v. Ihlenberg, 75 Fed. 873, 21 C. C. A. 546, 34 L. R. A. 393, it was held that whether or not a constitutional provision is self-executing is a question always of intention, to be determined by the language used and the surrounding circumstances.

The former Constitution (article 6, § 20) provided that "he [the mayor] shall have power to suspend or remove such officers," etc.; and in Burch v. Hardwicke, 30 Grat. 24, 32 Am. Rep. 640, it was held that policemen were state officers; that as such they were not contemplated in the words "such officers," but that this meant city officers; and as to the latter the mayor, by the Constitution, had the exclusive power of removal. It was further held that the provisions of the charter of the city of Lynchburg, taking from the mayor the power to remove the chief of police, and vesting it in the police board, was null and void. Article 6, § 20, of the former Constitution, appeared along with the other provisions provided for the government of cities and towns, and contained the provision that "the General Assembly, at its first session after the adoption of this Constitution shall pass such laws as may be necessary to give effect to the provisions of this article."

It may be true, as counsel for defendant in error say, that the provisions of the new Constitution enlarging the powers of the mayors of the several cities and towns with reference to suspension and removal of members of the police force and fire department were intended to overcome the decision in Burch v. Hardwicke, supra; but the question remains whether or not section 120, supra, was intended to operate proprio vigore as to the power of the suspension of the members of the police force and fire department and refer only the subject of the removal of such officers by the mayor to the Legislature for action.

Discussing the light which the purpose to be accomplished may afford in the construction of a constitutional provision in Cooley's Con. Lim. (6th Ed.) p. 80, the learned author says: "The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision, and it is especially important to look into it if the Constitution is the successor to another, and in the particular essential changes have apparently been made."

Here we have a constitutional provision which succeeds another, dealing with the same subject, and the former plainly referred the whole subject to the Legislature for action, while the latter is ambiguous in that respect. Under these circumstances we do not think it is a reasonable construction of the language employed that it was intended by the framers of the provision to refer to the Legislature for action the power intended to be conferred upon the mayor of a city or town to remove a member of the police force or fire department, while the suspension of these officers is left entirely in his power without legislative authority or control over his action.

We have no decision by this court helpful in determining the question under consideration. Arey v. Lindsay, 103 Va. 250, 48 S. E. 889, Oppenheim v. Myers, 99 Va. 582, 39 S. E. 218, and Burch v. Hardwicke, 30 Grat. 24, 32 Am. Rep. 640, have no application whatever to this case. Our conclusion is that, reading section 120 of the present Constitution in the light of the surrounding circumstances, the language used clearly indicates that it was the purpose of its framers to refer the subject—the power and control over the police force in the several cities of the state—to the Legislature for action, and that said action is not to be construed as self-executing.

The judgment of the corporation court of Newport News must therefore be reversed and annulled, and this court will enter such judgment as that court should have entered.

(104 Va. 64)

CITY OF NEWPORT NEWS v. ROBINS.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

Error to Corporation Court of Newport News.

Action by W. T. Robins against the city of Newport News. Judgment in favor of plaintiff, and defendant brings error. Reversed.

J. A. Massie, City Atty., for plaintiff in error. Ashby & Read, for defendant in error.

CARDWELL, J. This case is in all essential features the same as that of City of Newport News v. Woodward (just decided), 51 S. E. 193, and for the reasons stated in the opinion of the court filed with the record in that case the judgment of the corporation court of the city of Newport News in this will also be reversed.

(104 Va. 146)

WILLIAMSON v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. RAILROADS—ACTION FOR INJURIES—EVIDENCE.

In an action against a railroad for injuries, evidence examined, and *held* insufficient to show that plaintiff at the time of his injury was using the defendant's tracks as a walkway as an invited guest of the defendant or otherwise than as a bare licensee.

2. SAME—NEGLIGENCE.

Where a railroad track has been used as a walkway by the public for many years, and such use is known to the railroad company and its employés, the sole duty of the company to persons whom it may reasonably expect to be on the track is discharged by the use of reasonable care to discover and avoid injuring them.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1228, 1229, 1235, 1236.]

3. SAME.

A railroad is under no obligation to make preparation in advance for the protection of mere licensees in using its tracks for a walkway, and hence its failure to furnish a light on its engine on a dark night was not negligence as to a licensee using its tracks for a walkway.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1236, 1261.]

Error to Law and Equity Court of City of Richmond.

Action by James E. Williamson against the Southern Railway Company. Judgment in favor of defendant, and plaintiff brings error. Affirmed.

Meredith & Cocke, for plaintiff in error. Munford, Hunton, Williams & Andersen, for defendant in error.

HARRISON, J. This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company. The damages were assessed by the jury at $1,500, subject to a demurrer to the evidence, which was sustained, and judgment given for the defendant.

The accident which is the subject of inquiry occurred upon that portion of the main line of the defendant which runs along the south bank of James river, at or about its entry of the company's yards in the city of Manchester. A little northwest of the city of Manchester, in James river, is an island called "Belle Isle," upon which is located an iron manufactory. This island is connected with the south bank, or Manchester side, of the river by a railroad bridge built by the defendant company for its use in hauling freight, upon each side of which is provided a walkway for the use of persons going to and from the ironworks. These ironworks and the railroad bridge connecting them with the main line of the Southern Railway on the Manchester side of the river have been in operation for many years. When the employés from Belle Isle cross the bridge and reach the south bank of the river, they have two routes open to them—one leading away from the railroad and into the city of Manchester, and the other along the right of way of the defendant company into the city. These employés had for many years used both routes, the choice depending upon the point of destination in the city. Those who, for their convenience, adopted the latter route, had always enjoyed its use by the passive acquiescence of the defendant.

The plaintiff had been for "three or four months" an employé of the ironworks on Belle Isle, and on the 27th day of November, 1903, he left the works 15 minutes before 6 o'clock to go to his home. When he reached the south bank of the river he pursued, as was his regular habit, the route along the right of way of the defendant company. He walked on the pathway at the side of the track a distance of about 1,400 feet, but, finding the path rough, he

looked and listened to ascertain if a train was approaching, and, being satisfied that no train was coming, he stepped upon the railroad track and walked thereon for a distance of 25 yards, when he looked back and found a work train of the defendant company so close upon him that he could not jump out of the way in time to avoid the injuries complained of. The plaintiff says that it was a very dark night, that the engine was provided with no headlight or lights of any description, and when he looked back it was so dark that he could not see the engine good. He further says that his hearing was poor in one ear, and that it was downgrade at that point, which caused the train to run without making much noise.

It is contended by the plaintiff in error that when using the track and right of way of the railroad on the south side of the river as a convenient route to his home he occupied a higher relation to the defendant company than that of licensee, it being insisted that "the defendant so built its bridge with walkways on each side thereof that the workmen on Belle Isle could come across to the Manchester side, and use its tracks as their route to and from their homes; that no invitation in a practical way could have been more strongly given; that it is idle to say that the company only built the bridge to get the men to the shore, and that it never meant for them to use the tracks as their route home. The two things, the bridge and the route, were too closely connected for them to be separated with fairness. The old bridge and route had been used jointly for 50 years, and the new bridge and the route were intended and expected to be used jointly. The use was in fact by invitation."

We have been unable to find any fact or circumstance in the record to support this contention. No relation is disclosed between the defendant and the ironworks other than that of common carrier and shipper, and the defendant can hardly be held to have built its bridge from Belle Isle to the shore for the benefit of the workmen there employed. It was built for the use and the benefit of the railroad company in hauling freight. The construction of the walkways on each side of the bridge was a mere incident, and, while put there for persons to walk on, they served as a proclamation and warning to such persons not to use the track, rather than an invitation to use it. When those using the walkways on either side of the bridge reached the shore, they bore no relation whatever to the defendant company. They were uncontrolled and free to go where, when, and by whatsoever route they pleased. Such of them as chose to follow the right of way of the railroad as a convenient route to their homes did so voluntarily, and without invitation from the defendant company. On the contrary, 240 feet from where the plaintiff was struck there was a large sign 4 feet square, with the following warning thereon:

"Danger—Beware. The public is notified that these railroad tracks and right of way are no thoroughfare; must be used by trains, and are dangerous for pedestrians, who are warned to use the public streets and keep off these private tracks."

This warning is signed by the general manager of the defendant company. It is set up 10 feet high, and conspicuously in view of the plaintiff every time he passes over the right of way of the defendant in going to his home.

In the light of these facts, our conclusion is that the plaintiff was not using the railroad track on the evening of his injury as the "invited guest" of the defendant company, but was there as a bare licensee.

An action for negligence only lies where there has been a failure to perform some legal duty which the defendant owes to the party injured.

In the case at bar the evidence shows that the right of way of the defendant company, at the point where the accident occurred, had been for many years in daily use as a walkway by persons from Belle Isle, and that this use and the particular hours of such use were well known to the company and its employés. Under these circumstances it was the duty of the company to use reasonable care to discover, and not to injure, persons whom it might reasonably expect to be on its tracks at that point. Blankenship v. C. & O. Ry. Co., 94 Va. 449, 27 S. E. 20; C. & O. Ry. Co. v. Rodgers' Adm'x, 100 Va. 324, 41 S. E. 732.

In the case of N. & W. Ry. Co. v. Wood, 99 Va. 156, 37 S. E. 846, where the plaintiff was standing on the platform of a freight depot, and was injured by a freight train that ran against the platform, this court said: "Being there as a mere licensee, the defendant did not owe him the duty of maintaining its roadbed, switches, and connected appliances in proper condition for running its trains, or of providing and using proper and safe trucks, couplings, and machinery on its cars, or of properly inspecting the same, or of employing competent servants to manage its trains, or to run them at a safe and proper rate of speed. The general rule being that a bare licensee—that is, one who is permitted by the passive acquiescence of the railroad company to come upon its depot platform for his own purposes, in no way connected with the railroad—is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there" —citing 2 Shear. & Red. on Neg. § 705; Nichol's Adm'r v. W. O., etc., R. Co., 83 Va. 102, 5 S. E. 171, 5 Am. St. Rep. 257; Gillis v. Penn. R. R. Co., 59 Pa. 129, 98 Am. Dec. 317; Holland, etc., v. Sparks, 92 Ga. 753, 18 S. E. 990

In the case of C. & O. Ry. Co. v. Rodgers'

Adm'x, supra—a case similar in its facts and circumstances to that under consideration—this court approved an instruction which told the jury that the defendant company did not owe the plaintiff's intestate the duty of blowing its whistle, ringing its bell, running its engines at any particular rate of speed, or having a light on said engines or tender; that if they believed from the evidence that the servants of the defendant in charge of the engine could not, in the exercise of reasonable care, under the circumstances surrounding them at the time, have known of the danger to the plaintiff's decedent in time to avoid the accident, they must find for the defendant; but that if they believed from the evidence that the servants of the defendant in charge of the engine could, in the exercise of reasonable care, under the circumstances surrounding them at the time, by having a proper lookout, have discovered the danger of the plaintiff in time to avoid the accident, they must find for the plaintiff.

The result of these decisions is that a railroad company owes no duty of prevision to a bare licensee. It is under no obligation to make preparation in advance for his protection. Its sole duty is to use reasonable care to discover, and not to injure, such persons when they may reasonably be expected to be on its tracks at a particular point. As said in Wood's Case, supra, such a person is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there. The uncontradicted evidence of the engineer in the present case is that he did keep a lookout, and did not see the plaintiff, who, he says, must have been walking in the middle of the track, where he could not have seen him on account of a curve in the road at that point; that, if the plaintiff had been on the side of the track at the edge of the ties, he could have seen him.

It is earnestly insisted that it was not intended, in the Rodgers Case, supra, to hold that a railroad company was without fault in running a train on a dark night with no light on its engine, thereby depriving itself of the power to keep such reasonable lookout as the law required; that the declaration in the Rodgers Case meant to charge that the failure to have proper lights on the engine was negligence in itself, without regard to whether or not they were necessary for the maintenance of a reasonable lookout; that the evidence bears out this view of the pleading, because it there appears that it was a bright moonlight night, and therefore immaterial whether or not there were lights on the engine; that it would be a strange and striking contradiction, if not a curious absurdity, to announce it to be the duty of a railroad company to keep a reasonable lookout, and at the same time to hold that it could so envelop itself in darkness as to prevent its performance of such clearly stated duty.

The argument of the learned counsel on this point may be reduced to this proposition: that if it is a bright moonlight night the railroad may run its trains without lights on its engines, but if there is no moon, or the moon is obscured so as to make the night dark, it must, for the protection of bare licensees, provide its engines with artificial lights, or be held guilty of a failure to perform a legal duty due to such licensees.

To maintain this view would destroy the established rule that a railroad company is under no duty to make previous preparation for the protection of mere licensees; for, if they must provide lights for their protection on a dark night, it could with equal propriety be urged that on a downgrade—which it is here contended so reduced the noise of the train as to destroy its value as notice—the company should be required to substitute other noises as notice of its approach. It could with equal force be contended that its machinery and appliances, other than lights, should be in order, that competent employés should be provided, and that the speed of its trains should be so regulated as to provide for the increased danger of a dark night to the licensee. Many things could be done which would add to the facility and safety with which bare licensees might, for their own convenience, use the private property of the railroad; but enough has been said to indicate how difficult, if not impossible, it would be to ingraft upon the rule mentioned any exception without ignoring the property rights of the railroad company. There is no contradiction in the rule holding that the defendant company must keep a reasonable lookout to avoid injuring bare licensees, and at the same time providing that it is under no obligation to furnish lights for its engines on a dark night for the protection of such persons. There is no obligation upon the defendant to do anything to make the conditions more favorable than the natural surroundings make them. The obligation is not an absolute one to discover the plaintiff, but it is only the duty of using ordinary care to keep a reasonable lookout under the conditions and circumstances existing at the time the point is reached where the licensee may be reasonably expected. This is shown by the instruction approved in the Rodgers Case, supra, which told the jury that if they believed from the evidence that the servants of the defendant in charge of the engine could not, in the exercise of reasonable care, under the circumstances surrounding them at the time, have known of the danger to the plaintiff's decedent in time to have avoided the accident, they must find for the defendant.

In the case at bar the defendant discharged its duty to the plaintiff when it kept such reasonable lookout at the time as its

servants could keep under the conditions then existing, among which conditions was an absence of the moon, and no artificial light provided to take its place. The darkness, which it is contended imposed upon the defendant the duty of providing lights for the protection of the plaintiff, also enveloped the latter when he stepped from a place of safety on the pathway to the defendant's track, and should have suggested to him the increased danger of his situation. Having reached the conclusion, however, that the defendant company has failed in the performance of no legal duty that it owed the plaintiff, it is not necessary to consider the negligence of the latter.

For these reasons the judgment complained of must be affirmed.

(104 Va. 121)

VIRGINIA PASSENGER & POWER CO. et al. v. FISHER et al.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. DECREE — APPEALABILITY — APPOINTMENT OF RECEIVER.

A decree of a state court appointing a receiver of property of a corporation, a receiver of which had previously been appointed in the federal court in a suit commenced after the commencement of the suit in the state court, authorizing the receiver to intervene in the other suit, and requests a vacation of the federal order, and a turning over of the property to the receiver of the state court, was an appealable decree, under Code 1904, p. 1836, § 3454, authorizing an appeal from a decree requiring a change in the possession of property.

2. APPEAL—SCOPE OF REVIEW.

On appeal from a decree appointing a receiver of property of a corporation, all decrees and proceedings in the case were open to consideration and review.

3. CORPORATIONS—INJURY TO CORPORATION—SUIT BY STOCKHOLDERS.

In order for a stockholder to sue on a cause of action in favor of the corporation, there must have been a demand on the directors or other managing body to institute proceedings, and a refusal so to do, or it must have been reasonably certain that a demand would have been useless.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 791–796.]

4. SAME—SUIT BY STOCKHOLDERS—BILL—ALLEGATIONS—SUFFICIENCY.

Where the conduct of one controlling the majority of the stock of a corporation constituted a wrong toward the corporation, it was not necessary that a stockholder should apply to the corporation at a meeting of the stockholders for action to redress the wrongs, as a condition precedent to the maintenance of an action by him for the appointment of a receiver.

5. CORPORATIONS—ACTION BY STOCKHOLDERS—BILL—SUFFICIENCY.

In a suit by stockholders for the appointment of a receiver because of wrongs perpetrated against the corporation, the bill alleged that a certain defendant controlled a majority of the stock, and that, owing to his influence, certain persons had been elected directors, who held offices of trust in some of the numerous corporations controlled by him and his family, and that thereby he personally controlled the corporation; the directors colluding with him in acts of spoliation committed on its property. *Held*, that it not appearing what offices the directors held, and the allegation as to their being subservient to the wishes of the defendant in question being a conclusion, and there being nothing to show that any directors except the defendant in question would be benefited by the grievance complained of, the bill did not show a sufficient excuse for failing to apply to the directors for redress of the wrong complained of.

6. SAME — WRONG AGAINST CORPORATION—SUIT BY BONDHOLDERS.

The proper party to bring a suit to foreclose a mortgage deed securing railroad bonds or to protect the property is the trustee, and a bondholder may not bring it unless the trustee has been requested and neglected so to do, or is in a position where he is unable to act.

7. EQUITY—JURISDICTION — RIGHTS OF GENERAL CREDITORS.

A general creditor cannot file a bill in equity to enforce a claim against a going concern unless he has first obtained a lien on the property, or it is otherwise provided by statute.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Creditors' Suit, § 51.]

Appeal from Hustings Court of Petersburg.

Suit by George E. Fisher and others against the Virginia Passenger & Power Company and others. From a decree in favor of complainants, defendants appeal. Reversed.

Christian & Christian and Munford, Hunton, Williams & Andersen (Frank W. Christian and Henry W. Andersen, of counsel), for appellants. W. B. McIlwaine, Alexander Hamilton, L. L. Lewis, and Richd. B. Davis, for appellees.

BUCHANAN, J. The appellees, George E. Fisher, Charles Hall Davis, and Philip Rogers, filed their bill in the hustings court of the city of Petersburg against the Virginia Passenger & Power Company, the Charlotte & Prince Edward Electric Railway & Improvement Company, Frank Jay Gould, Helen Miller Gould, and William Northrup, trustee, in which they sue for themselves and all others who are stockholders or bondholders or creditors of the Virginia Passenger & Power Company who may come in and contribute to the costs of the suit. The number of shares of stock and the face value of the bonds which they own, respectively, is set out in the bill.

"The main purpose of the suit," as stated by the trial court, whose opinion is filed with the record, "is the appointment of a receiver to take charge of the property rights, assets, and franchises of said Virginia Passenger & Power Company, and operate the same under the direction of this court until the debts outstanding against said company, with their dignities and priorities, have been established, and for a sale of said property rights and franchises under the direction of this court, and the proceeds applied to the payment of the debts of said company in the order of their priorities as so established.

"Incident to said relief, the complainants pray that the defendants be enjoined until the further order of this court, namely:

"(1) Frank Jay Gould and Helen Miller Gould from disposing of the shares of stock and bonds of the Virginia Passenger & Power Company acquired by them under a certain agreement, bearing date December 23, 1902, commonly known as the 'Adjustment Agreement.'

"(2) Frank Jay Gould and the Charlotte & Prince Edward Electric Railway & Improvement Company from disposing of the notes or other evidences of debt executed by the Virginia Passenger & Power Company in connection with the purchase of the Richmond & Petersburg Electric Railway Company, or of the said stock and bonds which are claimed to be held by them as collateral security for said notes or other evidences of debt.

"(3) William Northrup, trustee, from selling or otherwise transferring to the Charlotte & Prince Edward Electric Railway & Improvement Company, or to any other person or corporation, any of the lands abutting upon the Appomattox river necessary for the development of the water power of said river, now held by him as such trustee."

The defendants demurred to and answered the bill. Upon the hearing of the cause, upon the motion of the complainants for the appointment of a receiver, and for injunctions as prayed for upon the pleadings, exhibits, and affidavits filed, the court overruled the demurrer, and appointed a receiver of all of the assets and property of the Virginia Passenger & Power Company, and directed him to hold the same as the officer of, and under the direction of, the court. From that decree this appeal was allowed.

The first question to be considered is the motion of the appellees to dismiss the appeal as improvidently awarded, because that decree was not an appealable decree under the provisions of section 3454, p. 1836, of the Code of 1904.

It is well settled that an appeal lies from a decree appointing a receiver, whereby a change in the possession or control of the property is required. Smith v. Butcher, 28 Grat. 144; Shannon v. Hanks, 88 Va. 338, 13 S. E. 437; Deckert v. Chesapeake Western Co., 101 Va. 804, 45 S. E. 799.

It is insisted by the appellees that the decree appealed from does not, on its face, require the receiver to take possession of any property, nor does it require any one to deliver property to him.

At the time the receiver was appointed, the property of the Virginia Passenger & Power Company was in the hands of receivers of the Circuit Court of the United States for the Eastern District of Virginia, appointed in the case of the Bowling Green Trust Company, trustee, against Virginia Passenger & Power Company and others, instituted after this suit was brought and the motion made for the appointment of a receiver in the hustings court. In appointing a receiver in this case, the hustings court proceeded upon the theory, as is apparent from its decree, that the proceedings therein had given it jurisdiction of the subject-matter of the suit and the parties to it before the suit in the federal court was instituted, and that, as soon as the facts were properly brought to the attention of that court, it would, out of regard to that comity which exists and must exist between the state and federal courts in such cases, if there is to be an orderly administration of justice, dismiss its receivers. 2 Cook on Stockholders (3d Ed.) § 839, and notes.

Acting upon this view, the hustings court appointed its receiver, and directed him to intervene by petition or other proper proceeding in the cause of the Bowling Green Trust Company v. Virginia Passenger & Power Company, etc., and request that court to vacate its order appointing receivers for the property in question, and direct them to turn over and deliver the property held by them to the receiver of the hustings court. And he was authorized and directed to take and receive from the receivers of that court the possession of all the property of the Virginia Passenger & Power Company, wherever situated, and generally to conduct all its business as a common carrier of passengers and freight, and to discharge all of the other public and private duties of that company. No further or other order was necessary on the part of the hustings court to authorize its receiver to take possession of the property when the federal court surrendered possession of it, as it might have done but for the fact that this appeal and supersedeas was granted before application was made to that court by the receiver as directed.

We are of opinion, therefore, that the decree appointing the receiver in this case is an appealable decree, and that the motion to dismiss the appeal as improvidently awarded must be overruled.

The case being properly before this court upon appeal, all decrees and proceedings therein are subject to consideration and review. Deckert v. Chesapeake Western Co., etc., supra.

The action of the hustings court in overruling the demurrers to the bill is assigned as error.

One of the grounds of demurrer is that the complainants sue as stockholders of the Virginia Passenger & Power Company, but do not allege facts which show their right to maintain the suit in the capacity of stockholders.

It is not insisted that the complainants, as stockholders, have any right of action against the corporation of which they are members, but their claim is that they are

suing as stockholders for the benefit of the corporation—to redress its wrongs and to enforce its rights.

Under what circumstances a stockholder in a corporation may bring a suit in a court of equity upon a cause of action existing in the corporation has been recently considered by this court in the case of Mount v. Radford Trust Co., 93 Va. 427, 431, 25 S. E. 244. The conclusion reached in that case was that, in order for a stockholder to maintain such a suit, he must allege and prove that a request or demand has been made upon the board of directors, or other body managing the corporation, to institute proceedings against the wrongdoers, and their refusal to do so after reasonable request or demand, or he must allege such facts in his pleading as will show that it is reasonably certain that a demand for corporate action would have been useless. This conclusion is sustained by the great weight of authority, and its correctness is not controverted by the appellees, as we understand their written and oral arguments. Foss v. Harbottle, 2 Hare, 461, 493; Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; 2 Pomeroy's Eq. Jur. § 1095; Morawetz on Corp. (2d Ed.) §§ 239, 240; 2 Cook on Stockholders (4th Ed.) §§ 740, 741, and cases cited.

While a stockholder may maintain a suit where the cause of action is in the corporation without a request to the directors or managing body to institute suit, it can only be done under exceptional circumstances. The rule is stated by Mr. Justice Miller as follows in Hawes v. Oakland, supra: "The plaintiff should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders, as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it."

In the case of Tuscaloosa Mfg. Co., etc., v. Cox, etc., 68 Ala. 71, it was held that where the interests of the corporation are suffering, or are likely to suffer, through the inefficiency or faithlessness of any agent or official, an appeal for redress should be made to the board of directors or other governing body, and, on their failure or refusal to act, the next redress in ordinary cases will be found in the power of the ballot, under the charter and by-laws of the corporation; and, though there may be cases in which the stockholder may invoke the restraining power of a court of equity in the first instance, it must be a very strong case, showing that an appeal to the board of directors would be of no avail, and delay extremely perilous.

The Supreme Judicial Court of Massachusetts, in discussing this question in Dunphy v. Traveller Newspaper Association, 146 Mass. 495, 497–98, 16 N. E. 426, 431, says: "Even where their [the officers'] acts are ultra vires or otherwise illegal, a complaining member must first seek his remedy with the corporation. The only exception to the rule that a stockholder must apply to the directors, and also, if need be, to the corporation, for redress of a wrong done it, before he can sue in a court of equity for himself and on behalf of other stockholders, is where it appears that such application would be unavailing to protect his rights." See Flynn v. Brooklyn, etc., R. Co., 158 N. Y. 493, 53 N. E. 520; Boyd v. Sims, 87 Tenn. 771, 11 S. W. 948; Rathbone v. Gas Co., 31 W. Va. 798, 8 S. E. 570; Moore v. Silver Valley Mining Co., 104 N. C. 534, 10 S. E. 679; Foss v. Harbottle, 2 Hare, 461, 493; Gray v. Lewis, L. R. 8 Ch. App. 1050.

The bill in this case contains no allegation that the directors had been requested to remedy the wrongs complained of by suit or otherwise. Having failed to make or allege such request, the next question is, does the bill allege such a state of facts as shows that redress was not attainable through the action of the corporation? The material statements of the bill upon this question are in substance as follows: It is alleged that a majority of the stock of the corporation is owned by Frank Jay Gould and his sister, Miss Gould, who are charged (particularly the brother) with the wrongs complained of; that by virtue of the said controlling interest in the capital stock of the Virginia Passenger & Power Company, transferred to him by the adjustment agreement of December 23, 1902, he has since that time continued in office as directors of that company all or nearly all of the directors who were then in office, and who recommended and advised or approved the execution of that agreement whereby he was given absolute control and management of both the Virginia Passenger & Power Company and the Atlantic Development Company, and has added to the directors in the first-named company, in addition to the old directors retained by him, himself and two of his brothers, and also certain other persons, who are holding offices or positions of trust in some of the numerous corporations controlled by him or his brothers, and many of whom have their offices or places of business in the same building with him; that since he has assumed control of the said company he has personally dictated and controlled all its acts and doings; that the board of directors elected and continued by him in office are and always have been subservient

to his wishes, and have, in effect, colluded with him in the acts of spoliation committed by him on the property and assets of the said company; that the officers, directors, and servants of the company are now, and have been since the 23d day of December, 1903, wholly subservient to his will and wishes, and that he has personally directed, controlled, and carried into effect all the acts of the company complained of; that since the 23d day of December, 1903, when he assumed absolute control of the company, the complainants have sought in various ways to get from officers of the company information as to its action and its financial condition, and in reference to the transfer of its bonds to the said Frank Jay Gould, and its general management by him, and have both at general meetings of the stockholders, and at the general office of the company in the city of Richmond, asked for and sought such information, but the complainants, both at the stockholders' meeting, in which the said Frank Jay Gould has a large majority of the stock, and by the employés of the company at its offices in Richmond, who are under his domination, have been refused any and all evidence or information with reference to the said matters; that the complainants have sought from the officers of the company at its office in Richmond, and at stockholders' meetings, information with reference to the operation and condition of the company, but all information in reference to its affairs has been refused by its officers and directors at its office in Richmond, and also at its stockholders' meetings, where the complainants have propounded questions and sought information which has been uniformly and in every case refused them.

The averments of the bill that Frank Jay Gould, the alleged wrongdoer, has since December, 1903, controlled a majority of the stock of the company, state a sufficient reason, we think, for not applying to the corporation, at a meeting of its stockholders, for action to redress the wrongs complained of. An application to the stockholders for corporate action under the facts alleged would have been a vain and useless undertaking. Dunphy v. Traveller, etc., Ass'n, 146 Mass. 495, 498, 16 N. E. 426; Decatur Mineral Co. v. Palm, 113 Ala. 532, 540, 21 South. 315, 59 Am. St. Rep. 140.

But the fact that he controlled a majority of the stock, and had elected to and continued in office the board of directors, did not relieve the complaining stockholders from applying to the directors, unless the other circumstances averred relieved them from that duty. Dunphy v. Traveller, etc., Ass'n, supra; Decatur Min. Co. v. Palm, supra.

The complainants do not allege who or how many directors there were when this suit was brought. There is an exhibit filed with the bill which shows that for the year ending December 31, 1903, the board consisted of nine members. How many of these were old and how many were new directors is not shown. What offices or positions of trust the new directors held under Frank Jay Gould, which would have prevented them from faithfuly performing their duties as directors, are not stated. The fact that the old directors recommended, advised, or approved the agreement by which Frank Jay Gould and his sister obtained a majority of the stock of the company, and, to that extent, control of it, is no ground for presuming that they would not perform their duty, since the complainants themselves were parties to and signed that agreement.

The allegation that the directors have always been subservient to his wishes, and have, in effect, colluded with him in the acts of spoliation charged to have been committed by him on the property and assets of the company, and that they are wholly subservient to his will and wishes, are not averments of fact, but the conclusions of the complainants, based upon facts which are not alleged, and upon which, if alleged, the court might draw different conclusions. None of the directors except Frank Jay Gould are charged with deriving any benefit from his alleged wrongdoing, or made parties to the suit.

In the case of Brewer v. Boston Theatre, etc., 104 Mass. 378, 388, 389, the allegations as to the subserviency of the directors to the wrongdoers, the latter's control over them, and their faithlessness, were as marked as in this suit. In that case it was alleged that the directors "have allowed themselves to become little less than the creatures of Tompkins and Thayer [the wrongdoers], and registers of their wishes, and have come to consider that no duty rested or now rests upon them, as directors, to do more or other than to make said corporation, and the property of the plaintiffs therein invested, serviceable to Tompkins and Thayer." That phraseology, said that court, "does not comport with the distinctness and certainty required of legal averments; and we do not think that any process of elimination would deduce from it the proposition that the present directors of the corporation are so hostile to its interests and to any judicial proceedings for their protection as to make proceedings in this forum necessary." Again, in discussing the allegation "that a majority of the present board of directors of said defendant corporation are acting in the interest of, and are under the control of, said Tompkins and Thayer," that court said: "But this does not show that they are wholly disregardful of the interests of the corporation, or that they would so act if informed of the injurious effect of their action, or that they would yield to the influence of Tompkins and Thayer if aware of the purpose and uses for which that influence is exerted. It is not equivalent to a request and a refusal of the use of the corporate

name and authority for the redress of the wrongs complained of, nor does it show that such an application, upon a suitable representation of facts, would be unavailing."

In the case of Steiner, etc., v. Parsons, 103 Ala. 215, 222, 13 South. 771, 774, where a bill was filed by a stockholder of a corporation to have redressed alleged corporate wrongs, without having made a request of the managing body of the corporation to have the grievances complained of corrected, it was held that the complainant must aver in his bill the facts constituting his excuse for not making such request with particularity and definiteness. The averment of conclusions will not suffice. "The facts," said the court, "upon which such averments of conclusions rest, should have been set out, so that the court might judge intelligently for itself—as it is its high duty to do in such cases—whether the plaintiff had the right to proceed to file the bill in his name or not. The particularity of averment to be observed in such cases has received extended discussion in adjudged cases, there being scarcely anything to be added on the subject." Hawes v. Oakland, supra; Dunphy v. Traveller, etc., Ass'n, supra; L. & N. R. Co. v. Neal (Ala.) 29 South. 865; Mount v. Radford, supra; Boyd v. Sims, supra; 2 Cook on Corp. (4th Ed.) § 741.

The allegation that a board of directors is colluding with the wrongdoers, and that it will not perform its duty or would fail to discharge its trust, is a charge of fraud; and, fraud being a conclusion of law from facts, it is a well-settled rule of pleading both at law and in equity that the facts out of which the fraud arises must be alleged, as well as proved, to justify relief on that ground. Steiner v. Parsons, supra; Southall, etc., v. Farish, etc., 85 Va. 403, 410, 7 S. E. 534, 1 L. R. A. 641.

The allegations of the bill do not show that any of the directors except Frank Jay Gould would be benefited by the grievances complained of. Directors generally are, and always ought to be, stockholders in the corporation whose business they have charge of; and it is to their interest to conduct its affairs properly and to discharge their trust faithfully. In the absence of causes which may influence them otherwise, the presumption is that they would do their duty, and this presumption is greatly strengthened when the effect of the duty would be to promote their own interests. Porter v. Pittsburg, etc., Co., 120 U. S. 670, 7 Sup. Ct. 741, 30 L. Ed. 830; Decatur, etc., Co. v. Palm, 113 Ala. 531, 539, 21 South. 315, 59 Am. St. Rep. 140.

Without discussing further the allegations of the bill relied on to excuse the complaining stockholders from not requesting the board of directors to redress the wrongs complained of, we are of opinion that, under the rules of law governing this class of cases, the bill does not allege such facts as show with reasonable certainty that the board of directors would have refused to remedy the wrongs complained of, or to bring a suit for that purpose, and that a request or a demand upon them to sue would therefore have been useless.

Another ground of demurrer to the bill is that the complainants have not alleged facts which show a right in them to maintain this suit in the capacity of bondholders.

The contention of the appellants is that the trustee in a railroad corporation mortgage is the proper party, and the only proper party, to bring a suit for the foreclosure of the mortgage, or to protect or recover the property of the corporation subject to, or which should be subject to, the lien of the mortgage, and that a bondholder cannot bring such suit unless the trustee has been requested so to do and has declined, or is in a position in which he is unable to act.

The general rule is that in suits respecting trust property, brought either by or against the trustees, the cestuis que trust as well as the trustees are necessary parties (Story's Eq. Pl. § 207), and this has been the rule generally followed in this state. To this rule, however, there are exceptions. Story's Eq. Pl. (6th Ed.) 207a; Carey v. Brown, 92 U. S. 171, 23 L. Ed. 469; Buck v. Pennybacker's Ex., 4 Leigh, 5.

In the last-cited case it was held that the beneficiaries were unnecessary parties, since the trustee in that case represented their interests.

In Carey v. Brown, supra, it was held that where the suit is brought by the trustee to recover the trust property or to reduce it into possession, and in no wise affects his relations with the cestuis que trust, it is unnecessary to make the latter parties.

In Short's Law of Railway Bonds & Mortgages, § 483, it is said: "One of the exceptions to the general rule is in relation to railroad mortgages. The exception in that class of cases," he states, "may almost be said to overshadow the rule itself. The doctrine now universally accepted is that the trustee is, in the absence of some special consideration, the only necessary party in suits to enforce or defend the rights of bondholders. This doctrine may be referred to two principles: (1) The bondholders usually constitute a numerous class, having a common interest, and therefore suits by or against them fall into the category of those in which appearance by representation is permissible; (2) the nature of the contract is such that the bondholders, in purchasing their securities, may reasonably be assumed to have agreed that the trustee should, under ordinary circumstances, be that representative." Again, in section 485, in discussing the question in what suits the trustee is the proper party plaintiff, he says: "From the above principle it follows that under ordinary cir-

cumstances the trustees are the proper parties to institute a suit for the foreclosure of the mortgage, or to maintain and defend the trust fund against wrongful attack or injury tending to impair its safety or amount, or to apply for an injunction to restrain an alleged illegal proceeding which will injure the value of the bonds and cast a cloud upon the security, or to bring suit to have a controverted priority or lien settled before irredeemable sale is made under another mortgage which is claimed to rank above the one made to the petitioners, or to secure from the company an accounting where it has neglected to apply earnings to the mortgage debt." And in section 462 it is said that, while the interposition of a trustee in the mortgage does not limit in any degree the abstract right of the bondholders to institute proceedings to foreclose, "it modifies the remedial procedure for its enforcement to the extent that the bondholders are not allowed to take any active steps in initiating a foreclosure suit unless they show that the trustee has refused to bring the suit, or is for some reason an improper person to represent their interests."

Judge Thompson, in his work on Corporations, vol. 5, § 6210, says, that: "The position of bondholders, as beneficiaries under the trust expressed in the mortgage deed of trust, is somewhat analogous to that of stockholders, in respect of their rights of action to redress grievances arising in the management of the affairs of the corporation. Ordinarily such bondholders have no right to bring an action to foreclose the mortgage, but the trustee in the mortgage, as stated in the preceding section, is the proper person to sue. But if he neglects to sue after the happening of the condition which entitles the bondholders to a foreclosure, and after being requested by them so to do, they may bring the action to foreclose, making him a party defendant."

The rule on the subject, as stated in Cook on Stockholders (4th Ed.) vol. 3, § 826, is that: "The proper person to foreclose is the trustee to whom the deed of trust runs. Unless he refuses or neglects to perform his duty, his cestuis que trust, the bondholders, have no standing in court. Hence the bondholder must in good faith place the matter before the trustee and ask him to commence the suit. If then he refuse or decline to do so, the bondholder may sue. But the bondholder, in his bill of complaint, must allege the request to the trustee, and the refusal or neglect of the trustee to act." And in section 830 the same author says: "In addition to bondholders' suits to foreclose the mortgage when the trustee refuses to do so, the bondholder may bring suit to protect the property, where there is imminent danger to it, and the trustee refuses to bring suit."

In 1 Morawetz on Corp. § 239, it is said, that: "It is a general rule, founded on convenience and the implied agreement of the parties, that, where a trustee is invested with active duties and represents numerous beneficiaries, no portion of the beneficiaries are entitled to bring suit for the protection of the trust unless the trustee has refused or is unable to take the necessary steps to protect it on their behalf."

The doctrine stated by the text-writers quoted is based upon or grows out of several considerations: The peculiar character of the security (Shaw v. Railroad Co., 100 U. S. 605, 25 L. Ed. 757); the fact that the trustees are parties to the mortgage contract, negotiating its terms and stipulations, to whom the usual rights and powers of mortgagees are reserved, and the usual obligation of mortgagors are made (Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179); that the debt secured generally consists of a large number of bonds, which pass frequently from hand to hand, and are owned by many persons (3 Cook on Corp. § 819); that generally all the rights the bondholders have or ever had in the mortgage, legal or equitable, they get through the trustees to whom the conveyance was made for their security (Richter v. Jerome, 123 U. S. 233, 246, 8 Sup. Ct. 106, 31 L. Ed. 132); the relation which the bondholders bear to each other, their bonds generally being of the same class and issued at the same time (Shaw v. Railroad, supra); the fact that the trust is not a dry, naked agency, but is coupled with important duties in caring for the trust subject, as well as instituting foreclosure proceedings where necessary (3 Cook on Stockholders, § 815); the difficulty, if not the impossibility, of bringing all the bondholders before the court, and the injurious delays which may result from endeavoring to do so (Story's Eq. Pl. § 97; 3 Cook on Stockholders, § 821); and the fact that by the terms, expressly or impliedly, of the mortgage itself, the trustee generally is made the representative of all the bondholders (3 Cook on Stockholders, § 821). See Coal Co. v. Blatchford, 11 Wall. 172, 178, 20 L. Ed. 179; Carey v. Brown, 92 U. S. 171, 23 L. Ed. 469; Kerrison v. Stewart, 93 U. S. 155, 160, 161, 23 L. Ed. 843; Shaw v. Railroad Co., 100 U. S. 605, 25 L. Ed. 757; Belfield v. Taylor, 12 Cond. Eng. Chy. Rep. 93; McFadden v. Mays Co., 49 N. J. Eq. 176, 22 Atl. 932; Falmouth Nat. Bank v. Cape Cod Co., 166 Mass. 550, 44 N. E. 617; Morgon v. Kansas, etc., Co. (C. C.) 15 Fed. 55; General Elec. Co. v. La Grande, 87 Fed. 590, 31 C. C. A. 118; Consolidated Water Co. v. City of San Diego (C. C.) 89 Fed. 272.

The question now under consideration has never been passed upon by this court, so far as we know. The suit of Gibert v. Washington, etc., R. Co., 33 Grat. 586, was brought by bondholders under a railroad mortgage deed for the purpose of foreclosing the mortgages under which they were

secured, and they were foreclosed in that suit. This, it is claimed by the appellees, must be regarded as a decision, by implication, at least, that the suit was properly brought. Not only was no question made in that case as to the right of the bondholders to bring the suit, but their bill alleged that, according to the terms of the several mortgage deeds, the beneficiaries thereunder were entitled to foreclose the same (page 589). Under the allegations of the bill, the bondholders had the right to sue, and, as their right was not questioned, that case cannot be regarded as adjudicating a question not raised, and, so far as the record shows, not in the mind of the court.

In Osborne v. Big Stone Gap Colliery Co., 96 Va. 58, 30 S. E. 446, also relied on by the appellees, in which it was held that the trustee did not represent the creditors, the deed of trust was the ordinary deed of trust to secure certain creditors; and, there being nothing in the character of the trust to show that the trustee had the right to or could have represented all the creditors secured by it, it came within the general rule that in suits respecting the trust property, brought either by or against the trustees, the beneficiaries as well as the trustees are necessary parties.

But as before stated, railroad mortgages are not like the ordinary deeds of trust, but are a peculiar class of securities, in which the trustee, expressly or impliedly, represents the bondholders, and it is his duty to enforce their rights and to protect their interests under the trust. This being so, it seems to us that the rule that the proper party to bring a suit for the foreclosure of such mortgage deed, or to protect or recover the property of the corporation subject to, or which should be made subject to, the lien of the mortgage, is the trustee, and that a bondholder should not be permitted to bring such suit unless the trustee has been requested to do so, and has refused or neglected to do so within a reasonable time, or he is in a position where he is unable to act. Such a rule does not deprive the bondholders of any right or remedy, but merely imposes conditions upon them in the exercise of their rights and remedies well adapted to the protection of the rights of those interested in such securities, without subjecting bondholders to unnecessary inconvenience.

Courts of equity are swift to protect such minority bondholders from oppression and wrong, but it is no hardship upon them to require that they shall allege and prove such facts as show that they cannot get the relief desired through their representative, the trustee, and that their suit is necessary for their protection.

So far we have been considering the question without reference to the special provisions contained in the mortgage deed under which the complainants claim. This deed, when all of its provisions are considered together, as they must be (Potomac Mfg. Co. v. Evans, 84 Va. 717, 720, 6 S. E. 2), clearly shows that the trustee therein was clothed with all necessary authority to assert and protect the rights of the bondholders secured thereby, and that it was made the duty of such trustee to do so. It further provides that the bondholders shall not institute any suit or proceeding for a foreclosure of the mortgage deed, or for the execution of the trusts under it, or for the appointment of a receiver, until after written notice has been given to the trustee of the default complained of, and a written request made to the trustee to exercise its powers, or to institute suit in its own name to assert the right or remedy the wrong in question. The provision in the mortgage deed that a majority in amount of the holders of bonds shall unite in such request to the trustee, before any of them can bring suit to protect rights or remedy wrongs which the trustee refuses or neglects to assert or remedy, need not be considered in this case, as there is no allegation that the complainants gave any such notice or made any such request.

The complainants having failed in their bill to aver that they had brought their grievances to the attention of the trustee and requested it to sue, or to set out such a state of facts as would show that the trustee was in such a position that it was unable to act, we are of opinion that the bill was demurrable on that ground.

Another ground of demurrer is that the complainants do not allege facts which show a right on their part to maintain this suit in the capacity of creditors.

The complainants sue in the capacity of general creditors, as well as of stockholders and bondholders, but they do not allege any indebtedness other than as bondholders, nor any indebtedness which was then due and unpaid. It is well settled that a general creditor cannot file a bill in equity to enforce a claim against a living person or a corporation which is a going concern, unless he has first obtained a lien upon the property, except where otherwise provided by statute. Rhodes v. Cousins, 6 Rand. 188, 18 Am. Dec. 715; Wallace v. Treakle, 27 Grat. 479, 486; Nunnally v. Strauss, 94 Va. 255, 260, 261, 26 S. E. 580; Hollins v. Brierfield Coal Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113.

We are of opinion, therefore, that the bill of appellees does not show that they had the right to maintain this suit, either as stockholders, bondholders, or general creditors; and, not being entitled to maintain the suit, the court erred in appointing a receiver.

Without considering the other grounds of demurrer, we are of opinion that the decree complained of must be reversed and set aside, and the cause remanded to the hustings court for such further proceedings as

the appellants may be advised to take, not inconsistent with the views expressed in this opinion, and in accordance with law.

(104 Va. 29)

BISHOP v. BAGLEY et al.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. WATERS—ESTABLISHMENT OF DAM — REPORT OF COMMISSIONERS—SUFFICIENCY.

Where commissioners appointed in proceedings under Code 1887, § 1347 [Va. Code 1904, p. 753], to investigate and report on an application for the establishment of a mill and milldam on a certain stream, designated one of their number to write out the report and sign their names thereto, the subsequent acknowledgment in open court of the report, and their signatures by the commissioners who had not personally signed it, was a sufficient compliance with the law.

2. SAME—CONCLUSIVENESS OF REPORT.

Under Va. Code 1904, p. 756, § 1353, concerning establishment of milldams, providing that if on the report of the commissioners, or on other evidence, it appears to the court that by granting such leave the health of the neighbors will be annoyed, the leave shall not be granted, the statement in the report of the commissioners that, if leave is granted, the health of the neighborhood will be annoyed by the stagnation of water caused by the pond, producing malaria, chills, and fever, is conclusive against the right of applicant to establish the dam.

Appeal from Circuit Court, Lunenburg County.

Proceeding by James A. Bishop against H. H. Bagley and others. From an order of the county court, plaintiff appealed to the circuit court, and, from the judgment of the circuit court in favor of the defendants, plaintiff appeals. Affirmed.

Wm. E. Neblett and Meade Haskins, for appellant. A. B. Dickinson, for appellees.

KEITH, P. Appellant, Bishop, presented his application in writing to the county court of Lunenburg county for the re-establishment of a mill and milldam on Flat Rock creek; and in February, 1901, the county court pronounced an order appointing commissioners to investigate and report upon the subject, as provided by Code 1887, § 1347 [Va. Code 1904, p. 753]. From time to time such proceedings were had in the county court that on the 13th of August, 1901, an order was entered refusing the application; and thereupon Bishop appealed to the circuit court, where the judgment of the county court was reversed, and the matter retained for further proceedings.

At the November term, 1901, the circuit court appointed five commissioners, four of whom made a report to the April term, 1902. To this report numerous exceptions were taken, and the court, being of opinion that the report was not sufficiently definite with respect to certain matters of inquiry, set aside the report and appointed a new commission, consisting of five persons. Three of these commissioners acted, and made their report to the November term, 1902. To this report appellant filed numerous exceptions, and at the May term, 1903, an order was entered dismissing his application, and he thereupon obtained an appeal from one of the judges of this court.

There are numerous assignments of error, of which we shall consider only two.

The final report of the case was excepted to by appellant upon the ground that it was signed by only one of the commissioners appointed. From the bill of exceptions it appears that the three commissioners met and acted together, and directed one of their number to prepare their report, embodying the results of their inquiry and deliberation. This duty was performed by T. C. Maddux, who drew up the report and signed his own name to it, and also the names of the two other commissioners. Some time thereafter L. A. Gee saw the report and adopted it. J. S. Saunders, the other commissioner, had never seen the report until it was read to him in open court; but, having heard it, he declared that it correctly stated his views, and that the commissioners had authorized one of their number to prepare and sign the report because they lived in different sections of the county, and it was not convenient for them to perform the work together in one day. And thereupon the report and the signatures thereto, as made by T. C. Maddux, were duly acknowledged in open court by the commissioners for whom he had signed.

This seems to us a reasonable and sufficient compliance with the law, and the exception to the report on that account was properly overruled by the circuit court.

The other ground of exception to which we shall allude, and which, being decisive of the case, obviates the necessity for dealing with any other, is to that part of the report which states that, "if said leave is granted to erect said milldam at said place, the health of the neighborhood will be annoyed by the stagnation of water caused by said pond, producing malaria, chills, and fever." In support of his exception, appellant offered to show by the testimony of numerous witnesses that the re-establishment of the dam would not affect the health of any one. But the court refused to hear testimony upon the subject, and overruled the exception.

So much of section 1353, p. 756, of Va. Code, 1904, as bears upon this point, is as follows: "If, on the report, or on other evidence, it appears to the court that by granting such leave the mansion house of any person other than the applicant himself, or the outhouses, yard, garden, or orchards thereto belonging, will be overflowed or taken, or that the health of the neighbors will be annoyed, the leave shall not be granted."

In Mayo v. Turner, 1 Munf. 405, Judge Tucker says that: "The only question in this case is whether the inquest of the jury, finding that the health of certain persons in the neighborhood, of whom appellee's family

were a part, will be annoyed by the erection of a milldam, etc., be conclusive against the petitioner, or whether it be competent for him to examine witnesses to impugn that finding. * * * The fifth section enacts that 'if, on such inquests, or on other evidence, it shall appear to the court that certain inconveniences may result, or the health of the neighbors be annoyed, they shall not give leave to build the mill and dam.' From hence it appears to me that if the opinion of the jury be affirmative, that the health of the neighbors will be annoyed, the same is conclusive against the party applying to build the mill, but that, if it be merely negative, a person supposing himself likely to be aggrieved thereby may controvert such opinion of the jury by other evidence; and, if by such other evidence it shall appear to the court that the health of the neighbors will be annoyed, they are bound by the terms of the law not to give leave to build the mill." This opinion was concurred in by all the judges.

In Miller v. Truehart, 4 Leigh. 570, speaking of the statute under consideration, the court said: "A glance at its provisions will show how exceedingly careful it has been of the health of the citizen. The jury is directed to inquire and report whether, in its opinion, the health of the neighbors will be annoyed by the stagnation of the waters. If the jury reports that no such annoyance will take place, any person may contest the truth of the statement, and produce evidence before the court; and if, upon this evidence, the court shall think that the jury is wrong, it will refuse leave to erect the mill. If, on the contrary, the jury reports that the health of any part of the neighbors will, in its opinion, be affected, or will probably be affected, this is conclusive—no evidence can be adduced to controvert it—for the law says that in such case the court shall not give leave to build the mill and erect the dam." And the case of Mayo v. Turner, supra, is cited with approval.

It is true that at the time Mayo v. Turner was decided, and when it was followed in Miller v. Truehart, the statute provided for the impaneling of a jury; and it is contended that, commissioners having been substituted for a jury, the authority of those cases has been impaired.

A comparison of the statutes will show that the only change in phraseology is that the former statute says that "if on such inquests, or on other evidence," while the present statute says, "if on the report, or on other evidence," it appears that the health of the neighbors will be annoyed, the leave shall not be granted.

We have then the statute law, which was interpreted by this court nearly a century ago, a revision and re-enactment of the statute law in 1849, and the substitution of the report of commissioners for a jury of inquest; the language of the statute in other respects remaining unchanged. This seems to us to be a legislative indorsement of the judicial construction, and places it outside the region of further controversy until the Legislature shall see fit to interpose.

Upon the whole case, we are of opinion that there is no error in the judgment of the circuit court, which is affirmed.

(104 Va. 21)

WEST v. CITY OF NEWPORT NEWS.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. MUNICIPAL CORPORATIONS — TAXES — ASSESSMENT—FOLLOWING STATE LIST.

Under the express provisions of Const. art. 8, § 128 [Code, p. ccxliii], and Code 1904, p. 495, § 1033h, a municipal assessment of property in cities and towns where there is an assessment for state taxes must be the same as the state assessment.

2. SAME—ORDINANCES—CONSTRUCTION.

A city ordinance imposing a tax on the "capital stock" of banks located within the city was not in violation of Acts 1902–04, § 17, p. 163, providing that no tax shall be assessed on the "capital" of any bank.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 2029, 2052; vol. 45, Cent. Dig. Taxation, §§ 637, 638.]

3. SAME—BANK STOCK.

Bank stock being declared to be personal property by Code 1904, p. 608, § 1173a, subsec. 7, such stock was covered by a city ordinance imposing a tax on "all personal property of every description, including capital stock of banks located within the city," though the latter clause should be construed as referring to the "capital" of the bank.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 2029, 2052; vol. 45, Cent. Dig. Taxation, §§ 637, 638.]

4. SAME—MARKET VALUE.

Certain bank stock having been assessed at its market value for state taxes, an ordinance imposing a tax of 90 cents on every $100 of the "assessed value" thereof was not objectionable on the ground that such assessment was not on the market value of the stock, the assessment having been made on the assessed valuation for state taxes, as required by Const. art. 8, § 128 [Code, p. ccxliii]; and Code 1904, p. 495, § 1033h.

5. SAME—COMMISSIONER OF REVENUE—CHARTER DUTIES.

Newport News City Charter, § 86, providing that the commissioner of revenue shall perform all the duties in relation to the assessment of property for city taxes that may be ordered by the council, applies only where there is no state assessment of the property within the city which can be followed as provided by Const. art. 8, § 128 [Code, p. ccxliii], and Code 1904, p. 495, § 1033h.

Error to Corporation Court of Newport News.

Motion by G. B. West against the city of Newport News for the collection of an alleged erroneous assessment of certain bank stock for city taxes. From a decree dismissing the application, plaintiff brings error. Affirmed.

J. A. Massie, City Atty., for defendant in error.

HARRISON, J. This motion was made by the plaintiff in error under section 571, p. 283, of the Code of 1904, for the correction

of an alleged erroneous assessment of taxes, whereby he was charged by the defendant in error with $148.50 city taxes for the fiscal year 1903–04 on 400 shares of the stock of the Citizens' & Marine Bank of Newport News, of the assessed value, for the purpose of state taxation, of $16,500, upon consideration whereof the lower court held that the taxes complained of were legally assessed and levied, and dismissed the application for relief therefrom.

The plaintiff in error claims to be aggrieved by this action of the lower court in the following particulars: Because (1) the ordinance of the city of Newport News approved June 17, 1903, imposing taxes on personal property, attempted to impose a tax on the capital stock of the banks of said city, instead of laying such tax upon the shares of stock of the individual stockholders; and that such an ordinance is invalid, and, being invalid, no legal tax was thereby assessed or levied either upon the shares of a stockholder or the capital stock of the bank. (2) That, even if a legal tax was imposed by the ordinance, the city authorities did not follow the mode of assessment and manner of collection prescribed by statute for the collection of state taxes upon shares of stock. (3) Because section 86 of the city charter, under which it is alleged the shares were assessed, if a tax was imposed on them, is unconstitutional and void. (4) That the ordinance imposing the tax is unconstitutional and void.

The ordinance in question, which was approved June 17, 1903, is as follows:

"Be it ordained by the common council of the city of Newport News, that for the fiscal year beginning on the first day of February, 1903, the taxes on lands and lots and the improvements thereon, persons, incomes, and other property for the payment of the interest on the city debt and to meet the appropriations for the fiscal year of 1903 and 1904, beginning July 1st, 1903, shall be as follows: Upon all lands, lots and improvements thereon, wharves and upon all personal property of every description, including the capital stock of banks located in this city, except such real and personal property as is exempted from taxation by the laws of the state of Virginia, or any ordinance of this city, ninety cents on every hundred dollars of the assessed value thereof."

The facts certified show that by virtue of the authority vested in him by this ordinance and the general law the commissioner of the revenue assessed the value of the shares of stock of the plaintiff in error along with the value of the shares of stock of the other stockholders in the Citizens' & Marine Bank, and levied a tax against each of such stockholders in favor of the city of Newport News, following the mode of assessment and the manner of collection prescribed for the assessment of state taxes upon such shares of stock, under the statute authorizing a tax upon the shares of stock in banks for state purposes; that the assessment list used by the commissioner was a fac simile of, and in exact conformity with, that used for the assessment and collection of taxes for state purposes, and contained an alphabetical list of all the stockholders of the Citizens' & Marine Bank, furnished for such purposes by the Auditor of Public Accounts, duly filled out by the cashier of the bank, and showing the number of shares of each stockholder. It is not pretended that the valuation upon which the shares of stock are taxed is erroneous, nor could such a contention be made, as the fact is shown that the tax is levied upon the same assessment made for the purposes of state taxation, the correctness of which is not questioned.

If the valuation for state purposes is correct, it follows that the assessment is correct for city purposes, as the law provides that "in cities and towns the assessment of real estate and personal property, for the purpose of municipal taxation, shall be the same as the assessment thereof for the purpose of state taxation, whenever there shall be a state assessment of such property." Const. Va. art. 8, § 128 [Va. Code, p. ccxliii]; Va. Code 1904, p. 495, § 1083h.

This proceeding is not, therefore, a motion to correct an erroneous assessment of valuation, as usually understood, but it is to avoid the payment of taxes upon a correct assessment of valuation, upon the ground that the levy has not been legally made. That the city has the authority to levy a tax upon the state assessment of this bank stock cannot be questioned, as section 1040a of Va. Code 1904, p. 502, gives it such power in express terms, the language of that section being in part as follows:

"(1) Hereafter each county or city in which any bank, either national or state, is so located may, subject to the conditions mentioned below, tax all the shares of stock issued by any such bank so located within its limits at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in such county or city. (2) That in so taxing said shares the said county or city authorities, respectively, shall follow the mode of assessment and manner of collection prescribed by statute for the collection of state taxes upon said shares."

The ordinance in question imposes a tax of 90 cents on every $100 of the assessed value of all personal property of every description, "including the capital stock of banks located in this city." The contention is that by the use of the words, "including the capital stock of banks located in this city," the council attempted to impose a tax on the capital of the banks, instead of laying such tax upon the shares of stock of the individual stockholders.

The statute does not use the term "capital stock" in providing for the exemption mentioned, but employs the word "capital"

alone. The language is, "No tax shall be assessed upon the capital of any bank," etc. Acts 1902–04, § 17, p. 163. "Capital" and "capital stock," while sometimes used interchangeably, are not one and the same thing. "Capital" includes the entire assets of the bank, whether represented by the money paid in for the issuance of stock, surplus, undivided profits, or other property of the bank, and may vary from time to time according to its profits or losses; while "capital stock" is fixed and definite, and represents only the total amount derived from the issuance of the shares of stock.

In the case of Union Bank v. Richmond, 94 Va. 316, 26 S. E. 821, it is said that: "The property or interest of a stockholder in an incorporated bank, commonly called a 'share,' the shares in the aggregate totality being sometimes called the 'capital stock' of the bank, is a different thing from the moneyed capital of the bank held and owned by the corporation. This capital may consist of cash, or of bills and notes discounted, or of real estate combined with these. * * * In whatever it may be invested, it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank."

This is a different thing from taxing the shareholders or stockholders upon the value of their stock. All legislative acts are presumed to be lawful, and are to be construed as such, unless the contrary plainly appears. Since, then, the capital of banks is exempt from taxation, the term "capital stock" used in the ordinance clearly had reference to the totality of shares of the individual stockholders which the city had the right to tax. The purpose of the ordinance is made manifest by the fact that in its execution no attempt has ever been made to tax the capital of the several banks of the city, but the assessment and levy has been upon the individual stockholders.

If, however, it were conceded that the use of the words "capital stock" showed an intention to tax the capital of banks, the result would be the same, for we concur in the view taken by the lower court that the words "all personal property of every description" are broad enough to levy a tax against all kinds of personal property, whether tangible or intangible. That bank stock is personal property would seem to be settled by section 1173a, subsec. 7, Va. Code 1904, p. 608, wherein it is declared to be personal property; and by section 5, subsec. 10, Va. Code 1904, p. 7, which defines personal estate to include chattels real, and such other estate as, upon the death of the owner intestate, would devolve upon his personal representative.

This court has held that bank stock is property, to be assessed like any other property. Burrows v. Smith, Treas., 95 Va. 694, 29 S. E. 674; Union Bank v. Richmond, supra. As the words, "all personal property of every description," used in the ordinance, are general terms, they include all kinds of personal property, whether tangible or intangible. Shares of bank stock being personal property, and therefore embraced by the words "all personal property," the added words, "including bank stock," gave no further meaning or force to the ordinance than it had without them. Where words of a general description are used, they cover everything of that kind not expressly or by necessary implication excepted.

The contention that the city authorities did not follow the mode of assessment or manner of collection prescribed by statute for the collection of state taxes upon shares of bank stock is not sustained by the record. As already pointed out, the contrary appears from the facts certified.

It is argued that because the words "assessed value" are used in the ordinance, instead of the words "market value," that the council did not intend to levy a tax upon bank stock.

This view is, we think, without merit. There being an assessment of this stock for state purposes, the city followed, as it was obliged to do under the statute, the state assessment. The stock had already been assessed by the state at its market value, and no question is raised here as to the correctness of that valuation. The ordinance in using the term "assessed value" had reference to the assessed value for the purposes of state taxation, which the city had to follow, and was not intended to, and did not in fact, prejudice the right of the stockholder to have his stock assessed at its market value.

As to the contention that section 86 of the charter of Newport News is unconstitutional, it is sufficient to say that the assessment complained of was not made under that section, and therefore it has no application to the case at bar. Section 86 of the charter applies only where there is no state assessment. Here there is a state assessment, and, as shown, section 128, art. 8, of the Constitution [Va. Code 1904, p. ccxliii], and section 1033h of Va. Code 1904, p. 495, provide that in cities and towns the assessment of real estate and personal property for the purpose of municipal taxation shall be the same as the assessment thereof for the purpose of state taxation, whenever there shall be a state assessment of such property.

Upon the whole case we are of opinion that the ordinance in question is constitutional, that the assessment complained of has followed the law, and the tax sought to be avoided has been properly levied. The judgment of the lower court must therefore be affirmed.

(104 Va. 222)

CONTINENTAL CASUALTY CO. v. PELTIER.

(Supreme Court of Appeals of Virginia. June 22, 1905.)

1. ACCIDENT INSURANCE—DEATH—PROXIMATE CAUSE—INSTRUCTIONS.

Where, in an action on an accident policy insuring against death from accident solely and independently of all other causes, it appeared that deceased died from typhoid fever after an accident, and that there was no necessary or natural causal connection between deceased's injuries and the disease, an instruction that if deceased was injured by accident, and as a direct result of such injuries, as an exciting cause, some disease was set up in his body, which would not have happened but for his injuries, and from which disease deceased died, the injuries would be the proximate cause of his death, and that where death results from any disease which is the direct cause of an injury, and which would not have happened but for the injury, such injury, in contemplation of law, is the cause of death, was erroneous, as misleading the jury to speculate as to whether deceased died from injuries or disease, or from both concurring.

2. SAME.

Such instruction was also erroneous as assuming that the injuries alone caused the disease, and as ignoring the provision requiring that the injury should be the sole and independent cause of death.

3. SAME.

Where a policy covered death by accident only in case it was independent of all other causes, and deceased succumbed to an attack of typhoid fever following an accident, an instruction authorizing the jury to infer that, before any other cause than the injuries could be considered as a defense to the policy, it must appear to have been independent of the injuries, was erroneous.

4. SAME—INSTRUCTIONS—CURING ERROR.

Where instructions are inconsistent and contradictory, error in one of them containing an incomplete statement of the law was not cured by a complete statement thereof in the other.

Error to Corporation Court of Bristol.

Action by Maxie Peltier against the Continental Casualty Company. From a judgment for plaintiff, defendant brings error. Reversed.

W. F. Rhea and Bullitt & Kelly, for plaintiff in error. A. H. Blanchard, W. H. Rouse, and H. N. Bell, for defendant in error.

CARDWELL, J. The defendant in error (plaintiff in the court below) brought this action to recover the sum of $1,500, the amount of a policy of insurance issued by plaintiff in error to William Peltier, payable to defendant in error, his wife, within a stipulated time after his death caused by accident; and the verdict and judgment in the court below were for the defendant in error for the amount of the policy, which judgment we are asked to reverse because of misdirection of the jury by the instructions given at the trial, and because the verdict is contrary to the law and the evidence.

William Peltier held what is known as an "accident insurance policy," whereby plaintiff in error bound itself, among other things, to pay to his wife, defendant in error, the sum of $1,500 "in the event of personal bodily injuries effected * * * through external, violent and purely accidental causes, and if such injuries should solely and independently of all other causes necessarily result in his death within ninety days from the date of said accident."

There were numerous other provisions in the policy, but they are immaterial to the issue in this case.

On the 12th of June, 1903, William Peltier, whilst engaged as a freight conductor on the Virginia & Southwestern Railroad, received in a railroad accident injuries of the character contemplated in the policy, and, as the result thereof, was confined to his bed from the date of his injury until some time shortly before the 1st day of July following; the time of his actual confinement being variously estimated by the witnesses as from ten days to three weeks. At all events, the fact is undisputed that on the 1st day of July, 1903, he applied in person at the office of the superintendent of the Virginia & Southwestern Railroad Company, in Bristol, for a pass to use on a trip to Big Stone Gap; presumably walking from his home, also in Bristol, to the superintendent's office, and certainly walking up two flights of stairs from the street to the third story of the office building. On the 3d day of July he used the pass, and went to Big Stone Gap, and on July 5th returned to Bristol; riding part of the way on a freight train, climbing into and getting off the freight caboose without difficulty, and telling his fellow trainmen that he was getting on finely, expected to go back to work in a few days, etc. July the 18th or 19th, nearly three weeks after he had gotten up from his injuries and had been going about, he went to the office of Dr. T. F. Staley, a reputable and competent physician, who had attended him and treated his injuries, and complained of headache and other symptoms. After examining him, Dr. Staley told him that he was threatened with typhoid fever, and advised him to go home and go to bed, which he did. On the next day Dr. Staley saw him again, and found that his fears, as expressed the day before, were well founded, and visited him thereafter every day, and sometimes as often as three times during the day, treating him all the while for typhoid fever, until the patient died, on the 16th day of August, 1903.

During the period between the 18th of July and the 16th of August, a physician of high standing in Bristol, who had been called in consultation with Dr. Staley, saw the patient twice—once about the 22d of July, and again some two weeks later—and fully agreed with Dr. Staley in his diagnosis of the case.

It was the contention of defendant in error at the trial that the death of William Peltier was the direct result of the injuries he received on the 12th of June, 1903, while plaintiff in error contended that typhoid fever caused his death, that there was no natural and nec-

essary connection between his injuries and the disease, and that, in any event, his injuries were not such as to, and did not, "solely and independently of all other causes necessarily result in death."

After the evidence had been introduced, the court gave to the jury two instructions at the instance of defendant in error, and over the objection of plaintiff in error. The first told the jury "that if they believed from the evidence that William Peltier on the 12th day of June, 1903, received personal, bodily injuries from external, violent, and purely accidental causes, and, as the direct result of such injuries, as an exciting cause, some disease was caused to set up in the body of William Peltier, which would not have happened or existed but for said injuries, and from which disease, caused as aforesaid, the said William Peltier died on the 16th of August, 1903, that in such case the said injuries would be the proximate cause of the death, and the defendant would be liable therefor under said policy.

"Where death results from any disease or cause which is the direct result of the injury, and which would not have happened but for the injury, in contemplation of law the original injury from which the intervening cause or disease springs, and without which it would never have existed, is the cause of the death."

This instruction is plainly erroneous. There is no evidence whatever in the record tending to prove that William Peltier had any disease except typhoid fever. Defendant in error, her father, and Dr. Staley testify as to the exact character and extent of his injuries. The first two describe the kind and location of the injuries very much as Dr. Staley does —as being a fracture of the ninth and tenth ribs, and bruises on the left side and hip and right knee—though the former refer to some symptoms and complaints confined chiefly to the first few weeks, which Dr. Staley says were not noticed by or known to him.

It is not controverted that typhoid fever is caused by a germ, that there is no necessary or natural causal connection between such injuries as the deceased had sustained and the disease, and that the one could not produce the other. Dr. Edwards, introduced for defendant in error as an expert, does testify that, if a man was injured so as to lower his vitality, "it would rather increase his liability to take typhoid fever," but adds that a man could not take it without first having his system impregnated with the germ, and that there is no necessary and natural connection between an external injury and this disease. Upon this point all of the physicians testifying in the case are agreed, so that there was no evidence to warrant the jury in finding, as the instruction told them they might, that the disease from which William Peltier suffered and may have died was the direct result of the injuries he had sustained, as an exciting cause, and which would not have happened or existed but for his injuries. The instruction was well calculated to mislead the jury into conjecture and speculation as to whether William Peltier died of his injuries or from disease, or from both concurring.

But conceding that Dr. Edwards' evidence tended to prove that Peltier, by reason of his injuries, might have contracted the disease more readily than he would otherwise have done, the instruction ignores the plain provision of the policy sued on—that it covers only injuries which "solely and independently of all other causes necessarily result in death," and erroneously assumes that the injuries alone caused the disease.

In Nat. M. Acc. Ins., etc., v. Shyrock, 73 Fed. 774, 20 C. C. A. 3, the policy contained a provision practically identical with the provision in the policy in this case, above set out; and it was held that under a policy promising indemnity in case death results solely because of bodily injuries effected by external, violent, and accidental means, and independently of all other causes, the burden of proof is on those claiming under the policy to show that the accident was the sole cause of death, independently of all other causes. In that case the disease from which the insured suffered pre-existed the accident, while in this the disease supervened between the injuries and the death of the insured, but the principle is the same in each. In either case the burden to be borne by the claimant of the indemnity was that not only were the injuries sustained by the insured sufficient to cause death, as a result, but that they did in fact produce death, independently of any other concurring cause.

The second instruction given for defendant in error was as follows: "The court instructs the jury that if they believe from the evidence that the insured, William Peltier, on the 12th day of June, 1903, through external, violent, and purely accidental causes, received personal bodily injuries, the reasonable and natural consequences of which resulted necessarily in the death of the said William Peltier, and that the said William Peltier died on the 16th day of August, 1903, that then they should find for the plaintiff, unless they should further believe from the evidence that the said William Peltier's death was not the proximate and direct result of said injuries, but was the result of some other cause or disease, independent of said injuries."

Much that has been said with reference to the first instruction applies with equal force to the second. The testimony of the attending and of the consulting physician is that William Peltier had a typical case of typhoid fever, and no witness testifies to the contrary. Instruction No. 2, just quoted, left the jury to infer that, before any other cause than his injuries could be considered by them as a defense to the action, it must appear to have been independent of the in-

juries; thus leaving entirely out of view the provision in the policy that, if disease or other cause supervening concurred with the injuries in producing death, the insurer was not liable for the indemnity. Counsel for defendant in error admit that the instruction is imperfect, but insist that the imperfection is cured by an instruction given for plaintiff in error. It is true that an incomplete statement of the law in one instruction may be cured by a complete statement of it in another. W. Alex. & Mt. V. Elec. Ry. Co. v. Quayle, 95 Va. 741, 30 S. E. 391. But it must appear that, when the instructions are read together, the jury could not have been misled by the incomplete instruction.

That is not this case. The instructions are inconsistent and contradictory of each other. Defendant in error's instruction, undertaking to state all the facts necessary to authorize a verdict against the insurer for the amount of the indemnity, leaves out of consideration an essential view of the case. It is impossible for the court to say whether or not the jury were controlled by this erroneous instruction. Richmond Pass. & Power Co. v. Steger, 101 Va. 821, 43 S. E. 612, and authorities there cited; C. & O. Ry. Co. v. Whitlow (just decided) 51 S. E. 182.

As the cause is, for the reason stated, to be remanded, we do not think it proper to review the evidence farther than we have found it necessary in considering the instructions to the jury complained of, or to express an opinion as to its weight.

The judgment of the corporation court of the city of Bristol must be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial to be had in accordance with this opinion.

(104 Va. 50)

BRAMMER'S ADM'R v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. RAILROADS—CROSSINGS—TRAVELERS—CARE REQUIRED.

A public railroad crossing is of itself a proclamation of danger, requiring a person about to cross to use both his eyes and ears to ascertain the approach of a train.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1043–1056.]

2. SAME—DEATH—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK AND LISTEN—PROXIMATE CAUSE.

Where plaintiff's intestate drove a covered wagon onto a railroad crossing without looking or listening for the approach of a train which was plainly visible for a distance of from 280 to 300 yards when intestate was within 20 or 25 feet of the track, deceased's contributory negligence, and not the failure of the train crew to give signals, was the proximate cause of the accident.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1069, 1073.]

3. SAME—ACTS OF SERVANTS—NEGLIGENCE.

The act of a railroad fireman in "hooking" his fire as the engine emerged from a cut and approached a railroad crossing, which act was in the regular line of his duty, and temporarily prevented him from viewing the crossing, was not negligence.

4. SAME—LAST CLEAR CHANCE—EVIDENCE.

Where deceased approached a railroad crossing at which he was killed from the side opposite to that on which the engineer sat, and the latter had no knowledge of deceased's peril until informed by the fireman, who did so as soon as, in the exercise of ordinary care, he could have ascertained the same, after which the engineer did everything possible to prevent a collision, defendant was not liable notwithstanding deceased's contributory negligence in going on the crossing.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1096–1099.]

Appeal from Circuit Court, Henry County.

Action by Brammer's administrator against the Norfolk & Western Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Samuel A. Anderson, for appellant. Henry G. Mullins and Wm. Gordon Robertson, for appellee.

KEITH, P. The accident by which plaintiff's intestate, M. L. Brammer, came to his death, occurred upon the track of the Norfolk & Western Railroad at the crossing of a public road a few miles west of Martinsville. Near the crossing is a small bluff, on the right hand of a traveler approaching the railroad from Smith's river. For a short distance this bluff cuts off a view of the railroad from a person going in the direction of Martinsville, and an engine coming from Martinsville is not visible to a person standing on the crossing until it comes out of a cut to the south, or east of south. As soon as it leaves the cut the engine is visible for the entire intervening distance. A man standing in the county road, or sitting in a vehicle in the road, 23 feet from the crossing, can see 800 feet towards the cut. At 20 feet from the crossing he can see 900 feet in that direction. At the cut there is a sharp curve, and a person walking in the road towards the railroad track can see an engine coming out of the cut towards him before he reaches the bluff. Approaching the railroad, he comes in plain view of the track up to the mouth of the cut. The farthest point from the track at which a view of the cut is relieved from the obstruction of the bluff is fixed by the testimony at 23 feet. Between this point and the track the view of the cut is entirely unobstructed.

On the evening of the accident, M. L. Brammer, a man in the possession of all of his faculties of sight and hearing, was approaching this crossing about 6 o'clock. There was nothing in the surroundings, save the bluff, to interrupt or to interfere with the full exercise of his senses either of sight or hearing. He was driving a two-horse covered wagon. The wagon sheet, according to the impression of one witness, was turned up a little on the sides. Whether it was

turned up sufficiently to enable a person sitting in the wagon to see to the right or the left is not stated. When seen by the witness Brown, Brammer was sitting in the front of the wagon; but later, at the crossing, at the time of the accident, he was not visible to other witnesses. According to one witness, who saw the collision, and at the time was about 15 feet above the crossing, as the wagon approached the railroad no driver was visible. Her language is: "I saw a wagon coming, but did not see anybody driving. I saw it when it struck it." She could see into the front of the wagon, but could see no one at all, and did not see Brammer until he was knocked out by the collision. Another witness was in 15 steps of the wagon when the accident happened. He saw no one driving it. He was coming along behind the wagon, and, as a matter of course, did not enjoy the same advantage of position for seeing the driver of the wagon as did one standing in front of it. It was plain that the driver of the wagon was either sitting far back in his wagon or was lying down. Wherever he may have been, he was not sitting on the front end of his wagon, where he would be visible to observers, and best able to take such notice of his surroundings as would enable him to take proper precautions for his own safety. Approaching the crossing, Brammer did not stop. The witness who was following the wagon says that when he heard the whistle of the engine blow he thought "the wagon would stop right there for the train to pass, and he would overtake it, but he did not make any check at all, but kept straight on" and in a minute after the whistle blew the engine came out of the cut. The witness "still thought that the driver would see the engine and stop, but he did not make any stop at all. He just kept right on."

It is clearly shown by the evidence that if Brammer had been looking he could have seen the engine at a distance of 280 or 300 yards when he was within 20 or 25 feet of the track. There is positive evidence that the engineer blew the whistle for the crossing. There is much negative evidence that it was not blown. We will not undertake to determine this question, but will, for the purpose of this case, assume that it was not blown, and that in the failure to blow it the railroad company was guilty of negligence.

There is evidence to show that the engine, to which no cars were attached, was running down grade by force of gravity, at a rapid rate of speed. There is no evidence, however, to show that its speed was such as to constitute negligence per se. The only negligence of which the railroad company may be said to have been guilty consists in its failure to sound the whistle, as we have assumed to be the case.

But this negligence was not the proximate cause of the injury, because it was none the less the duty of Brammer, upon approaching the railroad, to look and listen—to take precautions, in other words, for his own safety—and, if he had done so, there is no doubt that he would both have heard and seen the engine in time to stop, and thereby have avoided the accident. The real question upon which this case turns is, the plaintiff himself being negligent in his approach to the railroad, could the defendant, by the exercise of ordinary care after his danger was known, or ought to have been known, have avoided the consequences of that negligence?

After the evidence was all submitted to the jury, the defendant demurred; and, the jury having found a verdict subject to the demurrer to the evidence, the circuit court entered judgment for the defendant. The case is therefore before us upon a well-recognized rule of law, which has been stated so frequently that it is unnecessary now to do more than advert to it. Considered in obedience to that rule, we are of opinion that the judgment of the circuit court is plainly right.

It may be well to cite some authorities as bearing upon the reciprocal duties of the traveler and the railroad company at a public crossing:

In the case of Johnson v. C. & O. Ry. Co., 91 Va. 171, 21 S. E. 238, it is said that, if the death was caused solely by the negligence of the defendant, there can be no doubt of the right of the plaintiff to recover damages therefor. If, however, the proximate cause of death was his own negligence, concurring with the negligence of the defendant, there can be no recovery. And further, that "by the use of his faculties Johnson could have clearly seen the train as it approached the crossing, and the engineer could have seen him for the same distance after he came within 15 or 20 feet of the track, if they were at their posts and performing their duties." The negligence of the employés of the defendant was no excuse for negligence on the part of the plaintiff. The day was clear and still. His sight was unimpaired. He could hear the rumbling of the train. There were reciprocal duties imposed upon him. He could not go on the railroad, even at a public crossing, without exercising ordinary care and caution. The track was a proclamation of danger. It was his duty, before going on it, to use both eyes and ears. He should have listened and looked in either direction from which a train could come. If he had done so, he could not have failed to hear and see the approaching train, and be made sensible of the danger of going on the track. It was in plain view. If he failed to look and listen as duty required of him, and attempted to cross the track in front of a rapidly moving train, and was caught before he could get across, and was killed, his own act—his own negligence—so contributed to the injury that a recovery therefor cannot be sustained.

These remarks are applicable to the facts

of the case under consideration, and are supported by a line of decisions. See Lacy's Case, 94 Va. 475, 26 S. E. 834.

In Martin v. R., F. & P. R. Co., 101 Va. 406, 44 S. E. 695, the rule is stated as follows: "A plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and, if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such cases, and where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called 'contributory negligence.'"

It is true, however, that "a defendant company may be liable for injury inflicted on the plaintiff, notwithstanding the latter's contributory negligence, if by the exercise of reasonable care it could have discovered and avoided the injury." Rogers' Case, 100 Va. 325, 41 S. E. 732; Joyner's Case, 92 Va. 354, 23 S. E. 773.

"If at a public crossing where a party is injured by a railroad train the agents in charge of such moving train saw the party in a position of danger, or by the use of diligence might have seen him, and failed to exercise proper care and due diligence to stop the train and prevent it from striking him, it is liable." Few's Case, 94 Va. 82, 26 S. E. 406.

This principle is well established, and needs no further citation of authority.

Coming now to the facts as bearing upon this aspect of the case, it is true that, while Brammer could see the engine, the trainmen could likewise have seen Brammer. They saw the driver of a wagon approaching the track. The trainmen had a right to assume that Brammer would, in the discharge of his duty, take reasonable precautions for his own safety; that he would approach the railroad with his team under control (Lacy's Case, supra); and that he would look and listen before undertaking to cross the track. It was only after it came to the knowledge of the trainmen, or, by the exercise of ordinary diligence in the performance of duty upon their part, should have come to their knowledge, that Brammer, disregarding his duty and oblivious of his danger, was in a position of danger, that the duty devolved upon the agents of the company to stop the train.

It appears that as the engine emerged from the cut the firemen was engaged in "hooking" his fire. This was in the regular line of his duty, and it cannot be considered an act of negligence. L. & N. R. Co. v. Creighton (Ky.) 50 S. W. 227. As soon as the fireman had performed the duty about which he was engaged, he looked up, and saw the wagon approaching the crossing. He called to the engineer, who put on his emergency brake at once. The fireman saw no driver, and in this respect corroborates the testimony of other witnesses, who were near the scene of the accident, but saw no driver until he was thrown from the wagon by the force of the collision. When the fireman saw the horses, their feet were just about on the track, and they were in a fast walk. The engineman saw no one until the fireman called out, and his testimony is that he did all that he could to stop the engine; that his eye was on the track all the way from the cut; that there was a steep down grade to the crossing, and he could not see any one coming from the left on account of a curvature in the track; that the engine was running without steam, and by gravity alone.

To sum up the case briefly, it appears that the railroad company was guilty of negligence in failing to sound its whistle, but that this omission was not the proximate cause of the accident, since the plaintiff in error's intestate, had he taken the precautions which the law imposed upon him, could have heard and seen the approaching train. In other words, the evidence establishes beyond doubt that Brammer was guilty of contributory negligence. Considering the case from that point, it then became incumbent upon the plaintiff in error to show that after the position of danger in which the contributory negligence of Brammer had placed him was known to the defendant in error, or, in the exercise of reasonable diligence in the performance of its duties, should have been known to it, it omitted to do something which might have saved him from the consequences of his own imprudence. The evidence wholly fails to prove any such omission.

In what we have said we have attempted little more than to abridge the very excellent opinion of the circuit judge, but we think we have said enough to show that there is no error in the judgment complained of, which is affirmed.

(104 Va. 1)

BUTLER v. NEWS-LEADER CO.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

LIBEL — COPYING NEWSPAPER ITEM — MISTAKEN IDENTITY.

Defendant copied from reputable newspapers an article emanating from Chicago: That "Annie Oakley," daughter-in-law of Buffalo Bill, and the most famous rifle shot in the world, was in jail on a charge of theft; that she was the woman for whose marksmanship King Edward once led the applause; that when arrested she gave the name of Elizabeth Cody, but was not recognized as Col. Cody's daughter-in-law; that she pleaded guilty, and gave as an excuse the use of drugs; that the beauty of the woman whom the crowd at the World's Fair admired was gone, though she was but 28 years old; that her husband, Sam

Cody, was dead and their son was with Col. Cody on his ranch; and that she left Buffalo Bill two years ago, and had since been drifting around the country with stray shows. The woman who was in the police court was Mrs. Cody, who had given exhibitions of rifle shooting in various companies, including a Wild West Show, but not that of Buffalo Bill, under the show name of "Any O'Klay," which, by reason of similarity of sound, had often been mistaken for "Annie Oakley." Plaintiff, Mrs. B., had also been a celebrated rifle shot, exhibiting in Buffalo Bill's Wild West Show under the show name of Annie Oakley, but she had retired several years before, and had since been living with her family in New Jersey. Her name had never been Cody, and she had never gone by that name, and was not a relative of Col. Cody. Defendant knew nothing of the matter, further than the newspaper article, and there was no actual malice on its part. *Held*, that an instruction that if the jury believed that the article, as published, did not refer to plaintiff, but to a person who was sometimes known as Any O'Klay, and used this name to attract the notice of the public, and was not, in its description or identification, such as to lead those who knew or know of plaintiff to believe that the article was intended to refer to plaintiff, they should find for defendant, is correct, and authorized by the evidence.

Error to Circuit Court of City of Richmond.

Action by Annie Butler against the News-Leader Company. Judgment for defendant. Plaintiff brings error. Affirmed.

Munford, Hunton, Williams & Anderson, for defendant in error.

KEITH, P. Annie Butler brought an action of trespass on the case in the circuit court of the city of Richmond, in which she complains of the News-Leader Company on account of a certain publication concerning her, which she alleges to be false and libelous.

It appears that the plaintiff had been at one time a famous rifle shot, connected with the Wild West Show carried on by Col. Cody, commonly known as "Buffalo Bill"; that she appeared at public exhibitions under the name of Annie Oakley, which the declaration alleges was her maiden name, by which she was commonly known and called; that some time before the publication she had left the employment of Col. Cody, and been living with her husband, Frank Butler, in New Jersey, and had not been guilty of any of the disgraceful and improper acts, nor was she addicted to the habits, published concerning her; and that the defendant, well knowing the premises, but intending to injure her, had made the publication which is set forth in the declaration as follows:

"Annie Oakley (meaning the plaintiff) at the Bottom of Toboggan (meaning that the plaintiff had sunk to the lowest depths of moral degradation).

"Once Famous Beauty and Crack Shot of the World (meaning the plaintiff) Winds up in Police Court for Petty Theft.

"Chicago, Ill., Aug. 13.—Annie Oakley, daughter-in-law of 'Buffalo Bill' and the most famous rifle shot in the world, lies to-day in a cell at the Harrison-street station under a Bridewell sentence for stealing the trousers of a negro in order to get money with which to buy cocaine.

"This is the woman for whose spectacular marksmanship King Edward himself once led the applause in the courtyard of Buckingham Palace.

"When arrested Saturday on the complaint of Charles Curtis, a negro, she was living at 140 Sherman street. She gave the name of Elizabeth Cody, but it occurred to no one to connect her with Colonel Cody's famous daughter-in-law.

"To-day, however, when brought before Justice Caverly, she admitted her guilt.

"'I plead guilty, your Honor, but I hope you will have pity upon me,' she begged. 'An uncontrollable appetite for drugs has brought me here. I began the use of it years ago to steady me under the strain of the life I was leading, and now it has lost me everything. Please give me a chance to pull myself together.'

"The striking beauty of the woman whom the crowds at the World's Fair admired is gone. Although she is only 28 years old she looks almost forty. Hers, in fact, is one of the extreme cases which have come up in the Harrison-street police court. To-morrow she will be taken to Bridewell to serve out a sentence of $45 and costs.

"'A good long stay in the Bridewell will do you good,' said the court.

"The prisoner's husband, Samuel Cody, died in England. Their son, Vivien, is now with Colonel Cody at the latter's ranch on the North Platte. The mother left 'Buffalo Bill' two years ago and has since been drifting around the country with stray shows."

The plea was, "Not guilty," and the jury found the following verdict: "We, the jury, find on the issue joined for the defendant."

During the progress of the trial a number of exceptions were taken, but none of them pertain to matters or questions of any particular interest, and we shall advert but to one instruction, and to the evidence bearing upon it.

The court told the jury that if they believed from the evidence "that the article complained of, as published by the defendant company, did not refer to the plaintiff, Mrs. Butler, but to a person who was sometimes known as Annie Oakley, and used this title, stage or fanciful name in order to attract the notice of the public, and was not, in its description or identification, such as to lead those who knew or know of the plaintiff to believe that the article was intended to refer to the plaintiff, then they must find for the defendant."

That this was a correct instruction is plain, and, if the facts supported it, it cannot be doubted that the verdict should have been for the defendant.

The plaintiff lives in the state of New

Jersey. She is a married woman, doubtless of entire respectability. She had been distinguished in her career as a rifle shot, had won much applause and fame both in the United States and abroad, and had retired upon her laurels. Her name was not Annie Oakley, either before or after her marriage. Though the declaration avers that her maiden name was Annie Oakley, she, in her testimony, states that prior to her marriage her name was Mozee.

There was connected with an exhibition known as the "Wild West Show" a Mrs. S. F. Cody, sometimes known as Miss Lillian Cody. She began her career at the age of 15, married one Sam Cody, and achieved much reputation by her shooting with the rifle and pistol. She appeared also in London, in Paris, in Germany, and in Italy. The shows to which she belonged, it is to be inferred, were not exactly upon the same plane or level with the higher class represented by Buffalo Bill's Wild West Show; and it is to be inferred, also, that Mrs. Cody did not have the same rank in her art as was enjoyed by the plaintiff in error. She had, however, achieved much notoriety, if not fame, and had also affected a stage name, by which doubtless she expected in some degree to confuse herself in the public estimation with the more distinguished artist. Mrs. Cody, it seems, was known as "Any O'Klay"—idem sonans with "Annie Oakley" when somewhat carelessly pronounced.

The experience in the Chicago police court actually befell Any O'Klay, and that which appears in the declaration, and which the innuendo asserts was intended for the plaintiff in error, was a stern fact and hard experience in the life of Mrs. Cody. Her name, her occupation, the company with which she performed, and the innocent, or, it may be, the interested, assumption on her part of the stage name resembling in sound that borne by the plaintiff in error, all served to confuse the situation. The article which appeared in the News-Leader, it is shown, had theretofore been frequently published in a number of reputable newspapers—among others, in the Evening Star, of Washington, a newspaper shown to be conservative, careful, and accurate.

The evidence wholly negatives actual malice. It appears, indeed, that neither the editor in chief, and president of the News-Leader Company, nor others upon the staff of that company, connected with the publication in question, had any knowledge of or acquaintance with Mrs. Butler or Mrs. Cody. They found a report of a public proceeding before the police court in the city of Chicago with reference to an unfortunate woman who had achieved much notoriety, and which had been published in reputable newspapers; and, having ascertained those facts, the article was reproduced in the city of Richmond. Where newspapers lightly and recklessly publish what is offensive and injurious to a citizen, courts and juries should hold them to a strict accountability; but it is by a reasonable enforcement of the law, and not by its harsh and strained construction, the best interests of society are subserved. If an injury had been carelessly, recklessly, or wantonly inflicted upon the reputation or feelings of an individual, the wrongdoer should answer in damages; but it is the business of a newspaper to give news, the public demands it, and it is a condition of their existence; and we cannot discover from this evidence any ground whatever upon which to rest a claim for damages against the defendant in error.

There was no purpose in the publication in question to refer to the plaintiff in error. It is, at most, a case of mistaken identity, made not recklessly, but after reasonable inquiry; and the trouble arises from a most unusual complication of facts and circumstances with reference to the name, occupation, and career of two individuals.

Upon the face of the publication, however, it is difficult to see how plaintiff in error could have appropriated it to herself. The concluding paragraph is quite sufficient to exclude the conclusion that there was any reference to her intended. It states that "the prisoner's husband, Samuel Cody, died in England. Their son, Vivien, is now with Colonel Cody, at the latter's ranch on the North Platte. The mother left 'Buffalo Bill' two years ago and has since been drifting around the country with stray shows." There is not a fact here stated descriptive of the person referred to which applies to plaintiff in error. On the contrary, they do point with reasonable certainty to Mrs. Cody. It appears, then, that the person who alleges that she was injured by this publication was not known to the defendant, and was not referred to by the defendant. The innuendo, therefore, which alone points to the plaintiff in error, wholly fails of proof; and the jury were plainly right in applying the facts to the instruction we have quoted, in a finding that the defendant company did not refer to the plaintiff, Mrs. Butler, but to a person who was sometimes known as Any O'Klay, and used this title, stage or fanciful name in order to attract the notice of the public, and was not, in its description or identification, such as to lead those who knew or know of the plaintiff to believe that the article was intended to refer to her.

Upon the whole case, we are of opinion that there was no error in the judgment of the circuit court.

(104 Va. 65)

DAVIS' ADM'X et al. v. DAVIS et al.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. LIMITATIONS—SUSPENSION OF RIGHT OF ACTION.

Where creditors accepted from their debtor certain securities under an agreement that when and if paid these securities should be in full settlement of the debt, right of action on the debt was suspended during the currency of the securities.

2. LACHES—EXCUSABLE DELAY.

Plaintiffs loaned a large sum of money to their brother without security, subsequently forgiving him one half the debt, and accepting certain securities for the other half, under an agreement that, if paid, they should constitute full satisfaction. The brother died shortly after this agreement, leaving his whole estate to his wife for life, and plaintiffs took no steps to interfere with her possession, but commenced an action against the brother's personal representatives within less than two years after her death to recover the unpaid balance. *Held*, that plaintiffs were not guilty of laches.

3. ESTOPPEL—FAILURE TO SUE AT PARTICULAR TIME.

The failure of a creditor to enforce his claim at a time when prices of real estate were high, so that the claim might have been satisfied by the sale of a few acres of the debtor's land, did not estop the creditor from enforcing the claim afterward, when prices had fallen.

4. SAME—INCONSISTENT POSITIONS.

Creditors of the estate of a father, who were also creditors of the estate of his son, filed suits against both estates. The personal representative of the father was not a party to the suits against the estate of his son. In those suits a decree was rendered subjecting the son's interest in lands derived from the estate of the father to sale, all the suits being heard together. *Held*, that the creditors were not inconsistent in failing to assert their debt against the estate of the father in the suits against the son's estate, and so were not precluded from maintaining their bill against the father's estate.

Appeal from Chancery Court of Richmond.

Bill by Henry G. Davis and others against Elizabeth B. Jones, as administratrix de bonis non of John B. Davis, deceased, and others. There was a decree for plaintiffs, and defendants appeal. Affirmed.

Jo Lane Stern and H. R. Pollard, for appellants. H. G. & T. B. Davis (Smith, Moncure & Gordon, of counsel), for appellees.

WHITTLE, J. The decree appealed from was passed by the chancery court of the city of Richmond in three suits in equity pending in that court, and heard together. These causes are creditors' suits; the first two against the estate of Joseph B. Davis, deceased, who was a son and devisee under the will of John B. Davis, and the last against the estate of John B. Davis, deceased.

The appellees Henry G. Davis and Thomas B. Davis are creditors of both estates, and as creditors of the son's estate presented and had audited their debts against it in the two first-named causes. In these two suits the real estate of Joseph B. Davis, other than that derived from his father, was sold, and the proceeds administered. But the court at that time refrained from selling the residue because the life estate of the widow of John B. Davis intervened. Subsequently, the life estate having fallen in, the undivided one-third interest of Joseph B. Davis in his father's lands was decreed to be sold, the decree reciting, "It * * * appearing to the court that the said sale may now be made with propriety, since the death of Elizabeth B. Davis, the life tenant of said property under the will of John B. Davis, deceased." Accordingly, the owners of the remaining undivided two-thirds interest having united in the sale with the special commissioners, the whole of the real estate of which John B. Davis died seised was sold. Thomas B. Davis, one of the appellees, became the purchaser of 73 acres at the price of $2,920.

This was the status of affairs in 1901, when appellees, as creditors of the estate of John B. Davis, deceased, instituted suit against his personal representative and devisees to subject his property to the payment of their debt. To that suit the defendants interposed the defenses of the statute of limitations, laches, and estoppel.

A statement of the facts in connection with the origin of appellees' debt is essential to an intelligent apprehension of these several defenses. Appellees and John B. Davis were brothers. The two former are residents of the state of West Virginia, while the latter resided in Richmond, Va. John B. Davis became financially embarrassed, and on September 22, 1882, appellees loaned him the sum of $70,000, for which he executed his bond, payable on demand. On March 1, 1888, John B. Davis and his two brothers met at Piedmont, W. Va., when it was agreed that John B. Davis should deliver to appellees certain notes held by him against third parties, together with a life insurance policy and a check aggregating $35,000, upon the stipulation that the securities "when and if paid shall be in full settlement of the said note for $70,000." The agreement was signed in duplicate, and a schedule of the notes, and notes corresponding to the schedule, were delivered to appellees. The notes matured from time to time during the period from March 21, 1888, until October 15, 1896. The bulk of these assets was collected, and the residue, the precise amount of which has not been ascertained, constitutes the subject-matter of this litigation.

John B. Davis died in January, 1889, leaving his estate to his widow for life, with remainder in equal shares to his two surviving children and a grandchild. The personal assets were duly administered, and the proceeds of sale of the real estate have been deposited in bank to await the result of this appeal.

The contention that the demand is barred by the statute of limitations is founded upon a proviso to section 2920 of the Code of 1887, which went into effect May 1, 1888, and is as follows: "Provided, that the right of action

against the estate of any person hereafter dying, on any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not, in any case, continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued."

In this instance, while, as shall be seen presently, the right of action did not accrue until after the death of John B. Davis, still, as suit was brought within five years after such right did accrue, the debt would not have been barred, even if the proviso applied to the case.

In Daniel on Negotiable Instruments it is said: "When a bill or note is taken for or on account of a debt, the question arises whether it was taken in absolute discharge of it, and operates as a complete merger, or simply as a collateral security, or in suspension of the debt, during its currency. The intention of the parties is the controlling element. And, if there be any distinct agreement on the subject, all controversy is silenced. But when no particular intention is manifested, and no express or implied agreement appears, the question is to be solved by principles of law which make presumptions as to the intention of the parties according to the circumstances of each particular case." 2 Daniel on Neg. Instr. (5th Ed.) § 1259.

At section 1272 the learned author observes: "There is no doubt that a negotiable bill or note given for or on account of a contemporaneous or pre-existing debt, and whether or not it be in renewal of a previous bill or note, suspends all right of action on such debt during its currency; that is, until it is dishonored by nonacceptance or nonpayment. If this were not so, the creditor who took the additional security in the form of a bill or note might, in consequence of its negotiable character, transfer it to a bona fide holder, and subject the debtor to payment of both the original and the new debt.

"But as soon as the bill or note is dishonored the original debt revives, and the creditor may pursue his remedy for it, or sue upon the bill or note. The bill or note taken in conditional payment becomes, by its dishonor, a collateral security, which the creditor may retain and endeavor to collect, without forfeiting the right to proceed in the principal cause of action, subject to the obligation of surrendering up the bill or note at the trial." See, also, Armistead v. Ward, 2 Pat. & H. 504; McCluny v. Jackson, 6 Grat. 96; Blair & Hoge v. Wilson, 28 Grat. 165; Lewis v. Davisson, 29 Grat. 216, at page 226; Callaway v. Price, 32 Grat. 1.

The doctrine with respect to the delivery of bills or notes as conditional payments is not to be confounded with the mere deposit of collateral securities to secure payment of the principal debt. In the latter case, in the absence of agreement to the contrary, the pledgee's right of action on the principal debt and the right to enforce payment of the collateral security are concurrent rights, both of which may be pursued until the debt is paid. Colebrooke on Collateral Securities (2d Ed.) §§ 104, 105, 106, and notes; 2 Daniel on Neg. Instr. § 1260, note 4, and authorities cited.

In this case it was obviously the intention of the parties that the promissory notes in question should be treated as conditional payments, and suspend, during their currency, the right of action on the original debt. That was the legal effect of the contract, and a different construction would have defeated its purpose. This being the effect of the agreement, the cause of action had not accrued (was suspended) at the time of John B. Davis' death.

But we are of opinion that, inasmuch as suit was not pending on the day before the Code took effect, the case is controlled by section 2938 of the Code of 1887 [Va. Code 1904, p. 1556], which provides that, where the action was not pending on the day before the Code took effect, it "may be prosecuted within such time as the same might have been prosecuted if this chapter had not been enacted, and not after."

The period of limitation was 20 years on a writing under seal prior to the Code of 1887, the original bond is dated September 22, 1882, and the right of action thereon was not barred until September 22, 1902, more than a year after the institution of this suit. So that in neither aspect of the case can the plea of the statute of limitations avail.

The remaining defenses of laches and estoppel are not sustained by any fact or circumstance in the case. That appellees were not dealing at "arm's length" with their brother and after his death with his widow is manifested on every page of the record. When overtaken by financial reverses, they came to his relief, and loaned him $70,000 without security; and afterward forgave him one-half the debt, receiving promissory notes and other securities in conditional satisfaction of their demand. These securities were collected from time to time until the indebtedness of $35,000 was reduced to the amount now in controversy. It is not pretended that the debt has been paid from any other source, and the fact that uncollected and uncollectible collaterals, representing the balance claimed, are still in the hands of appellees, shows that it has never been paid. John B. Davis died within less than a year after the agreement of March, 1888, was entered into, and, as remarked, by his will left the whole of his estate to his wife for life. She was a nervous, delicate woman, and it is reasonable to pre-

sume that the same considerations which influenced appellees to assist and indulge their brother also induced them to allow his widow to remain in the undisturbed possession of the property during the continuance of her life estate.

In thus indulging her they kept within their legal rights, and instituted this suit in less than two years after her death. In the meantime the transaction had in no wise become obscure by lapse of time or loss of evidence, and the sum sought to be recovered is susceptible of exact ascertainment. That under such circumstances the defense of laches cannot prevail has been settled by repeated decisions of this court. Jameson v. Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726; Bell v. Wood, 94 Va. 677, 27 S. E. 504; Burnham v. James, 100 Va. 493, 42 S. E. 292; Tidball v. Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867.

The defense of estoppel is equally without merit. The chief ground of complaint in that connection is based on the theory that loss has accrued to appellants by reason of the failure of appellees to enforce the collection of their debt during the years 1890 and 1891 (the boom period), when, it is said, the proceeds of sale of a few acres of the debtor's land would have satisfied the demand.

As has been seen, appellees' right of action was suspended during those years by the agreement of March, 1888; but, if such had not been the case, the proposition proceeds upon the false premise that a creditor can be held responsible for loss occasioned by fluctuation in property values. Payment of the debt affords the debtor adequate protection against loss from such contingency, and the consequences of his failure to look after his own interests cannot be visited upon his creditor.

The remaining suggestion—that appellees have assumed inconsistent positions in the litigation, which ought to estop them from setting up the present demand—is not sustained by the record.

The alleged inconsistency is founded upon the circumstance that appellees did not assert their debt against the estate of John B. Davis, deceased, in the two first-named causes, and suffered a decree to be rendered therein, subjecting the interest of Joseph B. Davis, deceased, in the lands derived from the estate of his father to be sold; and that Thomas B. Davis, one of the appellees, became the purchaser of one of the lots.

Appellees had no notice of the decree directing a commissioner to inquire and ascertain whether there was any liability on the estate of Joseph B. Davis, deceased, on account of assets acquired by him under the will of his father, nor of the report returned in pursuance of that decree. And, even if they had received such notice, they could not have asserted their debt against the estate of John B. Davis, deceased, for the reason that his personal representative was not a party to the litigation. They therefore pursued the correct practice of filing a creditors' bill against his estate; and when the suit was matured for obvious reasons it was brought on to be heard with the other two causes.

It is not perceived that the course thus pursued by appellees has injuriously affected or prejudiced in any manner the rights of the appellants.

The following extract from the answer of the personal representative of John B. Davis sufficiently attests the meritoriousness of appellees' demand:

"In making the foregoing defenses to the complainants' claim, respondent has done so only because she has been advised that it was her imperative duty as administratrix. For whatever may be the legal merits or demerits of complainants' claim respondent feels bound to put on record her acknowledgment of the great kindness of complainants to her late father in the transactions out of which said claim arose, and the high character, from a moral standpoint at least, of the claim itself."

The decree of the chancery court is without error, and must be affirmed.

(104 Va. 47)

LANGSTON v. BASSETTE et al.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. INFANTS—GUARDIAN AD LITEM—NECESSITY OF APPOINTMENT.

Where it clearly appears that a decree is in favor of an infant defendant, failure to appoint a guardian ad litem for him is not reversible error.

2. SAME.

A decree finding a will valid is not in favor of an infant adopted son of testatrix, who was her only heir, and would, under Va. Code 1904, § 2614a, take her whole estate if the will was invalid, and hence failure to appoint a guardian ad litem for the son in a proceeding to contest the will was reversible error.

Appeal from Circuit Court, Elizabeth City County.

Action by James Langston against A. W. E. Bassette and others. There was judgment for defendants, and plaintiff appeals. Reversed.

Jones & Woodward and D. Lawrence Groner, for appellant. F. S. Collier & Son, for appellees.

BUCHANAN, J. This suit was instituted by the appellant for the purpose of impeaching the validity of a writing which had been admitted to probate as the last will and testament of Matilda Barnes, deceased. An issue of devisavit vel non was ordered. Upon the trial of that issue a jury was waived, and, all matters of law and fact having been submitted to the court for its decision, the

court was of opinion that the said writing was the last will and testament of Matilda Barnes, and so decreed. From that decree this appeal was granted.

It is alleged in the bill that James Barnes, one of the devisees and legatees named in the said writing, was an infant. He was made a party defendant, and process was served upon him, but no guardian ad litem was appointed for him.

As an infant can only appear and defend by guardian ad litem, proceedings against him are generally fatally defective unless the record shows that a guardian ad litem was assigned him. Code 1887, § 3255 [Va. Code 1904, p. 1714]. See Roberts v. Stanton, 2 Munf. 129, 5 Am. Dec. 463; Cole v. Pennell, 2 Rand. 174; Parker v. McCoy, 10 Grat. 594; Ewing, etc., v. Ferguson, 33 Grat. 548; Turner v. Barraud, 102 Va. 324, 331, 46 S. E. 318; note to Caperton v. Gregory, 11 Grat. (Michie's Ed.) at page 251 et seq., where a number of cases on the subject are collected.

It may be that the decree appealed from was for the benefit of the infant in this case, since he was named as a devisee and legatee in the writing which was held to be the last will of the decedent. If this clearly appeared, the failure to appoint a guardian ad litem for him would not be reversible error. See Harman v. Davis, 30 Grat. 461; Morriss v. Va. Ins. Co., 85 Va. 588, 8 S. E. 383. But it does not so appear. In the writing which was held to be the will of the decedent, she describes the infant as her adopted son. The pleadings and proofs in the case show that she was a widow, and that she died without issue or any descendant of issue living. If the infant was in fact her adopted child, then it would be to his interest to have the writing in question held not to be her last will, as in that event he would take the whole estate, instead of the small portion devised and bequeathed to him. Va. Code 1904, § 2614a.

We are of opinion, therefore, without passing upon any of the other questions raised on this appeal, that the decree appealed from should be reversed, and it and all orders in the cause affecting the rights of the said infant should be set aside, and the cause remanded to the circuit court, that a guardian ad litem may be appointed for James Barnes, if he is still an infant, and such further proceedings had as may be necessary and proper for his full defense and for a final disposition of the cause.

(104 Va. 226)

RICHARDSON v. WYMER.

(Supreme Court of Appeals of Virginia. June 22, 1905.)

1. EJECTMENT—EVIDENCE OF TITLE—SUFFICIENCY.

A plaintiff in ejectment, who shows title as purchaser at a sale under an execution on a judgment against one to whom the land was awarded in a partition suit, shows title sufficient to maintain the action.

2. JUDGMENT—SATISFACTION — UNCOMPLETED SALE UNDER EXECUTION—RIGHT TO SECOND EXECUTION.

Where an execution was issued, and a sale was made under it, but no part of the purchase price was paid, the judgment was not satisfied, and a second execution might issue.

Error to Circuit Court, Smyth County.

Ejectment by J. P. Wymer against W. R. Richardson. There was a judgment for plaintiff, and defendant brings error. Affirmed.

G. H. Fudge and H. N. Bell, for plaintiff in error. A. M. Dickenson, for defendant in error.

KEITH, P. J. P. Wymer instituted an action of ejectment to recover 23 acres of land from W. R. Richardson. In support of his claim he offered in evidence a deed from B. F. Buchanan, commissioner in the chancery suit of F. McMullin's administrator v. J. H. Stephenson, and V. S. Morgan, of the first part, and W. R. Richardson, Mary E. Richardson, and James E. Richardson, of the second part, conveying a tract of land supposed to contain 90 acres, more or less, to William R. Richardson; also a deed of partition in the chancery suit of Dickinson v. Richardson, in which the land was divided into three equal parcels, and assigned and conveyed to the parties entitled, the parcel allotted to Mary E. Richardson having been conveyed to her under the name of Maim Springs; and a deed from J. V. Richardson, sheriff and commissioner, conveying the land in controversy in this suit to J. P. Wymer, the defendant in error.

With respect to the last-mentioned deed, it appears that on the 20th of May, 1902, there was issued from the clerk's office of the county court of Smyth county an execution in the name of the Commonwealth of Virginia v. Maim Springs, in the sum of $100, fine, and $23.82, costs, upon a judgment obtained against her on the 18th of August, 1890; that the execution was issued on the 20th of May, 1902; that it was levied on June 11, 1902, on the tract of land containing 23¾ acres which had been assigned to Maim Springs, as aforesaid, in the case of Dickinson v. Richardson; and that at the sale under the execution J. P. Wymer became the purchaser at the price of $187, which, having been fully paid off and discharged, a deed was executed to him by the sheriff conveying him the land purchased with special warranty.

It appears from the testimony of the defendant in error that W. R. Richardson was at the time of the purchase in possession of the land; that he was the father of Maim Springs, to whom the land belonged, but who had not lived upon it for about 12 years; and that her father, the defendant, had during that time been in possession and control of it as her agent.

The defendant, to maintain the issue upon

his part, offered to introduce an execution upon the same judgment, dated the 26th of June, 1891, the return on which shows that it was levied on the land of Maim Springs, now in controversy; that the land was sold under this execution on the 19th of October, 1891, and that the purchaser gave bond and surety according to law; and that the bond was returned to the clerk's office. The defendant also offered the deposition of John R. Cooley, who states that he was one of the sureties upon the bond given at the sale under the execution of 1891; but he wholly fails to prove that this bond, or any part of it, had ever been paid, nor does he know what became of it. He cannot recall the date or the amount with any degree of certainty, but he states that Maim Springs and her father, W. R. Richardson, were the principals, and he and one Stephen Richardson, who is now dead, were the sureties. It further appears that before Wymer purchased the land the sheriff offered it for sale, and that W. R. Richardson, the defendant, was the highest bidder, and that it was knocked off to him for $240; that time was given him to execute the bond required by law, and that he failed to give it; and that the land was again offered for sale on the same day, when Wymer became the purchaser.

Thereupon the jury found a verdict for the plaintiff, upon which the court entered judgment, and the defendant in the court below applied for and obtained a writ of error from one of the judges of this court.

The first assignment of error is that the evidence of the plaintiff is insufficient to entitle him to recover, but we are of opinion that it makes out a case quite sufficient to support the verdict of the jury.

The principal reliance of plaintiff in error, however, is that the court erred in refusing to admit in evidence in his behalf the execution of June 26, 1891, with the indorsements thereon, and the deposition of John R. Cooley; his contention being that this proof is sufficient to show satisfaction of the judgment against Maim Springs, and that, having been satisfied, the execution which was issued on May 20, 1902, was null and void.

It is true that no execution can be issued upon a satisfied judgment, but the evidence offered entirely fails to prove the satisfaction of the judgment. It shows that an execution was issued, and that a sale was made under it, but there are no facts in evidence which tend to prove that the purchase price of the land sold under execution of 1891 was ever paid in whole or in part. Richardson, the plaintiff in error, was the purchaser at the sale under the first execution. He was the principal obligor in the bond given for the purchase price. He was present in court, and was a competent witness, and it cannot be doubted that, if the bond had been paid, he would have testified to that effect; but, so far from having done so, he became a bidder for the land under the second execution, it was knocked off to him, and, he failing to comply with the terms of the sale, it was again offered on the same day, and purchased by the defendant in error. The levy of the execution upon which he relied, and the sale under it, did not constitute a satisfaction of the judgment upon which it issued, unaccompanied by proof of the payment of the purchase price of the property sold, under the circumstances of this case.

The judgment of the circuit court is affirmed.

(105 Va. 668)

MORT et al. v. JONES et al.

(Supreme Court of Appeals of Virginia. June 22, 1905.)

DISTRIBUTION OF ESTATES—ADVANCEMENTS—HOTCHPOT—LAW OF SITUS.

Where the adult children of an owner of land in Virginia and Tennessee conveyed to him their expectancy in consideration of advancements received, and the conveyances were inoperative in Virginia, but effectual in Tennessee, the court, on the death of the owner, should not require the adult children to bring into hotchpot the advancements and enjoin the infants from setting up the deeds in the courts of Tennessee, for the lex situs must govern, and the court of Virginia cannot control the course of procedure in the courts of another state, but should ascertain the value of the owner's estate wherever situate, and distribute the estate in Virginia among the heirs without requiring the adults to bring into hotchpot the advancements, unless the advancements, added to their portion of the estate in Virginia, exceeded the shares of the infant heirs in the entire estate, in which case they should account for so much of the advancements as would produce equality.

Appeal from Corporation Court of Bristol.

Suit for partition by J. W. Mort, guardian of the infant heirs of Joseph W. Jones, deceased, and others, against John W. Jones and others. From the decree adjudging the rights of the parties, plaintiffs appeal. Modified.

Roberts & Roberts, for appellants. J. S. Ashworth, for appellees.

KEITH, P. Joseph W. Jones, who was in his lifetime seised of certain real estate situated in Bristol, Va., and Bristol, Tenn., died intestate on May 1, 1901. He had been twice married, and left surviving him John W. Jones and two daughters, children of his first wife, and a granddaughter, the sole surviving heir of another child of his first wife, who died leaving William Grossman as her devisee. His second wife and her six infant children also survived him, and another infant daughter, who married Walter D. Nave, who died intestate after the death of the granddaughter, without leaving issue.

In September, 1903, suit for partition was instituted in the corporation court of the city of Bristol, Va., by J. W. Mort, guardian. The bill alleges that the adult heirs, children

of the first wife, had, during the lifetime of their father, released and conveyed to him their expectancy in any property he then owned, or which he might own at his death.

The adult heirs filed an answer and cross-bill in the Virginia court, wherein they alleged that the conveyances of their expectancy to their father were obtained by fraud, duress, and undue influence, and were inoperative as a matter of law, and prayed that they be declared null and void, and that they might be permitted to bring the consideration for said deeds into hotchpot, and participate in the division of the estate. Upon these issues evidence was taken, and the cause came on to be heard in the corporation court, and by so much of its decree as we deem necessary to consider upon this appeal the court held "that it would be inequitable to require the adult heirs * * * to bring the amount, with its interest, which they had received in consideration of the contracts mentioned in this decree and in the pleadings, into hotchpot for the benefit of the infant heirs, and yet to allow them (the infant heirs) to set up said contracts in the courts of Tennessee in bar of the rights of the adult heirs to participate in the partition of their father's estate situated in Tennessee. It is therefore adjudged, ordered, and decreed that the said contracts, * * * which are filed with the papers in this cause, be given up and canceled upon the payment into hotchpot of the amount of consideration mentioned therein, with interest from the death of Joseph W. Jones, deceased, being May 1, 1901. It is further adjudged, ordered, and decreed that J. W. Mort, guardian, * * * personally or in any official capacity, and Henry Roberts, their guardian ad litem, and Elizabeth Jones (the widow) are hereby perpetually enjoined from setting up, proving, or attempting to set up or offer in proof, in the chancery court of the city of Bristol, Tennessee, or any other court, the said contracts hereinbefore mentioned."

This court held in Headrick v. McDowell, 102 Va. 124, 45 S. E. 804, 65 L. R. A. 578, that: "Upon the death of a parent intestate the descent is cast by operation of law upon his heirs, and his personalty passes in accordance with the statute of distribution. Where advancements have been made in the lifetime of the parent, they must be brought into hotchpot by the one who has received it, and thus perfect equality attained. This rule is unaffected by the fact that some of the heirs at the time of receiving their advancements entered into covenants with the parent, whereby they relinquished all interest in or claim to any portion of the estate then owned or which may be thereafter acquired by the parent, and as to which he may die intestate."

It appears, therefore, that the deeds given by the adult heirs to their deceased parent in consideration of the advancements made to them during his lifetime are in this state inoperative, and that upon the death of Joseph W. Jones the descent was, by operation of law, cast upon all of his heirs, and his personalty passed to them in accordance with the statute of distribution.

In the state of Tennessee a contrary rule prevails, and the deeds from the children to the parent are effectual to bar their participation in his estate after his death, whether as heirs or distributees.

It is apparent, therefore, that it would be inequitable to require the adult heirs to surrender, or, what is the same thing, to bring into hotchpot and account for, the sums advanced to them, and which constitute the sole consideration of the contracts under investigation, as a condition of their participation in the estate of their parent situated in Virginia, and at the same time to permit the infant heirs to plead those contracts in bar of the participation of the adult heirs in so much of the estate of their common ancestor as passes under the laws of Tennessee. We think, however, that the method by which the corporation court undertook to enforce this obvious equity cannot be maintained.

In Minor on Conflict of Laws, p. 28, § 11, it is said: "It is generally admitted that transactions relating to lands or immovable property of any kind are to be governed by the law of the place where the property is situated."

The courts of other states will not, it is said, "attempt to enforce their own laws with respect to land situated elsewhere, not only because of the spirit of comity and their unwillingness to engage in conduct towards other states which they would not tolerate in other states towards themselves, but also, and perhaps chiefly, because of their utter inability to render any judgment or decree that would be final and effectual to transfer any interest in the land. Instead, therefore, of rendering idle judgments in accordance with their own law, the courts, in dealing with the title to foreign real estate, will seek to determine the rules laid down by the lex situs of the land, and will decide in accordance with that law, for to it the parties must finally appeal in any event. Thus it comes to be a well-settled principle of private international law, fortified by a great mass of authority, that all questions relating to the transfer of title to immovable property, wherever arising, will be governed by the lex situs, the law of the ultimate forum in which all such questions must finally be decided." Id. p. 29.

So rigidly is this principle enforced that, contrary to the general rule with respect to the limit upon personal covenants, "the better opinion seems to be that the lex situs of the land should govern, so far as covenants of title running with the land are concerned." Id. § 185.

We are therefore of opinion that the corporation court erred in enjoining the infant defendants in this suit, their guardian and

guardian ad litem, from setting up the deeds in controversy in the courts of Tennessee, and in attempting to control the course of procedure in those courts. We are of opinion, however, that justice may be, in part at least, attained without undertaking to interfere with the courts of a foreign jurisdiction, and to that end we think that it is proper for the corporation court of Bristol to ascertain the estate of which Joseph W. Jones died seised and possessed, wherever it may be situated, and then proceed to divide and distribute the estate in Virginia among all the heirs and distributees, without requiring the adult heirs to bring into hotchpot the advancements they have received, and which constitute the consideration for the deeds in controversy, unless it shall be made to appear that the advancements so received, added to their aliquot portion of the estate in Virginia, shall exceed the shares of the infant heirs in the entire estate, in which event they shall be required to account for so much of such advancements to each of them as will produce equality.

For the reasons given, the decree of the corporation court must be reversed, and the cause remanded to be proceeded in in accordance with this opinion.

Inasmuch as this is a suit for partition, we are further of opinion that the costs should be paid ratably out of the estate of Joseph W. Jones, deceased.

(104 Va. 209)

F. T. BLANCHARD CO. v. SIMON et al.

(Supreme Court of Appeals of Virginia. June 22, 1905.)

1. TRADE-MARKS AND TRADE-NAMES—RIGHT TO USE ONE'S OWN NAME.

The right of a man to use his own name in connection with his business is so fundamental that an intention to entirely divest himself of it and transfer it to another will not be presumed, but must be fairly shown.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 14, 104½.]

2. SAME—SALE OF INTEREST IN FIRM—SUBSEQUENT USE OF FIRM NAME.

Where a partnership carried on business as the S. Auction Company, the sale by S. of his interest to his copartner did not entitle the purchasing partner to enjoin S. from entering into business again under the name of the S. Auction Company.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 41.]

3. SAME—RIGHT TO DAMAGES.

A partner in whose name business was conducted sold his interest to his copartner, the purchaser organizing a company which did a large mercantile business. The selling partner conducted under the name which the partnership had formerly used an entirely different business, in a different part of the city; calling particular attention in his advertisements to the character and location of his business. *Held*, that the use by the selling partner of the name of the old firm gave the purchasing partner no right to recover damages for such use.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 41.]

Appeal from Corporation Court of Bristol.

Separate actions by the F. T. Blanchard Company against H. J. Simon and others, and Ida V. Simon against F. T. Blanchard Company. The actions were heard together, and from judgments for defendants in the first action, and for plaintiff in the second action, the defeated party appeals. Affirmed.

Bullitt & Kelly and A. H. Blanchard, for appellants. Peters & Lavinder and J. S. Ashworth, for appellees.

HARRISON, J. This is an appeal from a final decree in two causes heard together by the corporation court for the city of Bristol. The object of the first cause, of F. T. Blanchard Co. v. H. J. Simon, etc., was to enjoin H. J. Simon and Joseph Gutman from the use of the name Simon Auction Company, and to recover of them damages for having wrongfully used such name. The second cause was an attachment proceeding in equity, in the name of Ida V. Simon v. F. T. Blanchard Co., to recover from the defendant a note for $1,250.

In the first-named cause a temporary injunction was granted, and upon the final hearing that injunction was dissolved, and the bill dismissed. In the second cause, by the same decree, the complainant recovered the amount of the note sued for, and a lien was declared in her favor, for that recovery, upon the real estate attached.

It is conceded that the decision of both causes hinges upon the right of the complainant in the first-named cause to the relief therein sought.

In April, 1896, F. T. Blanchard and H. J. Simon entered into a partnership agreement to carry on a mercantile business in the city of Bristol under the firm name and style of the Simon Auction Company. After doing business together for some five or six years, they had a settlement of their partnership affairs; Blanchard agreeing to pay Simon $2,500 for his interest in the concern, evidenced by two notes, for $1,250 each. Subsequently Blanchard organized a joint-stock company, called F. T. Blanchard Company, for the conduct of a mercantile business on a very much larger scale, and transferred all the business and assets of the Simon Auction Company to the F. T. Blanchard Company. In this bill of sale, Blanchard undertakes to transfer to his new company, which was practically himself, the right to the name Simon Auction Company. Several months later H. J. Simon and Joseph Gutman associated themselves together under the firm name of Simon Auction Company. It is this use of the old firm name of Simon Auction Company that the F. T. Blanchard Company seeks to enjoin as injurious to its business and in violation of its rights.

It has been held, and we think properly, that the right of a man to use his own name

in connection with his own business is so fundamental that an intention to entirely divest himself of such right and transfer it to another will not readily be presumed, but must be clearly shown. Where it is so shown, the transaction will be upheld, but it will not be sustained upon doubtful or uncertain proof. Hazelton Boiler Company v. Hazelton Tripod Boiler Company (Ill.) 30 N. E. 339; Ranft v. Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291.

The evidence in this case wholly fails to establish the claim that H. J. Simon ever at any time, expressly or by implication, divested himself, in favor of F. T. Blanchard, of the use of his name in business, or ever by contract transferred to F. T. Blanchard the exclusive use of the name Simon Auction Company. On the contrary, all the circumstances surrounding the transaction tend to negative the assumption that any property in the trade-name of Simon Auction Company was within the contemplation of the parties. F. T. Blanchard having acquired no right to use the name Simon Auction Company, he had no power to transfer any property in such name to the F. T. Blanchard Company. H. J. Simon clearly had the right to go into business in his own name, and no reason is perceived why he could not do so with the addition of the term "Auction," which identifies his business, and the word "Company," which indicated that there was more than one in the concern, unless in so doing he misled the public or encroached upon the rights of the complainant. Iowa Seed Co. v. Dorr, 70 Iowa, 481, 30 N. W. 866, 59 Am. Rep. 446.

The mere fact that the F. T. Blanchard Company claims to be the successor of a firm of the same name should not, it seems to us, deprive H. J. Simon of the right to do business in the name of Simon Auction Company.

The record discloses no sufficient ground upon which to rest a judgment for damages against Simon and Gutman for their use of the name Simon Auction Company during the brief period they did business under that name. Simon and Gutman did an auction business; buying and selling secondhand goods in a small, unpretentious store. The F. T. Blanchard Company carried on a very large mercantile business in another part of the city, and did not conduct an auction business, nor buy and sell secondhand goods. The use of the name Simon Auction Company did not operate to produce an unfair competition in business between the parties litigant, to the prejudice of the F. T. Blanchard Company. On the contrary, it satisfactorily appears that Simon and Gutman were particular in calling attention, by advertisement, to the character and location of their business, and do not appear to have had any intention of deceiving the public, or defrauding the complainant of any trade to which it was entitled. Indeed, it is difficult to see how a purchaser could have bought from Simon and Gutman, believing he was buying from the F. T. Blanchard Company.

For these reasons, the decree appealed from must be affirmed.

(104 Va. 213)

HURT v. CITY OF BRISTOL.

(Supreme Court of Appeals of Virginia. June 22, 1905.)

1. PROPERTY OF LUNATIC—STATUTES—APPLICATION.

Code 1904, p. 877, § 1702, provides that an insane person's committee shall have possession of his estate, may sue and be sued with respect thereto, and for the recovery of debts due to or from such insane person, and that he shall apply rents and profits to the lunatic's maintenance, etc. *Held*, that under such section a lunatic's committee has absolute control and management of the lunatic's estate, though it is the committee's duty to render annual accounts to the commissioner of the court in which he qualified.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, §§ 64–67, 110–114.]

2. SAME.

Code 1904, p. 1389, § 2700, authorizing the court to order money in the hands of any fiduciary to be invested, and section 492b, p. 254, relative to the payment of taxes on funds under the control of the court, apply only to such fiduciaries as represent the court, and have no application to funds in the hands of the committee of a lunatic.

3. SAME—LOCATION—DOMICILE.

Code 1904, p. 252, § 491, making it the duty of a commissioner of revenue to call on every person in his county, district, or city to furnish a list of such property, money, credits, or other subjects of taxation as required by law, and the value thereof, contemplates that such commissioner shall apply to the person liable to taxation at the place of his domicile and not elsewhere.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 551.]

4. SAME.

Where a committee of a lunatic was appointed and qualified in the corporation court of the city of Bristol, but had his domicile elsewhere, he was taxable on credits in his hands belonging to such lunatic in the county of his domicile, and not in the city of Bristol.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 443.]

5. SAME—LIMITATIONS.

Code 1904, p. 283, § 571, authorizing any person assessed for county or city taxes within two years to apply for relief, has no application to a proceeding to vacate a tax assessment against a lunatic's committee in a city in which he was not domiciled.

Error to Corporation Court of City of Bristol.

Garnishment proceedings by the city of Bristol against J. I. Hurt, committee of Lewis W. Lancaster, a lunatic. Judgment in favor of plaintiff, and defendant brings error. Reversed.

Filkerson, Page & Hurt, for plaintiff in error. J. S. Ashworth, for defendant in error.

CARDWELL, J. The principal question presented in this case is whether certain choses in action held by plaintiff in error,

whose residence or domicile is at Abingdon, Washington county, but who was appointed and qualified in the corporation court of the city of Bristol as committee of one Lewis W. Lancaster, a lunatic, now in the state of Tennessee, his last place of residence in the state of Virginia having been in Bristol, are taxable in the city of Bristol or in the county of Washington.

It appears that the plaintiff in error held the choses in action referred to against certain residents of Bristol, and that the funds held by him had not been assessed with taxes for the years 1901 and 1902 in the district in which he resides, or in any place; that there is no suit or other proceeding in the corporation court of Bristol, or in any other court, in which the funds held by plaintiff in error are being administered; and that these funds were assessed for city taxes for the years 1901 and 1902 by the commissioner of the revenue of the city of Bristol upon the report of the examiner of records of said city, pursuant to section 3326a, p. 1755, of Va. Code 1904, which assessments were upheld by the judgment of the corporation court of that city, to which this writ of error was awarded.

Section 3326a, p. 1755, supra, provides that the examiner shall examine the papers in all pending causes in the courts in his circuit and the records of such courts, "and ascertain what money, bonds, notes, stocks, shares of stock, capital, capital stock, choses in action, or other evidences of debt * * * subject to taxation are held by any receiver, commissioner, or fiduciary, or under the control of said courts; or are held by any person, bank, or corporation subject to the order of such courts," and forthwith make report thereof to the commissioner of the revenue of the county, city, or town "for which such examination is made or in which said property is taxable"; and thereupon it is made the duty of such commissioner of the revenue to enter upon his personal property books the names of the persons mentioned in such report, and the aggregate amount of property chargeable to each of them, as stated therein, and to extend the taxes thereon, etc.

Section 491, p. 252, of Va. Code 1904, provides that the commissioner of the revenue shall ascertain and assess all subjects of taxation in his county, district, or city; and section 492 provides that, if the property be owned by a person sui juris, it shall be listed by or taxed to him, and further provides that property owned by a lunatic shall be listed by and taxed to his committee.

The authorities are agreed that the situs of a chose in action for purposes of taxation is at the domicile of the creditor, and not at that of the debtor, no matter where property upon which the debt may be secured is situated.

Section 1702, p. 877, of Va. Code 1904, defining the duties and powers of committees, provides that the committee of an insane person shall be entitled to the custody and control of his person (when he resides in the state, and is not confined in a hospital or jail), shall take possession of his estate, and may sue and be sued in respect thereto, and for the recovery of debts due to or from the insane person. He shall take care of and preserve such estate and manage it to the best advantage; shall apply the personal estate, or so much as may be necessary, to the payment of the debts of such insane person; and the rents and profits of the residue of his estate, real and personal, and the residue of the personal estate, or so much thereof as may be necessary, to the maintenance of such insane person and of his family, if any; and shall surrender the estate, or so much as he may be accountable for, to such insane person, if he shall be restored to sanity, or the real estate to his heirs or devisees and the personal estate to his executors or administrators in case of his death without having been restored to sanity.

While it is the duty of a committee to render his accounts annually before a commissioner of the court in which he qualified, it will be seen from the statute just quoted that he has absolute control and management of the lunatic's estate, and that section 2700, p. 1389, of the Code, which authorizes the court to order money in the hands of any fiduciary to be invested or loaned out, or make such other order respecting the same as may seem to it proper, and section 492b, p. 254, relative to the payment of taxes on funds under the control of a court, have no application to funds in the hands of a committee or other fiduciary who is the representative of, or holds the estate of, a person under disability; such fiduciary being at all times liable for interest upon the annual balances in his hands. Said sections only apply to such fiduciaries as represent the court, and are the means by which the court holds and controls the fund in its charge. Sections 2686 and 2687, p. 1382, also cited for defendant in error, have no sort of bearing upon the question under consideration.

By section 491, supra, it is made the duty of the commissioner of the revenue to call on every person in his county, district, or city to furnish a list of such property, money, credits, or other subjects of taxation as required by law, and the value thereof; and clearly the statute contemplates that such commissioner should apply to the person liable to taxation at the place of his domicile, and not elsewhere.

We are of opinion that the situs of the funds held by plaintiff in error for taxation is in the county of Washington, where he resides, and not in the city of Bristol.

It is contended, however, for defendant in error, that defense of the assessment complained of could only have been made under section 571, p. 283, of the Code, and, two years having elapsed after the assessment

was made and before this defense was set up in this cause, it cannot be made at all. We do not think that this section has any application whatever to the case. Non constat, plaintiff in error knew of the assessment against him in the city of Bristol until served with notice of this garnishee proceeding, in which it is sought to collect the taxes assessed.

The judgment of the corporation court of Bristol must be reversed and annulled, and this court will enter such order as that court should have entered.

(104 Va. 240)

WESTERN UNION TELEGRAPH CO. v. HUGHES.

(Supreme Court of Appeals of Virginia. June 22, 1905.)

TELEGRAPHS—STATE REGULATION—STATUTES—INTERSTATE BUSINESS.

Where the points of transmission and destination of a telegraph sent over the lines of a single company were within the same state, the fact that a part of the transmission was made over lines of the company in another state did not make the same interstate business, nor prevent it from being subject to a state statute providing a penalty for delay.

Keith, P., and Cardwell, J., dissenting.

Error to Corporation Court of City of Danville.

Action by one Hughes against the Western Union Telegraph Company. From a judgment for plaintiff, defendant brings error. Dismissed.

Addison L. Holladay, for plaintiff in error. Thomas Hamlin, for defendant in error.

WHITTLE, J. The facts in this case are essentially the same as in the case of Western Union Telegraph Company v. Reynolds, reported 100 Va. 459, 41 S. E. 856, 93 Am. St. Rep. 971, where the court sustained a judgment against the company for the statutory penalty for failure to transmit and deliver a telegram, the initial and terminal points of which were both within the state of Virginia, notwithstanding the circumstance that the line passed in part over the territory of another state.

It is insisted, however, by counsel for plaintiff in error that this doctrine has been overruled by the decision of the Supreme Court of the United States in the more recent case of Hanley v. Kansas City So. R. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333.

We cannot assent to that contention. In the last-named case the court merely decided that the Railroad Commission of the state of Arkansas could not, without violating the commerce clause of the federal Constitution, fix and enforce rates for the continuous transportation of freight between two points in the state of Arkansas, where a large part of the route is outside of the state, through the Indian Territory or Texas. The distinction between that case and the case at bar is obvious. In the latter there is no attempt to fix and enforce rates for the transmission of telegrams, but the court simply upheld the recovery of a penalty, imposed by the statute upon a telegraph company doing business in the state, for failure to transmit faithfully and impartially, and as promptly as practicable, a telegram, in accordance with its contract. This principle was distinctly recognized and sustained by the Supreme Court of the United States, in construing a similar statute of the state of Georgia, in the case of Western Union Telegraph Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, the authority of which is in no wise impaired by the case referred to.

It is true that this court, in the Reynolds Case, cited and relied on Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, as analogous authority. But it will be observed that that case, like the case of Hanley v. Kansas City So. R. Co., involved the power of a state to fix the rate of taxation upon the receipts of a railway company "for the mileage within the state, from transportation by continuous carriage from a point in the state, but over a line which, in its course between these points, passed out of the state into another state and back again into the state." It was that doctrine, and not the principle of the James Case, that has been modified by the recent decision of the Supreme Court of the United States.

The case in judgment, in our opinion, involves the exercise of an important police power of the state, a power which ought not to be surrendered, and which we are unwilling to surrender, in the absence of a direct and authoritative declaration on the part of the Supreme Court of the United States that it is violative of the federal Constitution.

For these reasons, the court will adhere to its former decision and dismiss the case for want of jurisdiction.

CARDWELL, J. (dissenting). I am unable to concur in the opinion of the court in this case. The case, upon the agreed state of facts, is, as the opinion states, in all essential features the same as that of W. U. Tel. Co. v. Reynolds, 100 Va. 459, 41 S. E. 856, 93 Am. St. Rep. 971, decided June 19, 1902. In each case the action was to recover against the defendant the penalty of $100, imposed by sections 1291 and 1292 of the Code of Virginia of 1887 [Code 1904, pp. 696, 697, §§ 1294h (5), 1294h (6)], for the failure to transmit and deliver dispatches in the manner and time set forth in those sections. In the former case the message was received by the telegraph company at Radford, Va., while in the present it was received at Danville, Va.; the first was addressed to the sendee at Tom's Creek, Va., and the second to a sendee at Pocahontas, Va., and both

were lost at Bluefield, W. Va., where the telegraph company has a relay office, the only route by which the message in either case could be transmitted to its point of destination being via Bluefield, W. Va.

That it is settled law that a telegraph line is an instrument of commerce, and that telegraph companies, like railroad companies, are subject to the regulating power of Congress in respect to their foreign and interstate business, see Postal Tel.-Cable Co. v. Umstadter, 103 Va. 742, 50 S. E. 259, and authorities there cited.

This court having, in W. U. Tel. Co. v. Tyler, 90 Va. 297, 18 S. E. 280, 44 Am. St. Rep. 910, and W. U. Tel. Co. v. Bright, 90 Va. 778, 20 S. E. 146, held that section 1292 of the Code, as applied to a case where the telegram in question was a domestic message, was not in conflict with the Constitution of the United States, or any act of Congress passed in pursuance thereof, and construing, as have the courts of other states, the decision of the Supreme Court of the United States in Lehigh Valley R. Co. v. Penna., 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, as authority for the proposition that where both the point at which a telegram is received for transmission and the point to which it is addressed are in the same state, although the line over which the transmission is made passes into another state between the points, the penalty prescribed by the statute may be imposed for the default of the telegraph company occurring in the foreign state, as a reasonable exercise of the police power of the state, and not an attempt to regulate commerce violative of the federal Constitution, the telegram being regarded as a domestic message, dismissed the case of W. U. Tel. Co. v. Reynolds, supra, the amount involved not being large enough to give jurisdiction to the court.

The opinion by Whittle, J., after stating that the state of Pennsylvania levied a tax on the gross receipts of all railroad companies derived from the transportation by continuous carriage from points in Pennsylvania to other points in the same state—that is to say, passing out of Pennsylvania into another state, and back again into Pennsylvania, in the course of transportation—and that the Lehigh Valley Railroad Company had no road of its own from Mauch Chunk, Pa., to Philadelphia, but in transporting its coal, and general freight traffic, it used its own line from Mauch Chunk to Phillipsburg, N. J., from which point it was, under an arrangement for a continuous passage with the Pennsylvania Railroad Company, transported by the latter road via Trenton to Philadelphia, and that it was insisted that the state could not tax that part of the gross receipts derived from so much of the transportation as was wholly within the state of Pennsylvania, because the freight, during its entire transportation, was impressed with the character of interstate commerce, quotes from the opinion in Lehigh Valley R. Co. v. Pennsylvania, supra, as follows: "Commerce undoubtedly is traffic; but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. * * * Gibbons v. Ogden, 22 U. S. (9 Wheat.) 189, 6 L. Ed. 23. * * * The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between these points, and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same state, made interstate because in its accomplishment some portion of another state may be traversed? Is the transmission of freight or messages between two places in the same state made interstate business by the deviation of the railroad or telegraph onto the soil of another state? * * * It is simply whether, in the carriage of freight and passengers between two points in the same state, the mere passage over the soil of another state renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk. * * * We will observe, however, that we think that the principle laid down by that [the trial] court is peculiarly adapted to cases like the present, in which there is such an exceptional facility for the evasion of state authority to fix the rate of charges. This may be done in an instant, and without expense, by so adjusting the wires that messages must go through a part of the territory of another state."

In the more recent case, however—Hanley v. Kansas City So. R. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333—the Supreme Court of the United States gave its own interpretation of the opinion in Lehigh Valley R. Co. v. Pennsylvania, supra, and held that the Railroad Commission of Arkansas could not, without violating the commerce clause of the federal Constitution, fix and enforce rates for the continuous transportation of goods between two points within the state of Arkansas, where a large part of the route is outside of the state, through the Indian Territory or Texas. The opinion, by Mr. Justice Holmes, says: "It is decided that navigation on the high seas between ports of the same state is subject to regulation by Congress (Lord v. Goodall, N. & P. S. S. Co., 102 U. S. 541, 26 L. Ed. 224), and is not subject to regulation by the state (Pac. Coast S. S. Co. v. R. R. Com'rs [C. C.] 9 Sawy. 253, 18 Fed. 10); and, although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last-cited case disposes equally of the case at bar. 'To bring the transporta-

tion within the control of the state, as part of its domestic commerce, the subject transported must be, within the entire voyage, under the exclusive jurisdiction of the state.' 9 Sawy. 258, 18 Fed. 10." A number of other decisions are also cited as being in point.

The court having, in Hanley v. Kansas City So. Ry. Co., supra, held that the transportation of goods on a through bill of lading from Fort Smith, Ark., to Grannis, Ark., over a line of railroad by way of Spiro, in the Indian Territory, a total distance of 116 miles, of which 52 miles is in Arkansas and 64 in the Indian Territory, is interstate commerce, subject to regulation by act of Congress only, the controlling question in the case at bar is, does the doctrine apply with equal force to a telegraphic dispatch to be transmitted from Danville, Va., to Pocahontas, W. Va., by way of Bluefield, W. Va., that being "the only possible and proper one from Danville, Va., to Pocahontas, Va.—that is, by way of Bluefield, West Va."—and the default of the telegraph company in transmitting and delivering the dispatch occurring wholly within the state of West Virginia?

As we have seen, it is settled law that a telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods, both companies being regarded as instruments of commerce, and their business commerce itself. While they do their transportation in different ways, and their liabilities are in some respects different, they are both regarded as indispensable to those engaged to any extent in commercial pursuits. Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067, and W. U. Tel. Co. v. Pendleton, 122 U. S. 356, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

The opinion in Hanley v. Kansas City So. Ry. Co., supra, approving the language employed by Mr. Justice Field I have quoted above, and citing a number of cases regarded as in point, proceeds as follows: "There are some later state decisions contrary to those last cited. Campbell v. Chicago, Milwaukee & St. Paul Ry. Co., 86 Iowa, 587, 53 N. W. 351, 17 L. R. A. 443; Seawell v. Kansas City, Ft. Scott & Memphis Rd. Co., 119 Mo. 222, 24 S. W. 1002; Railroad Commissioners v. Western Union Tel. Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570. But these decisions were made simply out of deference to conclusions drawn from Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672 and we are of opinion that they carry their conclusions too far. * * *"

One of the cases disapproved in Hanley v. Kansas C., etc., Co., supra, is Campbell v. Chicago, etc., Ry. Co., supra, holding that "an act of the Legislature, providing that regulations fixing maximum rates of freight that may be charged by railroad companies for the transportation of property between points within the state of Iowa should be applicable whether such transportation shall be wholly within this state or partly within this state and an adjoining state or states, is not in conflict with section 8 of article 1 of the United States Constitution as being a regulation of commerce."

Another is Railroad Com'rs v. W. U. Tel. Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570, supra (cited in W. U. Tel. Co. v. Reynolds, supra), where it was held that telegraph messages transmitted by a company from and to points in the state, although traversing another state in the route, do not constitute interstate commerce, and are subject to the tariff regulations of the commission.

While the court in Hanley v. Kansas C., etc., Co., supra, referring to the case of Lehigh Valley, &c., Co. v. Pennsylvania, supra, says "that was the case of a tax, and was distinguished expressly from an attempt by a state directly to regulate the transportation while outside its borders," thus recognizing the distinction indicated in Pac. Coast S. S. Co. v. Rd. Com'rs, supra, the only reasonable conclusion to be drawn from the opinion, as it appears to me, is that the doctrine there announced has full and complete application to the transmission of a telegraphic dispatch from one point in a state to another point in the same state, traversing another state in its route, where the default in transmitting and delivering the dispatch occurred wholly within the foreign state.

Unlike the case of W. U. Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, where the default of the telegraph company occurred wholly in the state of Georgia, and that of Postal Tel.-Cable Co. v. Umstadter, supra, where the default took place in this state, the meaning of the certificate of facts in the case at bar is that the message was delivered to plaintiff in error at Danville, Va., to be transmitted to Pocahontas, Va., and could not be transmitted from its point of origin to its point of destination without passing through the territorial limits of the state of West Virginia; that the message was transmitted by plaintiff in error from Danville, Va., to Richmond, Va., and from Richmond to Bluefield, W. Va., and that it was received at Bluefield, where it was last heard from; it thus appearing that the default of plaintiff in error, for which the penalty prescribed by the statute is imposed in this case, occurred wholly within the state of West Virginia.

I am of opinion that upon this state of facts this court is bound by the decision of the Supreme Court of the United States in Hanley v. Kansas City, etc., Co., supra, to hold that the statute, in so far as it authorizes the imposition of the penalty in such a case, transcends the police power of the state, and violates section 8, art. 1, of the Constitution of the United States.

KEITH, P., concurs.

(104 Va. 229)

LYLE v. SARVEY.

(Supreme Court of Appeals of Virginia. June 22, 1905.)

1. RECEIVERS — DUTIES — NEGLECT—FAILURE TO ACCOUNT — FINAL HEARING — DEPOSITIONS.

Where a corporation's receiver, after having admitted in the pleadings that the assets of the corporation were sufficient to discharge all its liabilities, persistently disobeyed the orders of the court and neglected to avail himself of two opportunities to settle his account before commissioners during the period of three years after his appointment, he was not authorized by Va. Code 1904, § 3362, providing that in a suit in equity a deposition may be read if returned before the hearing of the cause, etc., to have his deposition considered for the purpose of extenuating his conduct and to reduce his liability as ascertained by the commissioners' report, because during his receivership his time was engrossed with public duties as a state senator, and that he was also prevented from performing his duties by the absence of his brother, who was a traveling salesman, and who had been president and general manager of the corporation and was familiar with its affairs.

2. SAME—LIABILITY.

Where the receiver of a corporation had stated in the pleadings prepared by himself as counsel, and in a letter to counsel for the creditors, that the corporation's assets were sufficient to discharge all its liabilities, but persistently disobeyed the orders of the court and neglected to settle his account before its commissioners, a commissioners' report requiring him to pay all the indebtedness proved against the corporation was proper.

Appeal from Corporation Court of Roanoke.

Suit by A. E. Sarvey against the Charles Lyle Drug Company, in which certain creditors intervened. From a decree overruling the exceptions of Edward Lyle, receiver, to a master's final report directing the receiver to pay the debts established thereby, Edward Lyle appeals. Reversed.

W. A. Glasgow, Jr., Hart & Hart, and John Dabney Smith, for appellant. H. T. Hall and Smith & King, for appellee.

WHITTLE, J. The primary purpose of this suit was to wind up the affairs of the Charles Lyle Drug Company, a corporation engaged in the retail drug business in the city of Roanoke, to pay its indebtedness, and distribute the surplus assets among the stockholders.

The plaintiff, Mrs. A. E. Sarvey, and her two sons, Charles and Edward Lyle, constituted the principal stockholders. Charles Lyle was a druggist and the president and general manager of the company, and Edward Lyle, the attorney who brought the suit, representing both plaintiff and defendant. The creditors were neither made parties nor informed of the litigation.

In the petition and answer of the company to the bill, by Charles Lyle, its president, the assets were estimated at $9,930 and the liabilities at $2,000. It was also averred that the president and general manager had tendered his resignation, and the defendant united in the prayer of the bill for the immediate appointment of Edward Lyle as receiver. The answer was accompanied by the affidavit of Edward Lyle that the corporation was solvent "and possessed of assets sufficient to pay all its creditors in full." Upon the same day the judge of the hustings court made an order appointing Edward Lyle receiver, and requiring him to execute bond with approved security in the penalty of $6,000. He was directed to collect the assets of the company and sell the stock and fixtures to the best advantage, to pay the expenses incident to the receivership, to rent the necessary buildings to preserve the property until sold, and also to report from time to time his proceedings as receiver. Within a short time after the date of this order, a number of creditors of the company intervened, and at their instance the cause was referred to a commissioner to take an account of debts and assets, and report any other matter deemed pertinent.

On May 22, 1903, the commissioner returned his report, in which he says the receiver had neglected to furnish a statement of his transactions, although repeatedly requested and repeatedly promising to do so. At the request of the creditors, he made up his report in the absence of such statement, returning therewith a copy of a letter written by the receiver to counsel, under date of December 7, 1900, admitting that he had taken possession of the stock of goods of the company of the inventoried value of $3,721.32, and open accounts due the company to the amount of $2,500, of which he thought $1,000 could be reasonably expected to be collected. The commissioner reported the debts proved, but did not report what assets had come into the hands of the receiver. Therefore, on February 14, 1903, the report was recommitted to another commissioner, who returned his report September 19, 1903, in which he charged the receiver with $3,271.32, the inventoried value of the stock of goods, and $1,000 in open accounts. He also reported that the White Front Pharmacy was really the property of the defendant company. With respect to the conduct of the receiver, the commissioner reports that he had used every means given him by the law to compel the production of books and papers of the Charles Lyle Drug Company and the White Front Pharmacy, without avail; that counsel for the receiver stated that he would close his account by July 25th, but failed to do so, and the commissioner kept the account open until September 19, 1903, relying upon the continued promises of the receiver to produce the books, together with the statement of his accounts as receiver, when, finding that further indulgence would be fruitless, he returned his report.

On December 30th following, the receiver, over the objection of creditors, gave his deposition in the cause, the object of which was to extenuate his conduct in failing to settle

his accounts, and to reduce his liability as ascertained by the report of the commissioner.

At the final hearing of the cause, April 30, 1904, the court sustained the motion of creditors to suppress the deposition of the receiver, and overruling his exceptions to the report (save only to so much thereof as ascertained the White Front Pharmacy to be the property of the defendant company), confirmed the report, and directed the receiver to pay the debts established thereby. From that decree this appeal was allowed.

The bare recital of the foregoing facts would seem to afford complete justification for the action of the court. In his belated deposition the receiver undertakes to excuse his flagrant neglect of duty to make reports, as required by law and the order appointing him, on the grounds that during his receivership his time was engrossed with public duties as state senator, and the continued absence from the state of his brother, Charles Lyle, who was engaged as a traveling salesman, and who, by reason of his position of president and general manager of the company, was familiar with its affairs.

When it is remembered that about three years had elapsed between the appointment of the receiver and the final settlement of his account by the commissioner, it is not surprising that the court declined to accept these frivolous excuses and refused to grant the receiver further indulgence.

The statute under which he claims the right to have his rejected deposition read is as follows:

"In a suit in equity, a deposition may be read, if returned before the hearing of the cause, or, though after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree." Va. Code 1904, § 3362.

In construing that statute, this court observes: "But the right is not an absolute one. The statute does not say the deposition 'shall be,' but it 'may be' read. It could hardly have been intended that after a cause had been referred to a commissioner, and ample opportunity offered both parties to introduce their witnesses, and after the commissioner had made his report and the cause was ready for a hearing, that one of them should have the absolute right at any time thereafter to bring forward his testimony, deliberately or negligently withheld without cause from the commissioner, and demand it shall be read upon a controverted matter of fact, passed upon by the commissioner, and made the subject of the report. Such a construction would be but a premium for negligence, and would place in the power of one or the other of the parties, in many cases, to protract litigation almost indefinitely. Whether testimony thus delayed will be heard, must in every case depend upon a sound judicial discretion to be exercised upon the facts of the case, the nature of the evidence, the reasons given for the delay, and a variety of circumstances which must be adjudged as they arise. The maxim that the laws assist those who are vigilant, not those who sleep over their rights, applies not only to the operation of statutes, but to the action of suitors in the conduct of their causes. In the case before us, the reading of the appellees' depositions would have involved a continuance of the cause when it was ready for a hearing, a recommittal of the commissioner's report, and a reopening of the case for the introduction of other testimony, and a prolongation of the controversy. The adoption of such a rule would not only be unjust in this particular case, but it would furnish an extremely bad precedent in other cases." Richardson v. Duble, 33 Grat. 730, 740.

The pertinency of the language of the learned judge in the case above cited to the facts of this case warrants the extended quotation from his excellent opinion. Indeed, the views therein expressed apply with stronger reason to this case, where the court was dealing with its own receiver.

The evidence was ample to sustain the findings of the commissioner. The receiver had already, in the pleadings prepared by himself as counsel, in his affidavit to the answer, and in his letter to counsel for creditors, solemnly admitted that the assets were sufficient to discharge all liabilities of the company; and, after having persistently disobeyed the orders of the court and neglected to avail himself of two opportunities of settling his account before its commissioners, when the cause was ready for final hearing to have granted further delay would have been an abuse rather than a proper exercise of the court's discretion under the statute invoked, and would have tended to bring reproach upon the administration of justice. In dealing with receivers the court cannot tolerate a practice which would place them on the footing of ordinary debtors, and render it as difficult to compel the disbursement of funds in their hands as to enforce the collection of a controverted demand. A receiver is the hand of the court, and it is his duty to yield prompt and unquestioned obedience to all its lawful decrees.

It follows from these views that the rulings of the trial court complained of by appellant are without error, and the decree in that aspect of the case must be affirmed.

Under rule 9, appellees assign as cross-error the action of the court in sustaining the exception of appellant to that part of the last report in the cause which ascertained that the White Front Pharmacy was the property of the Charles Lyle Drug Company.

The evidence upon which that finding was founded may be summarized as follows: The license was originally, and for several years thereafter, taken out in the name of the Charles Lyle Drug Company, and the

store in which the business was conducted was leased to that company until December 1, 1900. Executions in the hands of the sergeant of Roanoke, prior to and at the time of the institution of this suit, against the Charles Lyle Drug Company, were levied indifferently upon the goods in both stores, and the receiver on May 2, 1902, told the sergeant that the branch store was the property of the defendant company. He furthermore informed that officer, to whose hands the estate of his mother, Mrs. A. E. Sarvey, deceased, was committed for administration, that, although the business of the White Front Pharmacy at one time had been conducted in the name of his mother, she neither owned it nor knew that it was in her name. This statement was made after the death of Mrs. Sarvey, when the sergeant applied to Edward Lyle for the assets to pay the debts of the White Front Pharmacy. Both stores were under the general management of Charles Lyle, and the employés understood that the branch store belonged to the Charles Lyle Drug Company. It also appears that, when the White Front Pharmacy was sold by Charles Lyle, the cash payment and notes were made to Edward Lyle. There was other evidence tending to establish the Charles Lyle Drug Company's ownership of the branch store, and, taken as a whole, the evidence was quite sufficient to sustain the report of the commissioner in that regard.

The decree in that respect is therefore erroneous, and must be reversed, and the cause remanded for further proceedings to be had therein, not in conflict with this opinion; and, in future decrees providing for the payment of demands against the company, the amount of each demand, with the date from which interest is to be computed, should be specifically set forth. Spoor v. Tilson, 97 Va. 279, 33 S. E. 609; People's National Bank v. Virginia Textile Co. (decided at this term) 51 S. E. 155.

(58 W. Va. 94)

STATE v. DAVIS.

(Supreme Court of Appeals of West Virginia. June 16, 1905.)

1. ASSAULT WITH INTENT TO KILL—INDICTMENT—INSTRUCTIONS.

In the trial of an indictment found under section 9 of chapter 144 of the Code of 1899, for malicious wounding with intent to maim, disfigure, disable, or kill, an instruction at the instance of the state which eliminates from the consideration of the jury the intent with which the alleged wounding was done is erroneous.

2. SAME.

It is error to give an instruction which is confusing in its language and calculated to mislead the jury. State v. Sutfin, 22 W. Va. 771.

(Syllabus by the Court.)

Error to Circuit Court, Ritchie County.

James Davis was convicted of assault with intent to kill, and brings error. Reversed.

Freer & Robinson, for plaintiff in error. S. M. Hoff and C. W. May, Atty. Gen., for the State.

COX, J. In the circuit court of Ritchie county, James Davis was indicted, tried, and convicted of maliciously wounding and beating Peter Boston, with intent him, the said Peter Boston, to maim, disfigure, disable, and kill, and was sentenced to the penitentiary for the term of three years. Defendant moved to set aside the verdict, which motion was overruled, and he excepted. Upon his application to this court, a writ of error to the judgment was allowed.

Numerous assignments of error are made in this court. Defendant claims that his motion to quash and his demurrer to the indictment should have been sustained. The indictment is in the usual form, and clearly sufficient in law. The motion and demurrer were properly overruled. Hutchinson's Treatise, 1087; Crookham v. State, 5 W. Va. 510; Code 1899, c. 144, § 9.

Defendant complains of the instructions given at the instance of the state over his objection. Two instructions, numbered 1 and 3, were given at the instance of the state. It seems that these instructions were intended to propound certain principles announced in the case of State v. Cain, 20 W. Va. 679. No. 1 instructed the jury that if they believed from the evidence in the case, beyond all reasonable doubt, that on March 6, 1904, in the county of Ritchie, that James Davis, with a club or stick then and there held in his hand, struck the prosecuting witness therewith a violent blow on the forehead, near the left temple, and with sufficient force to knock the prosecuting witness down and cut his face to the bone, and thereby wounded him, and from the effect of said blow the prosecuting witness was necessarily under the care of a physician for several days, and if they further believed from the evidence that said blow was struck without any or very slight provocation being given the defendant by the prosecuting witness, then they should find the defendant guilty as charged in the indictment. This instruction was binding. It practically instructed the jury that if they believed the defendant struck the blow mentioned, with the effect mentioned, without any or upon slight provocation, they should find the defendant guilty as charged in the indictment. The defendant claimed self-defense, and offered evidence upon that theory. This instruction left no room for the defendant to show that the blow was in self-defense or accidental or otherwise excusable. It did not say that, if the jury believed the facts set forth in the instruction, the defendant was prima facie guilty as charged, and that such presumption might be rebutted, or that there must be an intent to maim, disfigure, disable, or kill; but it did, in effect, say that, if the jury be-

lieved the facts mentioned, the defendant should be found guilty, regardless of intent. This instruction made any presumption arising from the facts mentioned in the instruction conclusive and final, and not merely prima facie. This was error, and prejudicial as to a material matter. This instruction does not accord with the principles laid down in the case of State v. Cain, supra, or in the case of State v. Douglass, 28 W. Va. 297. In the latter case an instruction was held erroneous because it separated the blow from the character of the instrument with which it was inflicted, and the intent with which it was given. The instruction in question here disregarded the matter of intent, and instructed the jury to find the defendant guilty if they believed the facts mentioned, without right to rebut any presumption against him arising from such facts.

Instruction No. 3 is also objectionable. It is obscure and doubtful. There does not seem to be any evidence to sustain the theory assumed in this instruction. A part of this instruction is: "The court further instructs the jury that if you believe from the evidence in this case beyond all reasonable doubts that there was a quarrel between the prosecuting witness and James Davis, on the night of March 6, 1904, at the time of the trouble complained of, and that both were in fault, and a combat, as the result of said quarrel, took place," etc. We fail to find any evidence of a quarrel between the defendant and the prosecuting witness, resulting in a combat, at the time of the alleged wounding. If the wounding was done as alleged, it was not the result of a quarrel, according to the evidence. Another objection to this instruction is that, after stating what is claimed to be the law upon the facts mentioned therein, it contained an additional clause to the effect that, if the jury believed two facts did not exist in the case, then they should find the defendant guilty as charged in the indictment. The two facts referred to were that, before making the wound alleged, the defendant declined further combat, and that the wounding of the prosecuting witness was necessary to preserve the defendant from great bodily harm or to preserve his life. This additional clause was confusing. It rendered the import of the instruction obscure. The instruction was calculated to mislead the jury, and should not have been given. Bantz v. Basnett, 12 W. Va. 772; Patton v. Elk River Nav. Co., 13 W. Va. 259; State v. Cain, supra; State v. Sutfin, 22 W. Va. 771.

What we have already said will reverse the judgment, and, as the case is to be remanded for a new trial, it is not necessary for us to consider any of the other assignments of error, except those relating to the evidence. We find no error in the rulings of the lower court admitting or rejecting evidence, unless it was the rejection of certain evidence sought to be adduced from the witness Hoy. Hoy was asked whether or not he, Johnson, and Davis, or either of them, had been blackguarding any woman or doing anything to cause arrest. This question related to the particular evening on which the offense is alleged to have been committed, and shortly before the time of its alleged commission. The state was allowed to prove all the facts leading up to the alleged wounding, including the acts of the defendant, Davis, and of Johnson, and of Hoy. These parties were shown to have been together. While the form of the question was somewhat objectionable, it seems to us that, if a proper question had been propounded, the defendant should have been allowed to show his acts, or that he did nothing immediately preceding the alleged wounding.

One of the grounds of the motion to set aside the verdict was that it was contrary to the evidence. As this case is to be remanded for a new trial, we express no opinion as to the sufficiency of the evidence to sustain the verdict.

For the reasons stated, the judgment of the circuit court of Ritchie county entered in this case on the 12th day of January, 1905, is reversed, and the motion of the defendant to set aside the verdict and award him a new trial is sustained, and this case is remanded, to be further proceeded with in accordance with the principles herein announced.

(71 S. C. 361)

BUILDERS' SUPPLY CO. v. NORTH AUGUSTA ELECTRIC & IMPROVEMENT CO. et al.

(Supreme Court of South Carolina. April 14, 1905.)

1. MECHANIC'S LIEN — EVIDENCE — CONTRACT WITH AGENT.

In an action to enforce a mechanic's lien because of materials furnished by virtue of a contract and agreement with the agents of defendant duly authorized to make such contract, evidence *held* to support judgment for plaintiff.

2. SAME—BUILDING ON LOT OF ANOTHER—CONSENT OF OWNER.

An owner of a lot agreed with another to build a house thereon for a certain price, and to convey it, when completed, free from all claims and liens, and permitted the purchaser to contract with the builder and supervise the contract, and took a bond of indemnity from the builder, and accepted the benefits of the contract, and paid a corporation furnishing materials and paying for the labor of a builder. *Held* to show such consenting by the owner of the lot to the furnishing of materials and cash to the builder as to give the corporation furnishing such materials and cash a lien on the buildings and lot, under Civ. Code 1902, § 3008, for the difference between the amount to be paid for the building of the house and the amount actually paid, though the contract provided that the materials should be purchased from such corporation, not to exceed a specified amount.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 87–105.]

Appeal from Common Pleas Circuit Court of Aiken County; Aldrich, Judge.

Petition by the Builders' Supply Company against the North Augusta Electric & Improvement Company and M. M. R. Boatwright to enforce a mechanic's lien. Decree for petitioner, and the improvement company appeals. Affirmed.

George T. Jackson, for appellant. Hendersons, for respondent.

POPE, C. J. On the 12th day of August, 1902, the North Augusta Electric & Improvement Company, owning lands in the town of North Augusta, S. C., agreed to and with Mrs. M. M. R. Boatwright to sell her two lots of land, to wit, lots known as lots Nos. 4 and 5 in block No. 10, on a plan of lots made in 1891 by Charles Broeck, bounded as follows: North by lot No. 3, east by West avenue, south by lot No. 6, west by an alley—fronting 100 feet on West avenue, and running back 200 feet to an alley, which said premises are owned by the defendant North Augusta Electric & Improvement Company, at the price of $400; and said North Augusta Electric & Improvement Company agreed to and with Mrs. M. M. R. Boatwright that they would erect on said lot a dwelling house for the sum of $1,900, but that the expense to said company in the erection of said dwelling house should be limited to $1,800. The said Mrs. M. M. R. Boatwright was accorded the privilege of selecting the contractor to build said dwelling house and furnish all the material therefor, according to the plans and specifications of said dwelling house previously agreed upon by and between the said North Augusta Electric & Improvement Company and the said Mrs. M. M. R. Boatwright. The said parties agreed upon B. F. Roberts as the contractor to build said dwelling house, he furnishing all the material necessary therefor, and the said North Augusta Electric & Improvement Company agreed to pay said sum of $1,800 for the erection of said dwelling house according to the plans and specifications hereinbefore referred to. The said North Augusta Electric & Improvement Company furnished the sum of $1,350 to pay for the material and labor used in the construction of said dwelling house, which latter was nearly completed. But it was also agreed upon between the North Augusta Electric & Improvement Company and Mrs. M. M. R. Boatwright and the contractor, B. F. Roberts, that all the material should be purchased from and furnished by the Builders' Supply Company, a corporation under the laws of Georgia, resident in the city of Augusta. After the payment to the said Builders' Supply Company of the $1,350, there was still a balance left unpaid, as they claim, of the sum of $541.81. This the North Augusta Electric & Improvement Company declined to pay. A mechanic's lien was filed in the office of the clerk of the court for Aiken county, S. C., whereby the Builders' Supply Company sought to enforce their lien to recover said $540.81. A petition was filed by them against said North Augusta Electric & Improvement Company and Mrs. M. M. R. Boatwright, as defendants. The petition gave a history of the engagements of these defendants, respectively, which has been heretofore sketched. Mrs. Boatwright did not contest the same, though she answered. The North Augusta Electric & Improvement Company filed an answer, in which they vigorously contested the petitioner's rights. By an order and agreement of the parties, the testimony of each side to the controversy was taken before the master. This testimony included not simply oral testimony of the parties, but the documents which had been signed, and which included Exhibits B, C, D, E, and F, as follows:

Exhibit B.

"State of Georgia, County of Richmond. This memorandum of agreement entered into this 14th day of August, 1902, between M. M. R. Boatwright, as party of the first part, and North Augusta Electric and Improvement Co., a corporation of the State of South Carolina, as party of the second part,

"Witnesseth, That the said party of the second part agrees to sell to the said party of the first part a certain house and lot in Aiken County, State of South Carolina, for the sum of $2,300, said house to be erected on a lot known as lots Nos. 4 and 5, block No. 10, on a plan of lots made by Charles Broeck, C. E., in 1891.

"The said party of the first part agrees to pay for the said house and lot the said sum of $3,300, payable $400 cash and the balance according to the tenor of certain promissory notes, to bear date the 14th day of September, 1902, which she hereby binds herself to execute and deliver to the said party of the second part on or before the said date, as follows: One note for the sum of $33.90, due the 14th day of October, 1902, and eighty-three other notes for the sum of $33.70 each, and due on the 14th day of each and every month thereafter for eighty-three consecutive months.

"In witness whereof, the said party of the first part has hereunto affixed her signature the day and year first above written. M. M. R. Boatwright.

"Witness: Crommelin Fleming."

Exhibit C.

"Augusta, Ga.

"This agreement, made the 13th day of August, in the year 1902, by and between B. F. Roberts, party of the first part (hereinafter designated the contractor), and M. M. R. Boatwright, party of the second part (hereinafter designated the owner),

"Witnesseth, That the contractor, in consideration of the fulfillment of the agreement

herein made by the owner, agrees with the said owner as follows:

"Article I. The contractor, under the direction and to the satisfaction of M. M. R. Boatwright and North Augusta Electric and Improvement Co., shall and will provide all the materials and perform all the work shown on the drawings furnished by M. M. R. Boatwright for a one and one-half story dwelling to be built on lots Nos. 4 and 5, in block 10, in North Augusta, S. C., according to the plans and specifications signed by the contractor and owner and made part of this agreement."

"Article III. No alterations shall be made in the work shown or described by the drawings, except upon an order of the owner, and when so made, the value of the work added or omitted shall be computed by the contractors and owners, and the amount so ascertained shall be added to or deducted from the contract price.

"Art. IV. The contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the owner, or her authorized representatives.

"Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being proved by the owners, the owner shall be at liberty, after ten (10) days' written notice to the contractor and bondsmen, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the owner shall prove that such refusal, neglect or failure is sufficient ground for such action, the owner shall be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to recover any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner.

"Art. VI. The contractor shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, October 12th, 1902. * * *"

"Art. IX. It is hereby mutually agreed between the parties hereto, that the sum to be paid by the owner to the contractor for said work and materials shall be $1,800, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the owner to the contractor in installments as follows: (¼) one-fourth when framed and raised. (¼) one-fourth when weather-boarded and covered. (¼) one-fourth when plastered and floored. (¼) one-fourth when completed according to plans and specifications which form a part of this contract. The final payment shall be made within ten days after the contract is fulfilled. If at any time there shall be any evidence of any lien or claim for which, if established, the owner of the said premises might become liable and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default.

"Art. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part and that no payment shall be construed to be an acceptance of defective work or improper material.

"Art. XI. The contractor shall during the progress of the work maintain full insurance on said work, in his own name and in the name of the bondsmen, against loss or damage by fire. The policies shall cover all work incorporated in the building, and all materials for the same in or about the premises, and shall be made payable to the parties hereto, as their interest may appear.

"Art. XII. The said parties, for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

"In witness thereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written. B. F. Roberts. [Seal.] M. M. R. Boatwright. [Seal.]"

Exhibit D.

"Contract.—This agreement made this 12th day of August, 1902, between B. F. Roberts, of the first part, and M. M. R. Boatwright, of the second part, both parties of the city of Augusta, State of Georgia,

"Witnesseth, That the party of the first part, for the consideration hereinafter named, covenants and agrees with the party of the second part, to perform in a faithful and

workmanlike manner, the following specified work:

"To build on West avenue, North Augusta, S. C., a frame residence, according to plans and specifications, said plans and specifications furnished by the party of the second part, and signed by the party of the second part for the purpose of identification, it being understood and agreed that the said plans and specifications, are not to be changed or altered in any way without first obtaining written consent from the party of the second part.

"In addition to the above, the party of the first part agrees to become responsible for all material delivered at the building. The work to commence on August 12, 1902, and to be completed on or before October 12, 1902, and it is further agreed that the party of the first part is to deliver the building complete, as per plans and specifications, at the time above stated free from all mechanics' or other liens of any kind whatsoever.

"And the party of the second part covenants and agrees with the party of the first part in consideration of the faithful performance of the above specified work, to pay to the party of the first part, the sum of $1,800, to be divided in four equal payments.

"It is mutually agreed between both parties, that the party of the first part is to purchase all material from the Builders' Supply Co., and in no event will the bills be allowed to exceed $1,400, and said $1,400 to be deducted from the contract price of $1,800, as above mentioned.

"B. F. Roberts,
"M. M. R. Boatwright."

Exhibit E.

This is an indemnity bond, signed by B. F. Roberts as principal, and by the American Bonding Trust Company, of Baltimore, as surety, said bond indemnifying the North Augusta Electric & Improvement Company in the sum of $1,000 against any default on the part of the said B. F. Roberts in the full and faithful performance of the contract which said bond recites he has entered into "for the erection and completion of a one and one-half story frame dwelling house to be built on lots 4 and 5, block No. 10, in North Augusta, in accordance with plans and specifications," which said house and lot is the house and lot upon which the lien is claimed in this action. This indemnity bond is dated July 31st, 1902.

Exhibit F.

This paper is a bond for title entered into between Mrs. M. M. R. Boatwright and the North Augusta Electric & Improvement Company on the 28th day of January, 1903. Said company obligates itself to sell to Mrs. Boatwright the identical house and lot upon which the lien in this action is claimed, "warranting same to be free from liens of every and any kind," in consideration of the payment of $3,231, and upon which amount it is acknowledged in said bond that the sum of $400 has already been paid.

The cause came on to be heard before his honor Judge James Aldrich, who pronounced the following decree:

"The defendant, the North Augusta Electric & Improvement Company, is a corporation created by and under the laws of the state of South Carolina. It owns a body of land on the Carolina side of the Savannah river, in Aiken county, a part of which is laid out in streets and lots, and is known as the town of North Augusta. The company sells these lots, and also contracts or erects residences upon them for the purchasers. The defendant Mrs. M. M. R. Boatwright is the wife of A. M. Boatwright, and in 1902 they resided in Augusta, Ga. Mrs. Boatwright desired to purchase a lot or lots in North Augusta from the North Augusta Electric & Improvement Company. A. M. Boatwright, her husband, acted as her agent in the premises. Besides purchasing a lot, Mrs. Boatwright desired the company to erect a house upon the lots, and for the company to sell her the house and lot. Mrs. Boatwright obtained plans and specifications according to which the said house was to be built, and the bids of these different contractors for building the house. These she submitted to the company. B. F. Roberts, a contractor, submitted a bid to build the said house for $1,800, which attracted the attention of Mrs. Boatwright. On August 14, 1902, Mrs. Boatwright entered into a written agreement to purchase from the said company a lot of land known as lots Nos. 4 and 5, block 10, on a plan of lots made by Charles Broeck, C. E., in 1891, upon which the said company obligated itself to erect a certain house according to certain plans and specifications, to cost $1,800. She agreed to pay said company for said house, to be built, and the lot upon which it was to be erected, $2,300. This amount was to be paid, according to said memorandum, $400, cash, and the balance according to the tenor of certain promissory notes, to bear date of the 14th day of September, 1902, which she was to execute—eighty-four notes in all, one for each month, for eighty-four consecutive months. These matters are all set out in Exhibit B, included in the testimony. Mrs. Boatwright paid the cash as required, to the satisfaction of the company.

"The North Augusta Electric & Improvement Company authorized and allowed Mrs. Boatwright to enter into a written contract with the said B. F. Roberts to build for her a house, according to the plans and specifications above referred to, for the sum of $1,800. This contract is marked 'Exhibit C,' is under seal, and dated August 13, 1902. The same contract, not under seal, expressed in other language, and dated August 12, 1902, is submitted in evidence as Exhibit D.

"The contract Exhibit D contains this

stipulation: 'It is mutually agreed between the parties that the party of the first part, B. F. Roberts, is to purchase all material from the Builders' Supply Company, and in no event will the bill be allowed to exceed $1,400, and said $1,400 to be deducted from the contract price of $1,800, as above mentioned.' The agreement of August 13, 1902, contains the provision that Roberts is to perform the contract 'under the direction and to the satisfaction of M. M. R. Boatwright and North Augusta Electric and Improvement Co.'

"All the papers, contracts, heretofore mentioned were, as matter of fact, entered into August 14, 1902, the date of the agreement wherein Mrs. Boatwright and the company contracted for the house and lot. Under these contracts B. F. Roberts began the erection of the said house, and purchased from the plaintiff, the Builders' Supply Company, material used in the erection of said house, and obtained money alleged to be used for paying the laborers employed in building it. Upon both of these there is a balance alleged to be due.

"On July 31, 1902, the North Augusta Electric & Improvement Company required B. F. Roberts to enter into a bond to said company, with the American Bonding & Trust Company of Baltimore City as surety, in the sum of $1,000, conditioned, inter alia, for the erection and completion of a one and one-half story frame building house, to be built on lots 4 and 5 in block 10, North Augusta, S. C., in accordance with plans and specifications. B. F. Roberts, it is alleged, not only obtained materials and money, as stated, from the Builders' Supply Company, but also failed to pay for same and to complete the house. It is also alleged that Mrs. Boatwright, at her own expense, placed conveniences, ornaments, etc., in the building. She is now in possession of the house. Roberts, some time after he ceased work upon the house, was adjudged a bankrupt.

"On January 28, 1903, in pursuance of the agreement of August 14, 1902, the North Augusta Electric & Improvement Company executed and delivered to Mrs. Boatwright the bond for title set up in the evidence as Exhibit F, in which said company obligated itself to make good and sufficient title to the said lots and house, warranting the same to be 'free from lien of every and all kinds.' The North Augusta Electric & Improvement Company paid a large portion of the $1,800 which it agreed to pay for the erection of the said house, but had not paid the full amount. Said company not only authorized and permitted Mrs. Boatwright to enter into the building contract with Roberts, but also maintained a supervision of the building, and paid the money which went to Roberts and to the plaintiff, or certainly a large part of it. These figures will be considered further on. It appears that the construction of the house cost more than $1,800, which, under the contract of the North Augusta Electric & Improvement Co., it was to cost.

"On February 10, 1903, the plaintiff filed its lien in this proceeding, and the complaint and petition herein were served on May 18, 1903. The lien is claimed against both defendants. The materials and cash, according to the lien as filed, was furnished by plaintiff from August 14, 1902, the date of the first charge, up to November 12, 1902, the date of the last charge. The total amounts to $2,057.85, various payments and credits allowed, made August 30 to November 12, 1903, aggregate $1,517.04; leaving a balance, as alleged in the complaint or petition herein, of $540.81, the amount for which plaintiff demands judgment. Of the amount, to wit, $540.81, $439.23 is for materials furnished by plaintiff, and used in the erection of the house; $101.58 was the cash furnished by plaintiff to Roberts with which to pay his laborers, and by him paid to them.

"On August 15, 1902, B. F. Roberts gave an order upon the North Augusta Electric & Improvement Company as follows: 'Gentlemen: You will please pay to A. M. Boatwright all money when due on contract for residence of M. M. R. Boatwright. [Signed] B. F. Roberts.' And on the back of this order appears: 'Pay to the order of the Builders' Supply Co. [Signed] A. M. Boatwright. August 15, 1902.'

"The North Augusta Electric and Improvement Co. has paid $1,350, and this has gone to the plaintiff company, and has been credited upon its account against B. F. Roberts.

"I have considered the accounts as stated in the lien filed, and find it to be as follows:

"Total		$2,057 85
Credits allowed (errors, etc.)	$ 167 04	
Material	1,337 23	
Cash	553 58	
	$2,057 85	$2,057 85

"Stated according to application:

Total		$2,057 85
To cash	$ 452 00	
To material	898 00	
To credits allowed	167 04	
To unpaid cash	101 58	
To unpaid for material	439 23	
	$2,057 85	$2,057 85

"The evidence is long, and I shall refer to it. (1) Has the plaintiff a lien upon the lot in question (described in the lien and petition) in any amount? (2) If so, what is the amount of said lien for material? (3) Has plaintiff a lien in any amount for cash furnished to be expended for labor upon the house? (4) If a lien for cash, in what amount?

"The plaintiff or petitioner claims its lien under section 3008 of the Civil Code of 1902, of this state, which reads: 'Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration, or repairs of any building or structure upon any real estate, by virtue of an agreement with or by consent of the owner of such building

or structure, or any person having authority from, or rightly acting for, such owner, in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due to him, and the costs which may arise in enforcing such lien under this chapter, except as is provided in the following section.' The material was furnished by the plaintiff by the 'consent' of the 'owner,' and 'by virtue of an agreement with' 'a person having authority from' and 'rightfully acting for such owner' in 'procuring' such materials. I have construed the word 'consent' as defined in Geddes v. Bowden, 19 S. C. 1, and Gray v. Walker, 16 S. C. 147, in implying something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which, but for the consent, could not exist, and which the party consenting has the right to forbid. The North Augusta Electric & Improvement Company was to sell the lot with the house to be erected at its expense to Mrs. Boatwright. The sale was to be consummated after the completion of the house at the expense of the company. This company ratified the agreement on January 28, 1902, when it executed and delivered to Mrs. Boatwright its second bond for title, and upon which said company acknowledges the receipt of $400. The Electric & Improvement Company, after contracting—indeed, before the contract of the sale to Mrs. Boatwright was made—knew of the plans and specifications proposed by Mrs. Boatwright's agent, and the improvement company agreed to build that house for $1,800. The improvement company required a bond from Roberts, the contractor, to build the house, etc., according to these specifications. This security bond is dated July 31, 1902, conditioned to properly build, etc., the house which said company in the next month (August) obligated itself to erect for and sell to Mrs. Boatwright. The improvement company authorized, and indeed, in part, prepared, the contract to build, entered into between Mrs. Boatwright and Roberts. Mrs. Boatwright was acting as the agent of the North Augusta Electric & Improvement Company. The fact that Mrs. Boatwright signed papers in her own name is not material. If she was acting for said improvement company, with their consent, as their agent, her failure to reveal her 'undisclosed principal' would not relieve the company. The responsibility of the improvement company can be and is revealed by the circumstances of the case, the documentary and oral testimony, and the ratification of said contract by said company. Without citing in full, I refer to the law upon the subject. Mechem on Agency, §§ 449, 695, 701, 702; Story on Agency, § 160a; Dupont v. Mt. Pleasant Co., 9 Rich. Law, 258; 1 A. & E. Ency. (2d Ed.) pp. 1050, 1054; Bacon v. Soudley, 5 Rich. 542, 51 Am. Dec. 646; Nash v. Towne, 5 Wall. 703, 704, 18 L. Ed. 527.

"The following circumstances and oral testimony clearly show that Mrs. Boatwright, when she signed the contract with Roberts to erect the house, was acting for the North Augusta Electric & Improvement Company, with its consent and authority, and not for herself: First, the company had contracted to build the house; second, the company owned the land on which the house was to be built; third, the company by its general manager, directed and authorized Mrs. Boatwright to contract with Roberts; fourth, the company, by its officers, supervised and directed said contract; fifth, the company required and obtained a bond from Roberts to protect itself, not Mrs. Boatwright, for the faithful performance of the contract between Mrs. Boatwright and Roberts; sixth, the company accepted the entire benefits of said contract; seventh, the improvement company, with full knowledge of all facts, paid to the plaintiff company $1,350; eighth, the second bond for title of the improvement company to Mrs. Boatwright for the lot and the house as erected, the company accepted with knowledge the benefits of said contract. See Welch v. Mfg. Co., 55 S. C. 396, 33 S. E. 739.

"I conclude that the plaintiffs have a lien for the materials furnished and actually used in the construction of the house upon the lot upon which it is constructed.

"The North Augusta Electric & Improvement Company is the owner of the lot and house. Mrs. Boatwright is not the legal owner of the same. She has an equitable interest in the property, but no title therefor. I need not discuss her interests here, for the judgment must be against the improvement company, whose title is superior to the interest of Mrs. Boatwright.

"The North Augusta Electric & Improvement Company has paid $1,350 on its obligation for $1,800, and this has been paid to the plaintiff company. Of this amount, to wit, $1,250, the sum of $452 was applied to the payment of $353.58, the cash advanced by the plaintiff company to the payment of the laborers engaged in the construction of the house in question. The unpaid balance for the cash that was advanced by plaintiff, amounting to $101.58, is claimed by the plaintiff under this lien proceeding. The North Augusta Electric & Improvement Company contends (1) that plaintiff cannot collect the $101.58 in this lien proceeding, because it is not a debt due for labor performed or furnished; and (2) that the plaintiff had no right to apply the $452 upon the cash items.

"The first contention of the defendant company is sustained. Plaintiff neither performed nor furnished any labor for the erection of the house. Plaintiff, with the consent of the improvement company and of Mrs.

Boatwright, advanced the money to pay the wages of the laborers, so that the work could go on. This, at most, was a loan of money, and does not come within the provision of the statute. This statute is in derogation of common law, and must be strictly construed, and plaintiff for these items is not within the pale thereof. These items are refused. Gray v. Walker, 16 S. C. 143; Geddes v. Bowden, 19 S. C. 1.

"The $452 of the improvement company applied long ago to the payment of plaintiff's cash advancements was legally so applied, and that matter ended.

"As we have seen, the improvement company and Mrs. Boatwright consented to and authorized such advancements by plaintiff. It was a debt due to plaintiff for which the improvement company was liable. The improvement company paid the money without instruction as to its application. The improvement company owed the plaintiff company two debts, so to speak: (1) for materials furnished, for which plaintiff had a lien; and (2) for cash advanced and for which plaintiff had no security. The improvement company paid the money without any direction as to its application, and in that way it was received by the plaintiff. Under these circumstances, it could apply the payment to either debt; and, in so far as it actually applied such payments to the satisfaction of the debts for cash advanced, it acted legally within the scope of its rights, and the improvement company cannot now disturb those payments. This contention of the North Augusta Electric & Improvement Company is disallowed and rejected.

"The balance due upon the debt, as appears from the account of the North Augusta Electric & Improvement Company, to plaintiff for materials furnished and used in the construction of the said house, is $439.23; and for this amount plaintiff is entitled, together with the costs and disbursements of this proceeding."

To this decree the following exceptions were exhibited by the North Augusta Electric & Improvement Company:

"First. His honor erred in not finding that the plaintiff had failed to sustain its lien, and in not dismissing the complaint on the ground that there was a fatal variance betwen the allegata and probata, in this: that the complaint alleges that the material and cash for which the lien is claimed was sold, delivered, and furnished by the plaintiff to the agents, representatives and servants of the defendant North Augusta Electric & Improvement Company, by virtue of a contract or agreement with the agents, representatives, and servants of said defendant, whereas the undisputed evidence shows that whatever contract or agreement was entered into by the plaintiff for the sale and furnishing of material and cash was entered into, not with the agents, representatives, or servants of said defendant, but with an independent contractor, to wit, B. F. Roberts, and that the plaintiff sold, delivered, and furnished the said material and cash to him, and not to the agents, representatives, or servants of said defendant, as alleged in the complaint.

"Second. His honor erred in finding that the plaintiff was entitled to a lien under section 3008 of the Code, for the reason that said section is not applicable to subcontractors or persons dealing with an original contractor, and the undisputed evidence shows that the plaintiff was a subcontractor, and was dealing with an original contractor, B. F. Roberts, in furnishing the material and cash for which the lien is claimed.

"Third. He further erred in finding that the plaintiff was entitled to a lien under section 3008 of the Civil Code of 1902, and that there had been a sufficient agreement or consent on the part of the defendant North Augusta Electric & Improvement Company to the furnishing of the alleged material and cash to entitle plaintiff to a lien even under said section 3008.

"Fourth. His honor erred in not finding that the plaintiff was a subcontractor or person dealing with an original contractor, and, as such, if entitled to a lien at all, was entitled only upon compliance with the provisions of section 3009 of the Code, and, further, in not finding that the plaintiff was not entitled to the lien claimed, nor to any lien whatever, because the evidence shows a failure on its part to give notice in writing, as required by said section, to the defendant North Augusta Electric & Improvement Company, as the owner, or to its lawful agent, and also to the original contractor, B. F. Roberts, that it intended to claim such a lien.

"Fifth. His honor erred in finding as a fact that the defendant North Augusta Electric & Improvement Company exercised or maintained a supervision over the construction of the house.

"Sixth. His honor erred in finding generally that Mrs. M. M. R. Boatwright was the agent of the defendant the North Augusta Electric & Improvement Company, and should have found that she was only its special agent for a particular purpose, to wit, the entering into a contract with B. F. Roberts for the construction of a house according to the plans and specifications submitted, at and for the sum of $1,800. He should have further found that the authority of Mrs. Boatwright as such agent was limited by the scope of her special agency, and to the particular purpose for which she was appointed, and that the plaintiff had notice of the special character of her agency and the limited scope of her authority. He should have further found that she was not acting within the scope of her authority as agent of the defendant, so as to bind the defendant, in entering into the stipulation or agreement contained in the contract of August 12th, between herself and B. F. Roberts,

that the said Roberts should purchase all material from the plaintiff.

"Seventh. His honor erred in finding that the fact that the defendant North Augusta Electric & Improvement Company, consented to and authorized the advance of cash by the plaintiff to pay the wages of the laborers, and should have found instead that whatever cash was advanced for labor by the plaintiff was advanced by it to the original contractor, B. F. Roberts, pursuant to an understanding and agreement between plaintiff and said Roberts, entered into without the authority or consent of said defendant, and in not further finding that when James R. League, said defendant's agent, was first informed by A. M. Boatwright of the existence of said agreement and arrangement, he notified said Boatwright, as agent of plaintiff, that said defendant was not a party to, nor in any way bound by, such agreement.

"Eighth. His honor erred in finding that the advances of cash by plaintiff to B. F. Roberts was (a) one of two debts owed the plaintiff by the defendant; and (b) constituted a debt due to plaintiff for which the defendant was liable; the error in finding being that (a) such advances was not a debt owed primarily by the defendant to plaintiff, because they were not made to plaintiff, nor at its request; (b) such advances did not constitute a debt due to plaintiff for which the defendant was liable, because (a) the defendant did not promise to repay such advances made by plaintiff to Roberts, and (b) such promise, if made at all, is not shown to have been in writing, and, being a special promise on the part of defendant to answer for the debt, default, or miscarriage of another, to wit, B. F. Roberts, is not a promise upon which defendant can be charged.

"Ninth. His honor erred in finding that the plaintiff could apply the money received by it from the defendant to the payment of the debt due plaintiff by B. F. Roberts for cash advanced him, because (a) said debt was not a debt due by defendant, or with which defendant could be charged; and (b) the stipulation contained in the contract or agreement between B. F. Roberts and Mrs. M. M. R. Boatwright of August 12, 1902, providing that the said Roberts should purchase all material for the construction of the house from plaintiff, which plaintiff had knowledge of before furnishing material, and relies on as the consent on the part of the defendant to the furnishing of the material necessary to establish its lien, expressly provides that in no event should the bills for such materials be allowed to exceed $1,400, and that said $1,400 was to be deducted from the contract price of $1,800, which defendant had agreed to pay for the construction of the house. His honor should have found, therefore, that the plaintiff, claiming under this stipulation, was bound by it, and that, in pursuance thereof, it should have deducted the amount due for material first from the payments as made by defendant on account of the contract price up to $1,400, and applied the balance, if any, to the repayment of the cash advanced Roberts.

"Tenth. His honor erred in not finding that the following items set forth in the bill of particulars attached to the complaint were improperly charged against the defendant North Augusta Electric & Improvement Company as cash advanced for the payment of labor, and in not striking the same or portions thereof for the reasons given, to wit: (1) Item of $30 charged as cash August 16th, because the evidence shows that the same was advanced to Roberts, and by him expended in the payment of a note given by his wife to the Union Savings Bank, which he had indorsed. (2) Item of $100 charged as cash August 30th, because the evidence shows that $49 thereof was deposited in bank by Roberts, and thereafter included in a check given by him to Mrs. S. E. Slack in payment of an indebtedness not in any way connected with the labor on the house. (3) Item of $116 charged as cash September 16th, because the evidence shows that $40 thereof was used and expended in taking up a note given by B. F. Roberts to the Irish-American Bank, and indorsed by A. M. Boatwright. (4) Item of $43 charged as cash November 13th, because the evidence shows that the same was used and expended in taking up two notes given by B. F. Roberts to the Irish-American Bank, and indorsed by A. M. Boatwright—the one for $13, and the other for $30."

The Builders' Supply Company filed the following additional grounds in support of the circuit judge in his decree: "As to the $452 which has been applied by the plaintiff company to the partial extinguishment of the cash account, which cash account, Judge Aldrich found, as a matter of fact, the defendant company was responsible for as an open account, and which finding is excepted to by the defendant company, it is respectfully submitted as an additional ground for sustaining Judge Aldrich's finding that the application as made was legal; that, even should the court find (contrary to Judge Aldrich's finding, which, however, we submit should be sustained) that the defendant company was in no wise responsible for the cash account, still we submit that the application was perfectly legal, for the reason that the money so applied was paid by the defendant company to the plaintiff company upon a written order of Roberts. Thereby Roberts, in legal effect, we submit, himself paid over the whole $1,350 to the plaintiff, and orally, as we shall show, directed and consented to the application which was made; $452 being applied to cash account of $553.58, and $898 to the material account of $1,337.23, which Judge Aldrich finds the defendant company is bound to pay in full under the lien law."

The following exception to said decree

was filed by plaintiff: "That his honor erred in not finding for the plaintiff in the full sum claimed, viz., $540.81, thereby including the $101.58, which, it appears, remains unpaid on the cash account; it being submitted that it appears from the evidence that plaintiff furnished $553.58 to pay laborers to work on the house in question, which said cash was actually used for labor actually done upon the house in question with the consent (in the statutory sense) of defendant company. Hence we submit that he should have held that plaintiff, in reality and in fact, furnished labor upon said house, and should have granted them a lien for the balance due thereon, viz., $101.58."

What we shall say in discussing these exceptions may be premised by these observations: After a careful examination of all this testimony, oral and documentary, we are satisfied, as the circuit judge was, that Exhibits B, C, and D were signed at the same time and place, to wit, in the office of the defendant North Augusta Electric & Improvement Company, and, furthermore, that the defendant M. M. R. Boatwright acted as the agent of said North Augusta Electric & Improvement Company. We may remark just here that hereafter we shall refer to the defendant North Augusta Electric & Improvement Company as the "North Augusta Company," and the plaintiff as the "Builders' Company." It appears also by the evidence that the contractor, B. F. Roberts, in writing, directed the North Augusta Company to pay amounts coming to him to the Builders' Company, which was done to the extent of $1,350, which payments left $450 of the sum of $1,800 still to be paid to B. F. Roberts upon the completion of his contract. Quite a contention has arisen amongst the parties hereto as to what law of this state it was expected that the lien, if any, should fall under; the plaintiff contending that section 3008 of the Code of Laws of this state of 1902 should govern, and which appears to be set out in full in the judge's decree, while the defendant the North Augusta Company claims that section 3009 is alone applicable, which, if so, would plainly prevent any recovery by the plaintiff, because of failure to give the notice in writing therein required. The judge held that section 3008 was the governing law, and we are inclined to think that he was correct, in view of his findings of fact that Exhibits B, C, and D were also all signed by Mrs. M. M. R. Boatwright as the agent of the North Augusta Company. We think the circuit judge has given most excellent reasons why she was obliged to be the agent of said North Augusta Company. The land upon which the dwelling house was erected was and is the property of the defendant North Augusta Company. Said company agreed, after certain conditions were complied with by Mrs. Boatwright, to convey to her said house and lot, freed from all claims and liens. The further fact was that the North Augusta Company took and holds the bond of B. F. Roberts, signed by the Baltimore Surety Company, to hold the said North Augusta Company harmless for the acts and doings of B. F. Roberts in and about the building of such dwelling house. It should still be remembered that all of the parties—the Builders' Company, the North Augusta Company, Mrs. M. M. R. Boatwright, and B. F. Roberts—knew and agreed that the limitations upon the expenditures for which the North Augusta Company was responsible in and about the construction of this dwelling house was the sum of $1,800. Now, with this understanding, let us consider the exceptions:

(1) We cannot agree with this view of the appellant, for the reason that it asserts that the allegata and probata were at fatal variance. Reference to the complaint, however, will show that this claim is not well taken, for the second allegation in the complaint reads: "Plaintiff, by virtue of a contract and agreement with the agents of the defendant, furnished and sold to said agents, who were duly authorized to make such contract, and with the consent of said defendant, certain articles of material, cash," etc. Here the complaint alleges that the articles were sold not only upon a contract, but the complaint goes on to state with the consent of the said defendant. We are satisfied with the circuit judge's conclusion in this matter. This exception is therefore overruled.

We will next take up the second, third, and fourth exceptions. The question really presented by these exceptions is, was the consent of the defendant North Augusta Company to the furnishing of all materials by the plaintiff made to appear? This is no longer a vexed question in this state, since the decision of Geddes v. Bowden, 19 S. C. 17. It is there stated: "It is, however, contended that the labor and material were furnished by the appellant with the consent of the owners, and it is necessary, therefore, to determine the meaning of the word 'consent,' as used in this statute. The word 'consent' implies 'choice,' and one can scarcely be regarded as giving his consent to that which he has no right to object to. In the experience of life, man is oftentimes compelled to accept results, in the sense that he makes no objection or opposition thereto, for the reason that he has no right or power so to do; but he cannot in any proper sense of the term be regarded as consenting to them unless he has the right and the power to exercise a choice to consent or object thereto. As is well said by Mr. Justice Simpson in Gray v. Walker, 16 S. C. 147, in construing this statute: 'Consent here, we think, implies something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which but for the consent could not exist, and which the party consenting has the right

to forbid.'" In this case the defendant North Augusta Company owned this land. They had agreed to build a 1½ story dwelling house thereon, and to convey the same, free of all claims and liens, to the defendant Mrs. Boatwright. They had agreed to limit themselves to the sum of $1,800 for the building and material in said building. Who was in a position better than they to consent to all these things? How was it to be done, except with their money being paid for them? It is idle to speak of any other conclusion. These exceptions are therefore overruled.

The fifth exception involves a pure question of fact, namely, was the defendant North Augusta Company exercising a supervisory control over the construction of the house? We agree with the circuit judge that the testimony plainly establishes that fact. It is true, their agent, Mr. League, was only proved to be at the house two or three times; but their otherwise agent was there many, many times. This exception, therefore, is overruled.

We will now consider the sixth exception. We cannot agree with the appellant, North Augusta Company, that Mrs. Boatwright was only the special agent of said company for a particular purpose, to wit, the entering into of a contract with Mr. Roberts for the construction of a house according to the plans and specifications submitted for and at the sum of $1,800, for to our minds the testimony, both oral and documentary, well established her agency in other respects as found by the circuit judge. We therefore overrule this exception.

We will now consider the seventh, eighth, and ninth exceptions. We take this view as a practical matter: The defendant North Augusta Company had agreed to build this dwelling house, and deliver it finished to their codefendant, Mrs. Boatwright. To furnish labor and material necessary to the erection of such dwelling house was, in contemplation of law, their duty. By the terms of their contract, they paid $1,350. The application of such $1,350 to the payment of the cost of labor and the cost of material was a matter which did not greatly concern them, so long as kept within reasonable limits, because labor had to be furnished, and, to be furnished, had to be paid for, and cash must be furnished for that purpose, and such was the actual application of this money. We agree with the circuit judge, therefore, in his conclusions in regard to these matters, and hence we overrule these exceptions.

We will now consider the tenth exception. We do not see that there is any force in the items referred to in this exception, and, after a thorough consideration of the testimony, we overrule the same.

But now, as to the Builders' Supply Company, we are not satisfied that the lien, under section 3008 of our Code of Laws of 1902, should cover anything else than the $1,800 which had been agreed upon by all parties as the limit of the money to be paid by the defendant North Augusta Company for the construction of this dwelling house. It has paid all but $450 that it stipulated to pay. This should be the difference between $1,800 and $1,350, to wit, $450, which should be the limit of the recovery of the plaintiff, Builders' Supply Company, of the defendant North Augusta Electric & Improvement Company. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be modified by inserting the sum of $450, instead of $439.23, as the amount in which the North Augusta Electric & Improvement Company is indebted to the plaintiff upon the lien described in these proceedings, and in all other respects the judgment of the circuit court is affirmed.

GARY, A. J., did not sit in this case, because of illness.

(71 S. C. 404)

ROBERTS v. JONES.

(Supreme Court of South Carolina. April 15, 1905.)

1. COUNTERCLAIM—ACTION FOR TORT.
In an action for damages for tort, a counterclaim arising out of tort is no defense.
[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Set-Off and Counterclaim, § 17.]

2. RES JUDICATA.
Where a circuit court on appeal from a magistrate does not hear the case on the merits, his findings are not binding on a succeeding judge on appeal from a new trial ordered by such judge.
[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1009.]

3. LEASE—AGRICULTURAL PURPOSES.
Where a dwelling house and about 20 acres of land were rented for a term of 14 months, and the tenant agrees to pay his rent in lint cotton and cotton seed, the renting was for agricultural purposes.

4. APPEAL—REVIEW.
The findings of a circuit court on appeal from a magistrate are not reviewable in the Supreme Court.

5. AGRICULTURAL LEASE—RIGHT TO MANURE.
Where lands were rented for agricultural purposes, the manure, at the conclusion of the lease, should not be disturbed by the tenant.
[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 491.]

Appeal from Common Pleas Circuit Court of Anderson County; Townsend, Judge.

Action by James T. Roberts against J. T. C. Jones. From a judgment for plaintiff on appeal from the magistrate, defendant appeals. Affirmed.

The rent contract in question is as follows: "This indenture, made and entered into between * * * witness: That the party of the first part has agreed to rent, and does hereby rent, to the party of the second part * * * consisting of dwelling house and about twenty acres of land, it being all the land in cultivation of what is known as the Jno. Catlett place, and also about two acres

on the old Anderson place, said Jas. T. Roberts reserving the house on the Anderson place, for the term of fourteen months, beginning on the 25th day of October, 1900, and ending on the 25th day of December, 1901. And the party of the second part hereby agrees to rent, and does rent, the said premises for the period hereinbefore set forth, and agrees to pay as rent therefor the sum of $120, 1,000 pounds of middling lint cotton and 60 bushels of cotton seed, on the 15th day of October, 1901. And he further agrees to take good care of premises, and deliver them to the lessor at the expiration of this lease in as good repair as when he received them, ordinary wear and tear excepted."

Breazeale & Rucker, for appellant. A. H. Dagnall, for respondent.

POPE, C. J. This action has had four trials in the magistrate court—two before Magistrate B. F. Wilson, and two before Magistrate J. A. O'Neal. The verdict of the jury in the last case tried before Magistrate O'Neal was in favor of the defendant for $1 on his counterclaim, from which judgment the plaintiff appealed, and the matter came on to be heard before Judge Townsend in the court of common pleas for Anderson county, who reversed the decision of the magistrate court, and gave the plaintiff a judgment for $12; and from this judgment the defendant appealed on the following grounds: "(1) Because his honor erred in deciding that the counterclaim of the defendant could not be set up in the case, under section 171 of the Code of Civil Procedure of 1902, when he should have decided that said claim was one 'arising out of the contract or transaction' upon which the plaintiff brought his action, and was properly pleaded under said section of the Code. (2) Because his honor erred in deciding that said counterclaim could not be set up, when he should have decided that said claim was 'connected with the subject of the action,' to wit, the rights of the parties to the manure on the leased premises during the term of the tenancy under the contract, and that the magistrate was correct in so holding. (3) Because his honor erred in deciding that said counterclaim could not be set up, when he should have decided that plaintiff's action was one arising on a contract, was sued on as such, and that the counterclaim, being one arising out of a contract, was properly pleaded. (4) Because his honor erred in deciding that, even if the counterclaim could be sustained, that the manure was the property of the plaintiff, and he was entitled to its use, when he should have decided that under the contract the leased premises was the defendant's during the term of his tenancy, and the defendant was entitled to the use of the manure on said premises for use on said premises, and the plaintiff had no right to remove it, especially as said manure was not reserved by the contract, and a part of it was made by defendant's own stock. (5) Because his honor erred in deciding that the premises leased were used for agricultural purposes, when said question adjudicated by Judge Purdy that a portion of the premises leased were for agricultural purposes, and should have decided that there is nothing on the face of said contract to show that the premises were leased for agricultural purposes, and that the evidence showed the primary object of the renting was that the defendant might secure a residence for himself and family near his place of business, as county dispenser. (6) Because his honor erred in finding as a matter of fact 'that all the manure removed by the plaintiff was the property of the plaintiff,' when he should have found that under the lease contract the manure on the premises, or to be made thereon, was not reserved, and the defendant was entitled to its use upon the rented premises, and the plaintiff had no right to take any manure therefrom, whether made by his own horse, which was permitted to be kept there for accommodation, or by the defendant's stock; and that the defendant had a right of action for the value of the manure so removed. (7) Because his honor erred in finding that the manure removed by the defendant was plaintiff's, when he should have decided that, even if the contract was an agricultural one, that plaintiff could only claim the manure made in the usual mode of agriculture from products of the farm, and that the defendant was entitled to the manure made by stock in excess of that maintained by the products produced elsewhere, and that he did not remove more than said excess. When the undisputed evidence shows that he bought feed for his stock amounting to four times as much as was produced on farm, and that he only worked fifteen acres of land, a little more than a half of a one-horse crop, and kept one horse, one mule, and a cow, and only removed the manure made in three months of the fifteen months of the tenancy. (8) Because his honor erred in practically finding that the landlord in case of a tenancy has the right to enter the premises of his tenant, and remove therefrom any manure on the leased premises, and thus deprive the tenant of using it on the rented premises, and that all manure made by the tenant, even from stock not used on the premises for agricultural purposes, belongs to the landlord, and that the tenant has no right or title thereto whatever. (9) Because his honor erred in finding that the manure removed by the defendant was of the value of $12, when the plaintiff admitted he had been buying it for fifty cents per load, which would make it of the value of only $2. (10) Because his honor erred in deciding as a fact that the manure taken by defendant was plaintiff's, when he should have decided that a jury had found by this verdict, under a proper declaration of the law, that the defendant

was entitled to the manure, and that the evidence supported the verdict."

It will be better to reproduce the judgment on circuit, which was as follows: "This case came on for trial before me on July 4, 1904, on appeal from magistrate court from a verdict and judgment rendered in favor of the defendant for $1 against the plaintiff. The plaintiff appeals to this court on numerous exceptions from said verdict and judgment. This was an action brought by the plaintiff, J. T. Roberts, against the defendant, J. T. C. Jones, for $12, the alleged value of certain manure, which the plaintiff alleged was his property, and that the defendant converted the same to his own use, to the damage of plaintiff $12. The defendant, at the trial before the magistrate, set up as his defenses a general denial, and also a counterclaim against the plaintiff for other certain manure, which the defendant alleged was his property, and that plaintiff converted it to his own use, to the damage of defendant $12. The plaintiff demurred to the counterclaim, and the magistrate overruled the demurrer. The magistrate was in error in sustaining the counterclaim, but should have sustained the demurrer to the counterclaim, as under section 171 of the Code of Civil Procedure, vol. 2, 1902, a counterclaim cannot be set up in this case. But even if a counterclaim could be pleaded in this action, the evidence at the trial plainly shows that the manure removed by plaintiff was in his own property, and he was entitled to its use, and the jury erred in not so finding. The evidence was not sufficient for the jury to find for the defendant on the counterclaim. I find as a matter of fact that all of the manure removed by plaintiff from the leased premises was the property of the plaintiff. The premises leased was used for agricultural purposes, and in such cases the manure made upon the land should be left upon the land by the tenant. I find as a matter of fact that the manure which plaintiff alleges was his property in his complaint was made upon the leased premises. I find as a matter of fact that the defendant took and disposed of the manure, as it is alleged in complaint, and that the manure was of the value of $12. The exceptions of the plaintiff should be sustained. It is the order of the court, that the verdict and judgment of the magistrate's court be, and the same is hereby, reversed, and it is the further order of the court that the plaintiff have judgment against the defendant for the sum of $12."

We will consider the above-quoted exceptions in their order.

1. The defendant contends that the judge erred in holding that the defendant's counterclaim could not be set up in the case, under section 171 of the Code of Civil Procedure, when he should have decided that the claim was one arising out of contract of transaction, upon which the plaintiff brought his action. The circuit judge held that the plaintiff's demurrer to the counterclaim should have been sustained; we suppose upon the ground that the counterclaim of the defendant was for a tort, just as the claim of the plaintiff was for a tort. This court held in the case of Simkins v. Railway Company, 20 S. C. 258, 269, that another counterclaim in tort cannot be interposed as a defense. The court said in the last case cited: "The alleged tort of the defendant, which constitutes the foundation of plaintiff's action, is the negligent running of defendant's cars by which his horses were killed. The alleged tort of plaintiff, which is the foundation of defendant's counterclaim, was the alleged illegal presence of his horses on the railroad track, by which the train was thrown from the track and the engine injured. The injury to the engine in point of time, it is true, followed in quick succession that of the injury to the horses; but it cannot be said that the illegal presence of the horses on the track, which is the foundation of defendant's counterclaim, arose out of the negligence of the defendant in running the cars, which is the foundation of plaintiff's action. Nor was it connected with the subject of plaintiff's action." Section 171 provides: "The counterclaim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." Subdivision 2 plays no part in this discussion, because it refers to a contract as its basis. Our attention is confined to subdivision 1. In the case of Simkins v. Railway, supra, the court says: "In most of the states having the Code similar provisions to ours in reference to the counterclaims have been adopted, and in some of the states the terms 'transaction,' 'arising out of,' 'subject of action,' and 'connected therewith' have been much discussed. The decisions are not uniform, and from them it is difficult to arrive at a definite and satisfactory conclusion. In some of the states, especially New York, the tendency has been to limit and narrow the meaning of these terms. In others the construction has been more liberal. In the first the principles of former doctrine of set-off and recoupment, which applied to actions ex contractu entirely, have controlled, more or less; in the latter it has been held that the terms 'transaction' and 'subject of action' mean something more than contract, and that, consequently, counterclaims may embrace other causes of action besides those arising in contract. This whole subject is fully discussed with great ability and per-

spicuity in Mr. Pomeroy's second edition of his Remedies and Remedial Rights, at section 734 et seq., 772. . And at section 790 will be found a discussion of the 'cases in which the demands of both parties are for damages arising from tort,' in which he says: 'Counterclaims of damages from torts, when attempted to be enforced against causes of action for damages also arising from other torts, have, with few exceptions, been rejected. The courts have been inclined to adopt, or at least assume as a general principle, that such a cross-demand can never arise from the transaction set forth by the plaintiff as the foundation of his claim.'" While the circuit judge has held, in effect, the foregoing, and that the testimony was not sufficient, even if the defendant's counterclaim was admissible, to allow the jury to find for the defendant on his counterclaim, and he found as a matter of fact that all the manure moved by plaintiff from the leased premises was the property of the plaintiff; but we agree with the circuit judge that the plaintiff's demurrer should have been sustained, and this ground of appeal therefore is overruled.

2. This is set aside, being included in the first ground of appeal. It is therefore overruled.

3 and 4. For the same reasons are these exceptions set aside, and we therefore overrule them.

5. Appellant claims that the circuit judge erred in deciding that the premises leased were used for agricultural purposes. Whatever Judge Purdy may have held in the first trial before the circuit court, his ruling was not binding upon Judge Townsend, because confessedly he did not hear the case upon its merits, and any purpose that the defendant might have had in renting the dwelling house as a place of residence could have no effect, for it was apparent from the contract that it was rented for agricultural purposes. We therefore overrule this exception.

6. We do not see that the question here raised could have any effect in reversing Judge Townsend's decision, because his finding of fact is not reviewable by us. This is a law case, and as such the findings of fact by the circuit judge are beyond our powers of control. So, therefore, when the circuit judge held that all of the manure removed by the plaintiff was the property of the plaintiff, such finding is conclusive upon us. As we understand this case, the manure was removed by the defendant from the plaintiff's premises at the very conclusion of his connection with the rented premises, and could not, therefore, be entitled to be used by the defendant upon the rented premises. This exception is therefore overruled.

7. In the 19th vol. of A. & E. Ency. of Law, p. 927, it is said: "Manure made in the usual course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it becomes appurtenant to and is treated as realty." In the ground of appeal the appellant (defendant) seems to admit that the lands were used for agricultural purposes. That being so, the manure on the premises at the conclusion of the lease by the defendant was a part of the realty, and should not have been disturbed by the appellant. This exception, therefore, is overruled.

8. We do not see how the question here suggested by the appellant is pertinent to this inquiry. The counterclaim that the defendant sought to set up has been decided to have been improperly so done. Therefore this question does not arise, and this exception is overruled.

9. The value fixed by the circuit judge to the manure, for which he held the defendant responsible to the plaintiff, was ascertained from the testimony of the circuit judge to have been for $12. We have no power to interfere with such valuation. This exception is therefore overruled.

10. We do not see how we can look at what was the verdict of the jury as to the ownership of the manure taken by the defendant. That is a question of fact, and we have no right to look back at the verdict of the jury. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed, and the action is remitted to the circuit court for the enforcement of such judgment.

(71 S. C. 528)

ZIMMERMAN v. AMERICAN TELEPHONE & TELEGRAPH CO.*

(Supreme Court of South Carolina. Feb. 15, 1904.)

1. TELEPHONE COMPANY—GRANT OF RIGHT OF WAY.

A grant of a telephone company to erect a line "over and along the property which I own or in which I have an interest," with a right to place poles along the highways adjoining the property, does not give a grant to erect a line diagonally across grantor's lot.

2. SAME—CONSTRUCTION OF GRANT.

Where a grant of a right to erect telephone poles did not authorize the construction of a line diagonally across the grantor's lot, it was more favorable to the telephone company than it was entitled to, for the court to charge that the contract was silent as to the location of the line, and to submit to the jury whether the location by the telephone company was within the contract.

Appeal from Common Pleas Circuit Court of Spartanburg County; Townsend, Judge.

Action by E. J. Zimmerman against the American Telephone & Telegraph Company. Judgment for plaintiff. and defendant appeals. Affirmed.

Ralph K. Carson, for appellant. D. E. Hydrick and Johnson & Nash, for respondent.

*Rehearing denied April 25, 1905.

workmanlike manner, the following specified work:

"To build on West avenue, North Augusta, S. C., a frame residence, according to plans and specifications, said plans and specifications furnished by the party of the second part, and signed by the party of the second part for the purpose of identification, it being understood and agreed that the said plans and specifications, are not to be changed or altered in any way without first obtaining written consent from the party of the second part.

"In addition to the above, the party of the first part agrees to become responsible for all material delivered at the building. The work to commence on August 12, 1902, and to be completed on or before October 12, 1902, and it is further agreed that the party of the first part is to deliver the building complete, as per plans and specifications, at the time above stated free from all mechanics' or other liens of any kind whatsoever.

"And the party of the second part covenants and agrees with the party of the first part in consideration of the faithful performance of the above specified work, to pay to the party of the first part, the sum of $1,800, to be divided in four equal payments.

"It is mutually agreed between both parties, that the party of the first part is to purchase all material from the Builders' Supply Co., and in no event will the bills be allowed to exceed $1,400, and said $1,400 to be deducted from the contract price of $1,800, as above mentioned.

"B. F. Roberts,
"M. M. R. Boatwright."

Exhibit E.

This is an indemnity bond, signed by B. F. Roberts as principal, and by the American Bonding Trust Company, of Baltimore, as surety, said bond indemnifying the North Augusta Electric & Improvement Company in the sum of $1,000 against any default on the part of the said B. F. Roberts in the full and faithful performance of the contract which said bond recites he has entered into "for the erection and completion of a one and one-half story frame dwelling house to be built on lots 4 and 5, block No. 10, in North Augusta, in accordance with plans and specifications," which said house and lot is the house and lot upon which the lien is claimed in this action. This indemnity bond is dated July 31st, 1902.

Exhibit F.

This paper is a bond for title entered into between Mrs. M. M. R. Boatwright and the North Augusta Electric & Improvement Company on the 28th day of January, 1903. Said company obligates itself to sell to Mrs. Boatwright the identical house and lot upon which the lien in this action is claimed, "warranting same to be free from liens of every and any kind," in consideration of the payment of $3,231, and upon which amount it is acknowledged in said bond that the sum of $400 has already been paid.

The cause came on to be heard before his honor Judge James Aldrich, who pronounced the following decree:

"The defendant, the North Augusta Electric & Improvement Company, is a corporation created by and under the laws of the state of South Carolina. It owns a body of land on the Carolina side of the Savannah river, in Aiken county, a part of which is laid out in streets and lots, and is known as the town of North Augusta. The company sells these lots, and also contracts or erects residences upon them for the purchasers. The defendant Mrs. M. M. R. Boatwright is the wife of A. M. Boatwright, and in 1902 they resided in Augusta, Ga. Mrs. Boatwright desired to purchase a lot or lots in North Augusta from the North Augusta Electric & Improvement Company. A. M. Boatwright, her husband, acted as her agent in the premises. Besides purchasing a lot, Mrs. Boatwright desired the company to erect a house upon the lots, and for the company to sell her the house and lot. Mrs. Boatwright obtained plans and specifications according to which the said house was to be built, and the bids of these different contractors for building the house. These she submitted to the company. B. F. Roberts, a contractor, submitted a bid to build the said house for $1,800, which attracted the attention of Mrs. Boatwright. On August 14, 1902, Mrs. Boatwright entered into a written agreement to purchase from the said company a lot of land known as lots Nos. 4 and 5, block 10, on a plan of lots made by Charles Broeck, C. E., in 1891, upon which the said company obligated itself to erect a certain house according to certain plans and specifications, to cost $1,800. She agreed to pay said company for said house, to be built, and the lot upon which it was to be erected, $2,300. This amount was to be paid, according to said memorandum, $400, cash, and the balance according to the tenor of certain promissory notes, to bear date of the 14th day of September, 1902, which she was to execute—eighty-four notes in all, one for each month, for eighty-four consecutive months. These matters are all set out in Exhibit B, included in the testimony. Mrs. Boatwright paid the cash as required, to the satisfaction of the company.

"The North Augusta Electric & Improvement Company authorized and allowed Mrs. Boatwright to enter into a written contract with the said B. F. Roberts to build for her a house, according to the plans and specifications above referred to, for the sum of $1,800. This contract is marked 'Exhibit C,' is under seal, and dated August 13, 1902. The same contract, not under seal, expressed in other language, and dated August 12, 1902, is submitted in evidence as Exhibit D.

"The contract Exhibit D contains this

stipulation: 'It is mutually agreed between the parties that the party of the first part, B. F. Roberts, is to purchase all material from the Builders' Supply Company, and in no event will the bill be allowed to exceed $1,400, and said $1,400 to be deducted from the contract price of $1,800, as above mentioned.' The agreement of August 13, 1902, contains the provision that Roberts is to perform the contract 'under the direction and to the satisfaction of M. M. R. Boatwright and North Augusta Electric and Improvement Co.'

"All the papers, contracts, heretofore mentioned were, as matter of fact, entered into August 14, 1902, the date of the agreement wherein Mrs. Boatwright and the company contracted for the house and lot. Under these contracts B. F. Roberts began the erection of the said house, and purchased from the plaintiff, the Builders' Supply Company, material used in the erection of said house, and obtained money alleged to be used for paying the laborers employed in building it. Upon both of these there is a balance alleged to be due.

"On July 31, 1902, the North Augusta Electric & Improvement Company required B. F. Roberts to enter into a bond to said company, with the American Bonding & Trust Company of Baltimore City as surety, in the sum of $1,000, conditioned, inter alia, for the erection and completion of a one and one-half story frame building house, to be built on lots 4 and 5 in block 10, North Augusta, S. C., in accordance with plans and specifications. B. F. Roberts, it is alleged, not only obtained materials and money, as stated, from the Builders' Supply Company, but also failed to pay for same and to complete the house. It is also alleged that Mrs. Boatwright, at her own expense, placed conveniences, ornaments, etc., in the building. She is now in possession of the house. Roberts, some time after he ceased work upon the house, was adjudged a bankrupt.

"On January 28, 1903, in pursuance of the agreement of August 14, 1902, the North Augusta Electric & Improvement Company executed and delivered to Mrs. Boatwright the bond for title set up in the evidence as Exhibit F, in which said company obligated itself to make good and sufficient title to the said lots and house, warranting the same to be 'free from lien of every and all kinds.' The North Augusta Electric & Improvement Company paid a large portion of the $1,800 which it agreed to pay for the erection of the said house, but had not paid the full amount. Said company not only authorized and permitted Mrs. Boatwright to enter into the building contract with Roberts, but also maintained a supervision of the building, and paid the money which went to Roberts and to the plaintiff, or certainly a large part of it. These figures will be considered further on. It appears that the construction of the house cost more than $1,800, which, under the contract of the North Augusta Electric & Improvement Co., it was to cost.

"On February 10, 1903, the plaintiff filed its lien in this proceeding, and the complaint and petition herein were served on May 18, 1903. The lien is claimed against both defendants. The materials and cash, according to the lien as filed, was furnished by plaintiff from August 14, 1902, the date of the first charge, up to November 12, 1902, the date of the last charge. The total amounts to $2,057.85, various payments and credits allowed, made August 30 to November 12, 1903, aggregate $1,517.04; leaving a balance, as alleged in the complaint or petition herein, of $540.81, the amount for which plaintiff demands judgment. Of the amount, to wit, $540.81, $439.23 is for materials furnished by plaintiff, and used in the erection of the house; $101.58 was the cash furnished by plaintiff to Roberts with which to pay his laborers, and by him paid to them.

"On August 15, 1902, B. F. Roberts gave an order upon the North Augusta Electric & Improvement Company as follows: 'Gentlemen: You will please pay to A. M. Boatwright all money when due on contract for residence of M. M. R. Boatwright. [Signed] B. F. Roberts.' And on the back of this order appears: 'Pay to the order of the Builders' Supply Co. [Signed] A. M. Boatwright. August 15, 1902.'

"The North Augusta Electric and Improvement Co. has paid $1,350, and this has gone to the plaintiff company, and has been credited upon its account against B. F. Roberts.

"I have considered the accounts as stated in the lien filed, and find it to be as follows:

"Total		$2,057 85
Credits allowed (errors, etc.)	$ 167 04	
Material	1,337 23	
Cash	553 58	
	$2,057 85	$2,057 85

"Stated according to application:

Total		$2,057 85
To cash	$ 452 00	
To material	898 00	
To credits allowed	167 04	
To unpaid cash	101 58	
To unpaid for material	439 23	
	$2,057 85	$2,057 85

"The evidence is long, and I shall refer to it. (1) Has the plaintiff a lien upon the lot in question (described in the lien and petition) in any amount? (2) If so, what is the amount of said lien for material? (3) Has plaintiff a lien in any amount for cash furnished to be expended for labor upon the house? (4) If a lien for cash, in what amount?

"The plaintiff or petitioner claims its lien under section 3008 of the Civil Code of 1902, of this state, which reads: 'Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration, or repairs of any building or structure upon any real estate, by virtue of an agreement with or by consent of the owner of such building

or structure, or any person having authority from, or rightly acting for, such owner, in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due to him, and the costs which may arise in enforcing such lien under this chapter, except as is provided in the following section.' The material was furnished by the plaintiff by the 'consent' of the 'owner,' and 'by virtue of an agreement with' 'a person having authority from' and 'rightfully acting for such owner' in 'procuring' such materials. I have construed the word 'consent' as defined in Geddes v. Bowden, 19 S. C. 1, and Gray v. Walker, 16 S. C. 147, in implying something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which, but for the consent, could not exist, and which the party consenting has the right to forbid. The North Augusta Electric & Improvement Company was to sell the lot with the house to be erected at its expense to Mrs. Boatwright. The sale was to be consummated after the completion of the house at the expense of the company. This company ratified the agreement on January 28, 1903, when it executed and delivered to Mrs. Boatwright its second bond for title, and upon which said company acknowledges the receipt of $400. The Electric & Improvement Company, after contracting—indeed, before the contract of the sale to Mrs. Boatwright was made—knew of the plans and specifications proposed by Mrs. Boatwright's agent, and the improvement company agreed to build that house for $1,800. The improvement company required a bond from Roberts, the contractor, to build the house, etc., according to these specifications. This security bond is dated July 31, 1902, conditioned to properly build, etc., the house which said company in the next month (August) obligated itself to erect for and sell to Mrs. Boatwright. The improvement company authorized, and indeed, in part, prepared, the contract to build, entered into between Mrs. Boatwright and Roberts. Mrs. Boatwright was acting as the agent of the North Augusta Electric & Improvement Company. The fact that Mrs. Boatwright signed papers in her own name is not material. If she was acting for said improvement company, with their consent, as their agent, her failure to reveal her 'undisclosed principal' would not relieve the company. The responsibility of the improvement company can be and is revealed by the circumstances of the case, the documentary and oral testimony, and the ratification of said contract by said company. Without citing in full, I refer to the law upon the subject. Mechem on Agency, §§ 449, 695, 701, 702; Story on Agency, § 160a; Dupont v. Mt. Pleasant Co., 9 Rich. Law, 258; 1 A. & E. Ency. (2d Ed.) pp. 1050, 1054; Bacon v. Sondley, 3 Strob. 542, 51 Am. Dec. 646; Nash v. Towne, 5 Wall. 703, 704, 18 L. Ed. 527.

"The following circumstances and oral testimony clearly show that Mrs. Boatwright, when she signed the contract with Roberts to erect the house, was acting for the North Augusta Electric & Improvement Company, with its consent and authority, and not for herself: First, the company had contracted to build the house; second, the company owned the land on which the house was to be built; third, the company by its general manager, directed and authorized Mrs. Boatwright to contract with Roberts; fourth, the company, by its officers, supervised and directed said contract; fifth, the company required and obtained a bond from Roberts to protect itself, not Mrs. Boatwright, for the faithful performance of the contract between Mrs. Boatwright and Roberts; sixth, the company accepted the entire benefits of said contract; seventh, the improvement company, with full knowledge of all facts, paid to the plaintiff company $1,350; eighth, the second bond for title of the improvement company to Mrs. Boatwright for the lot and the house as erected, the company accepted with knowledge the benefits of said contract. See Welch v. Mfg. Co., 55 S. C. 586, 33 S. E. 739.

"I conclude that the plaintiffs have a lien for the materials furnished and actually used in the construction of the house upon the lot upon which it is constructed.

"The North Augusta Electric & Improvement Company is the owner of the lot and house. Mrs. Boatwright is not the legal owner of the same. She has an equitable interest in the property, but no title therefor. I need not discuss her interests here, for the judgment must be against the improvement company, whose title is superior to the interest of Mrs. Boatwright.

"The North Augusta Electric & Improvement Company has paid $1,350 on its obligation for $1,800, and this has been paid to the plaintiff company. Of this amount, to wit, $1,350, the sum of $452 was applied to the payment of $553.58, the cash advanced by the plaintiff company to the payment of the laborers engaged in the construction of the house in question. The unpaid balance for the cash that was advanced by plaintiff, amounting to $101.58, is claimed by the plaintiff under this lien proceeding. The North Augusta Electric & Improvement Company contends (1) that plaintiff cannot collect the $101.58 in this lien proceeding, because it is not a debt due for labor performed or furnished; and (2) that the plaintiff had no right to apply the $452 upon the cash items.

"The first contention of the defendant company is sustained. Plaintiff neither performed nor furnished any labor for the erection of the house. Plaintiff, with the consent of the improvement company and of Mrs.

Boatwright, advanced the money to pay the wages of the laborers, so that the work could go on. This, at most, was a loan of money, and does not come within the provision of the statute. This statute is in derogation of common law, and must be strictly construed, and plaintiff for these items is not within the pale thereof. These items are refused. Gray v. Walker, 16 S. C. 143; Geddes v. Bowden, 19 S. C. 1.

"The $452 of the improvement company applied long ago to the payment of plaintiff's cash advancements was legally so applied, and that matter ended.

"As we have seen, the improvement company and Mrs. Boatwright consented to and authorized such advancements by plaintiff. It was a debt due to plaintiff for which the improvement company was liable. The improvement company paid the money without instruction as to its application. The improvement company owed the plaintiff company two debts, so to speak: (1) for materials furnished, for which plaintiff had a lien; and (2) for cash advanced and for which plaintiff had no security. The improvement company paid the money without any direction as to its application, and in that way it was received by the plaintiff. Under these circumstances, it could apply the payment to either debt; and, in so far as it actually applied such payments to the satisfaction of the debts for cash advanced, it acted legally within the scope of its rights, and the improvement company cannot now disturb those payments. This contention of the North Augusta Electric & Improvement Company is disallowed and rejected.

"The balance due upon the debt, as appears from the account of the North Augusta Electric & Improvement Company, to plaintiff for materials furnished and used in the construction of the said house, is $439.23; and for this amount plaintiff is entitled, together with the costs and disbursements of this proceeding."

To this decree the following exceptions were exhibited by the North Augusta Electric & Improvement Company:

"First. His honor erred in not finding that the plaintiff had failed to sustain its lien, and in not dismissing the complaint on the ground that there was a fatal variance betwen the allegata and probata, in this: that the complaint alleges that the material and cash for which the lien is claimed was sold, delivered, and furnished by the plaintiff to the agents, representatives and servants of the defendant North Augusta Electric & Improvement Company, by virtue of a contract or agreement with the agents, representatives, and servants of said defendant, whereas the undisputed evidence shows that whatever contract or agreement was entered into by the plaintiff for the sale and furnishing of material and cash was entered into, not with the agents, representatives, or servants of said defendant, but with an independent contractor, to wit, B. F. Roberts, and that the plaintiff sold, delivered, and furnished the said material and cash to him, and not to the agents, representatives, or servants of said defendant, as alleged in the complaint.

"Second. His honor erred in finding that the plaintiff was entitled to a lien under section 3008 of the Code, for the reason that said section is not applicable to subcontractors or persons dealing with an original contractor, and the undisputed evidence shows that the plaintiff was a subcontractor, and was dealing with an original contractor, B. F. Roberts, in furnishing the material and cash for which the lien is claimed.

"Third. He further erred in finding that the plaintiff was entitled to a lien under section 3008 of the Civil Code of 1902, and that there had been a sufficient agreement or consent on the part of the defendant North Augusta Electric & Improvement Company to the furnishing of the alleged material and cash to entitle plaintiff to a lien even under said section 3008.

"Fourth. His honor erred in not finding that the plaintiff was a subcontractor or person dealing with an original contractor, and, as such, if entitled to a lien at all, was entitled only upon compliance with the provisions of section 3009 of the Code, and, further, in not finding that the plaintiff was not entitled to the lien claimed, nor to any lien whatever, because the evidence shows a failure on its part to give notice in writing, as required by said section, to the defendant North Augusta Electric & Improvement Company, as the owner, or to its lawful agent, and also to the original contractor, B. F. Roberts, that it intended to claim such a lien.

"Fifth. His honor erred in finding as a fact that the defendant North Augusta Electric & Improvement Company exercised or maintained a supervision over the construction of the house.

"Sixth. His honor erred in finding generally that Mrs. M. M. R. Boatwright was the agent of the defendant the North Augusta Electric & Improvement Company, and should have found that she was only its special agent for a particular purpose, to wit, the entering into a contract with B. F. Roberts for the construction of a house according to the plans and specifications submitted, at and for the sum of $1,800. He should have further found that the authority of Mrs. Boatwright as such agent was limited by the scope of her special agency, and to the particular purpose for which she was appointed, and that the plaintiff had notice of the special character of her agency and the limited scope of her authority. He should have further found that she was not acting within the scope of her authority as agent of the defendant, so as to bind the defendant, in entering into the stipulation or agreement contained in the contract of August 12th, between herself and B. F. Roberts,

that the said Roberts should purchase all material from the plaintiff.

"Seventh. His honor erred in finding that the fact that the defendant North Augusta Electric & Improvement Company, consented to and authorized the advance of cash by the plaintiff to pay the wages of the laborers, and should have found instead that whatever cash was advanced for labor by the plaintiff was advanced by it to the original contractor, B. F. Roberts, pursuant to an understanding and agreement between plaintiff and said Roberts, entered into without the authority or consent of said defendant, and in not further finding that when James R. League, said defendant's agent, was first informed by A. M. Boatwright of the existence of said agreement and arrangement, he notified said Boatwright, as agent of plaintiff, that said defendant was not a party to, nor in any way bound by, such agreement.

"Eighth. His honor erred in finding that the advances of cash by plaintiff to B. F. Roberts was (a) one of two debts owed the plaintiff by the defendant; and (b) constituted a debt due to plaintiff for which the defendant was liable; the error in finding being that (a) such advances was not a debt owed primarily by the defendant to plaintiff, because they were not made to plaintiff, nor at its request; (b) such advances did not constitute a debt due to plaintiff for which the defendant was liable, because (a) the defendant did not promise to repay such advances made by plaintiff to Roberts, and (b) such promise, if made at all, is not shown to have been in writing, and, being a special promise on the part of defendant to answer for the debt, default, or miscarriage of another, to wit, B. F. Roberts, is not a promise upon which defendant can be charged.

"Ninth. His honor erred in finding that the plaintiff could apply the money received by it from the defendant to the payment of the debt due plaintiff by B. F. Roberts for cash advanced him, because (a) said debt was not a debt due by defendant, or with which defendant could be charged; and (b) the stipulation contained in the contract or agreement between B. F. Roberts and Mrs. M. M. R. Boatwright of August 12, 1902, providing that the said Roberts should purchase all material for the construction of the house from plaintiff, which plaintiff had knowledge of before furnishing material, and relies on as the consent on the part of the defendant to the furnishing of the material necessary to establish its lien, expressly provides that in no event should the bills for such materials be allowed to exceed $1,400, and that said $1,400 was to be deducted from the contract price of $1,800, which defendant had agreed to pay for the construction of the house. His honor should have found, therefore, that the plaintiff, claiming under this stipulation, was bound by it, and that, in pursuance thereof, it should have deducted the amount due for material first from the payments as made by defendant on account of the contract price up to $1,400, and applied the balance, if any, to the repayment of the cash advanced Roberts.

"Tenth. His honor erred in not finding that the following items set forth in the bill of particulars attached to the complaint were improperly charged against the defendant North Augusta Electric & Improvement Company as cash advanced for the payment of labor, and in not striking the same or portions thereof for the reasons given, to wit: (1) Item of $30 charged as cash August 16th, because the evidence shows that the same was advanced to Roberts, and by him expended in the payment of a note given by his wife to the Union Savings Bank, which he had indorsed. (2) Item of $100 charged as cash August 30th, because the evidence shows that $49 thereof was deposited in bank by Roberts, and thereafter included in a check given by him to Mrs. S. E. Slack in payment of an indebtedness not in any way connected with the labor on the house. (3) Item of $116 charged as cash September 16th, because the evidence shows that $40 thereof was used and expended in taking up a note given by B. F. Roberts to the Irish-American Bank, and indorsed by A. M. Boatwright. (4) Item of $43 charged as cash November 13th, because the evidence shows that the same was used and expended in taking up two notes given by B. F. Roberts to the Irish-American Bank, and indorsed by A. M. Boatwright—the one for $13, and the other for $30."

The Builders' Supply Company filed the following additional grounds in support of the circuit judge in his decree: "As to the $452 which has been applied by the plaintiff company to the partial extinguishment of the cash account, which cash account, Judge Aldrich found, as a matter of fact, the defendant company was responsible for as an open account, and which finding is excepted to by the defendant company, it is respectfully submitted as an additional ground for sustaining Judge Aldrich's finding that the application as made was legal; that, even should the court find (contrary to Judge Aldrich's finding, which, however, we submit should be sustained) that the defendant company was in no wise responsible for the cash account, still we submit that the application was perfectly legal, for the reason that the money so applied was paid by the defendant company to the plaintiff company upon a written order of Roberts. Thereby Roberts, in legal effect, we submit, himself paid over the whole $1,350 to the plaintiff, and orally, as we shall show, directed and consented to the application which was made; $452 being applied to cash account of $553.58, and $898 to the material account of $1,337.23, which Judge Aldrich finds the defendant company is bound to pay in full under the lien law."

The following exception to said decree

was filed by plaintiff: "That his honor erred in not finding for the plaintiff in the full sum claimed, viz., $540.81, thereby including the $101.58, which, it appears, remains unpaid on the cash account; it being submitted that it appears from the evidence that plaintiff furnished $553.58 to pay laborers to work on the house in question, which said cash was actually used for labor actually done upon the house in question with the consent (in the statutory sense) of defendant company. Hence we submit that he should have held that plaintiff, in reality and in fact, furnished labor upon said house, and should have granted them a lien for the balance due thereon, viz., $101.58."

What we shall say in discussing these exceptions may be premised by these observations: After a careful examination of all this testimony, oral and documentary, we are satisfied, as the circuit judge was, that Exhibits B, C, and D were signed at the same time and place, to wit, in the office of the defendant North Augusta Electric & Improvement Company, and, furthermore, that the defendant M. M. R. Boatwright acted as the agent of said North Augusta Electric & Improvement Company. We may remark just here that hereafter we shall refer to the defendant North Augusta Electric & Improvement Company as the "North Augusta Company," and the plaintiff as the "Builders' Company." It appears also by the evidence that the contractor, B. F. Roberts, in writing, directed the North Augusta Company to pay amounts coming to him to the Builders' Company, which was done to the extent of $1,350, which payments left $450 of the sum of $1,800 still to be paid to B. F. Roberts upon the completion of his contract. Quite a contention has arisen amongst the parties hereto as to what law of this state it was expected that the lien, if any, should fall under; the plaintiff contending that section 3008 of the Code of Laws of this state of 1902 should govern, and which appears to be set out in full in the judge's decree, while the defendant the North Augusta Company claims that section 3009 is alone applicable, which, if so, would plainly prevent any recovery by the plaintiff, because of failure to give the notice in writing therein required. The judge held that section 3008 was the governing law, and we are inclined to think that he was correct, in view of his findings of fact that Exhibits B, C, and D were also all signed by Mrs. M. M. R. Boatwright as the agent of the North Augusta Company. We think the circuit judge has given most excellent reasons why she was obliged to be the agent of said North Augusta Company. The land upon which the dwelling house was erected was and is the property of the defendant North Augusta Company. Said company agreed, after certain conditions were complied with by Mrs. Boatwright, to convey to her said house and lot, freed from all claims and liens. The further fact was that the North Augusta Company took and holds the bond of B. F. Roberts, signed by the Baltimore Surety Company, to hold the said North Augusta Company harmless for the acts and doings of B. F. Roberts in and about the building of such dwelling house. It should still be remembered that all of the parties—the Builders' Company, the North Augusta Company, Mrs. M. M. R. Boatwright, and B. F. Roberts—knew and agreed that the limitations upon the expenditures for which the North Augusta Company was responsible in and about the construction of this dwelling house was the sum of $1,800. Now, with this understanding, let us consider the exceptions:

(1) We cannot agree with this view of the appellant, for the reason that it asserts that the allegata and probata were at fatal variance. Reference to the complaint, however, will show that this claim is not well taken, for the second allegation in the complaint reads: "Plaintiff, by virtue of a contract and agreement with the agents of the defendant, furnished and sold to said agents, who were duly authorized to make such contract, and with the consent of said defendant, certain articles of material, cash," etc. Here the complaint alleges that the articles were sold not only upon a contract, but the complaint goes on to state with the consent of the said defendant. We are satisfied with the circuit judge's conclusion in this matter. This exception is therefore overruled.

We will next take up the second, third, and fourth exceptions. The question really presented by these exceptions is, was the consent of the defendant North Augusta Company to the furnishing of all materials by the plaintiff made to appear? This is no longer a vexed question in this state, since the decision of Geddes v. Bowden, 19 S. C. 17. It is there stated: "It is, however, contended that the labor and material were furnished by the appellant with the consent of the owners, and it is necessary, therefore, to determine the meaning of the word 'consent,' as used in this statute. The word 'consent' implies 'choice,' and one can scarcely be regarded as giving his consent to that which he has no right to object to. In the experience of life, man is oftentimes compelled to accept results, in the sense that he makes no objection or opposition thereto, for the reason that he has no right or power so to do; but he cannot in any proper sense of the term be regarded as consenting to them unless he has the right and the power to exercise a choice to consent or object thereto. As is well said by Mr. Justice Simpson in Gray v. Walker, 16 S. C. 147, in construing this statute: 'Consent here, we think, implies something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which but for the consent could not exist, and which the party consenting has the right

to forbid.'" In this case the defendant North Augusta Company owned this land. They had agreed to build a 1½ story dwelling house thereon, and to convey the same, free of all claims and liens, to the defendant Mrs. Boatwright. They had agreed to limit themselves to the sum of $1,800 for the building and material in said building. Who was in a position better than they to consent to all these things? How was it to be done, except with their money being paid for them? It is idle to speak of any other conclusion. These exceptions are therefore overruled.

The fifth exception involves a pure question of fact, namely, was the defendant North Augusta Company exercising a supervisory control over the construction of the house? We agree with the circuit judge that the testimony plainly establishes that fact. It is true, their agent, Mr. League, was only proved to be at the house two or three times; but their otherwise agent was there many, many times. This exception, therefore, is overruled.

We will now consider the sixth exception. We cannot agree with the appellant, North Augusta Company, that Mrs. Boatwright was only the special agent of said company for a particular purpose, to wit, the entering into of a contract with Mr. Roberts for the construction of a house according to the plans and specifications submitted for and at the sum of $1,800, for to our minds the testimony, both oral and documentary, well established her agency in other respects as found by the circuit judge. We therefore overrule this exception.

We will now consider the seventh, eighth, and ninth exceptions. We take this view as a practical matter: The defendant North Augusta Company had agreed to build this dwelling house, and deliver it finished to their codefendant, Mrs. Boatwright. To furnish labor and material necessary to the erection of such dwelling house was, in contemplation of law, their duty. By the terms of their contract, they paid $1,350. The application of such $1,350 to the payment of the cost of labor and the cost of material was a matter which did not greatly concern them, so long as kept within reasonable limits, because labor had to be furnished, and, to be furnished, had to be paid for, and cash must be furnished for that purpose, and such was the actual application of this money. We agree with the circuit judge, therefore, in his conclusions in regard to these matters, and hence we overrule these exceptions.

We will now consider the tenth exception. We do not see that there is any force in the items referred to in this exception, and, after a thorough consideration of the testimony, we overrule the same.

But now, as to the Builders' Supply Company, we are not satisfied that the lien, under section 3008 of our Code of Laws of 1902, should cover anything else than the $1,800 which had been agreed upon by all parties as the limit of the money to be paid by the defendant North Augusta Company for the construction of this dwelling house. It has paid all but $450 that it stipulated to pay. This should be the difference between $1,800 and $1,350, to wit, $450, which should be the limit of the recovery of the plaintiff, Builders' Supply Company, of the defendant North Augusta Electric & Improvement Company. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be modified by inserting the sum of $450, instead of $439.23, as the amount in which the North Augusta Electric & Improvement Company is indebted to the plaintiff upon the lien described in these proceedings, and in all other respects the judgment of the circuit court is affirmed.

GARY, A. J., did not sit in this case, because of illness.

(71 S. C. 404)

ROBERTS v. JONES.

(Supreme Court of South Carolina. April 15, 1905.)

1. COUNTERCLAIM—ACTION FOR TORT.
In an action for damages for tort, a counterclaim arising out of tort is no defense.
[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Set-Off and Counterclaim, § 17.]

2. RES JUDICATA.
Where a circuit court on appeal from a magistrate does not hear the case on the merits, his findings are not binding on a succeeding judge on appeal from a new trial ordered by such judge.
[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1009.]

3. LEASE—AGRICULTURAL PURPOSES.
Where a dwelling house and about 20 acres of land were rented for a term of 14 months, and the tenant agrees to pay his rent in lint cotton and cotton seed, the renting was for agricultural purposes.

4. APPEAL—REVIEW.
The findings of a circuit court on appeal from a magistrate are not reviewable in the Supreme Court.

5. AGRICULTURAL LEASE—RIGHT TO MANURE.
Where lands were rented for agricultural purposes, the manure, at the conclusion of the lease, should not be disturbed by the tenant.
[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 491.]

Appeal from Common Pleas Circuit Court of Anderson County; Townsend, Judge.

Action by James T. Roberts against J. T. C. Jones. From a judgment for plaintiff on appeal from the magistrate, defendant appeals. Affirmed.

The rent contract in question is as follows: "This indenture, made and entered into between * * * witness: That the party of the first part has agreed to rent, and does hereby rent, to the party of the second part * * * consisting of dwelling house and about twenty acres of land, it being all the land in cultivation of what is known as the Jno. Catlett place, and also about two acres

on the old Anderson place, said Jas. T. Roberts reserving the house on the Anderson place, for the term of fourteen months, beginning on the 25th day of October, 1900, and ending on the 25th day of December, 1901. And the party of the second part hereby agrees to rent, and does rent, the said premises for the period hereinbefore set forth, and agrees to pay as rent therefor the sum of $120, 1,000 pounds of middling lint cotton and 60 bushels of cotton seed, on the 15th day of October, 1901. And he further agrees to take good care of premises, and deliver them to the lessor at the expiration of this lease in as good repair as when he received them, ordinary wear and tear excepted."

Breazeale & Rucker, for appellant. A. H. Dagnall, for respondent.

POPE, C. J. This action has had four trials in the magistrate court—two before Magistrate B. F. Wilson, and two before Magistrate J. A. O'Neal. The verdict of the jury in the last case tried before Magistrate O'Neal was in favor of the defendant for $1 on his counterclaim, from which judgment the plaintiff appealed, and the matter came on to be heard before Judge Townsend in the court of common pleas for Anderson county, who reversed the decision of the magistrate court, and gave the plaintiff a judgment for $12; and from this judgment the defendant appealed on the following grounds: "(1) Because his honor erred in deciding that the counterclaim of the defendant could not be set up in the case, under section 171 of the Code of Civil Procedure of 1902, when he should have decided that said claim was one 'arising out of the contract or transaction' upon which the plaintiff brought his action, and was properly pleaded under said section of the Code. (2) Because his honor erred in deciding that said counterclaim could not be set up, when he should have decided that said claim was 'connected with the subject of the action,' to wit, the rights of the parties to the manure on the leased premises during the term of the tenancy under the contract, and that the magistrate was correct in so holding. (3) Because his honor erred in deciding that said counterclaim could not be set up, when he should have decided that plaintiff's action was one arising on a contract, was sued on as such, and that the counterclaim, being one arising out of a contract, was properly pleaded. (4) Because his honor erred in deciding that, even if the counterclaim could be sustained, that the manure was the property of the plaintiff, and he was entitled to its use, when he should have decided that under the contract the leased premises was the defendant's during the term of his tenancy, and the defendant was entitled to the use of the manure on said premises for use on said premises, and the plaintiff had no right to remove it, especially as said manure was not reserved by the contract, and a part of it was made by defendant's own stock. (5) Because his honor erred in deciding that the premises leased were used for agricultural purposes, when said question adjudicated by Judge Purdy that a portion of the premises leased were for agricultural purposes, and should have decided that there is nothing on the face of said contract to show that the premises were leased for agricultural purposes, and that the evidence showed the primary object of the renting was that the defendant might secure a residence for himself and family near his place of business, as county dispenser. (6) Because his honor erred in finding as a matter of fact 'that all the manure removed by the plaintiff was the property of the plaintiff,' when he should have found that under the lease contract the manure on the premises, or to be made thereon, was not reserved, and the defendant was entitled to its use upon the rented premises, and the plaintiff had no right to take any manure therefrom, whether made by his own horse, which was permitted to be kept there for accommodation, or by the defendant's stock; and that the defendant had a right of action for the value of the manure so removed. (7) Because his honor erred in finding that the manure removed by the defendant was plaintiff's, when he should have decided that, even if the contract was an agricultural one, that plaintiff could only claim the manure made in the usual mode of agriculture from products of the farm, and that the defendant was entitled to the manure made by stock in excess of that maintained by the products produced elsewhere, and that he did not remove more than said excess. When the undisputed evidence shows that he bought feed for his stock amounting to four times as much as was produced on farm, and that he only worked fifteen acres of land, a little more than a half of a one-horse crop, and kept one horse, one mule, and a cow, and only removed the manure made in three months of the fifteen months of the tenancy. (8) Because his honor erred in practically finding that the landlord in case of a tenancy has the right to enter the premises of his tenant, and remove therefrom any manure on the leased premises, and thus deprive the tenant of using it on the rented premises, and that all manure made by the tenant, even from stock not used on the premises for agricultural purposes, belongs to the landlord, and that the tenant has no right or title thereto whatever. (9) Because his honor erred in finding that the manure removed by the defendant was of the value of $12, when the plaintiff admitted he had been buying it for fifty cents per load, which would make it of the value of only $2. (10) Because his honor erred in deciding as a fact that the manure taken by defendant was plaintiff's, when he should have decided that a jury had found by this verdict, under a proper declaration of the law, that the defendant

was entitled to the manure, and that the evidence supported the verdict."

It will be better to reproduce the judgment on circuit, which was as follows: "This case came on for trial before me on July 4, 1904, on appeal from magistrate court from a verdict and judgment rendered in favor of the defendant for $1 against the plaintiff. The plaintiff appeals to this court on numerous exceptions from said verdict and judgment. This was an action brought by the plaintiff, J. T. Roberts, against the defendant, J. T. C. Jones, for $12, the alleged value of certain manure, which the plaintiff alleged was his property, and that the defendant converted the same to his own use, to the damage of plaintiff $12. The defendant, at the trial before the magistrate, set up as his defenses a general denial, and also a counterclaim against the plaintiff for other certain manure, which the defendant alleged was his property, and that plaintiff converted it to his own use, to the damage of defendant $12. The plaintiff demurred to the counterclaim, and the magistrate overruled the demurrer. The magistrate was in error in sustaining the counterclaim, but should have sustained the demurrer to the counterclaim, as under section 171 of the Code of Civil Procedure, vol. 2, 1902, a counterclaim cannot be set up in this case. But even if a counterclaim could be pleaded in this action, the evidence at the trial plainly shows that the manure removed by plaintiff was in his own property, and he was entitled to its use, and the jury erred in not so finding. The evidence was not sufficient for the jury to find for the defendant on the counterclaim. I find as a matter of fact that all of the manure removed by plaintiff from the leased premises was the property of the plaintiff. The premises leased was used for agricultural purposes, and in such cases the manure made upon the land should be left upon the land by the tenant. I find as a matter of fact that the manure which plaintiff alleges was his property in his complaint was made upon the leased premises. I find as a matter of fact that the defendant took and disposed of the manure, as it is alleged in complaint, and that the manure was of the value of $12. The exceptions of the plaintiff should be sustained. It is the order of the court, that the verdict and judgment of the magistrate's court be, and the same is hereby, reversed, and it is the further order of the court that the plaintiff have judgment against the defendant for the sum of $12."

We will consider the above-quoted exceptions in their order.

1. The defendant contends that the judge erred in holding that the defendant's counterclaim could not be set up in the case, under section 171 of the Code of Civil Procedure, when he should have decided that the claim was one arising out of contract of transaction, upon which the plaintiff brought his action. The circuit judge held that the plaintiff's demurrer to the counterclaim should have been sustained; we suppose upon the ground that the counterclaim of the defendant was for a tort, just as the claim of the plaintiff was for a tort. This court held in the case of Simkins v. Railway Company, 20 S. C. 258, 269, that another counterclaim in tort cannot be interposed as a defense. The court said in the last case cited: "The alleged tort of the defendant, which constitutes the foundation of plaintiff's action, is the negligent running of defendant's cars by which his horses were killed. The alleged tort of plaintiff, which is the foundation of defendant's counterclaim, was the alleged illegal presence of his horses on the railroad track, by which the train was thrown from the track and the engine injured. The injury to the engine in point of time, it is true, followed in quick succession that of the injury to the horses; but it cannot be said that the illegal presence of the horses on the track, which is the foundation of defendant's counterclaim, arose out of the negligence of the defendant in running the cars, which is the foundation of plaintiff's action. Nor was it connected with the subject of plaintiff's action." Section 171 provides: "The counterclaim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." Subdivision 2 plays no part in this discussion, because it refers to a contract as its basis. Our attention is confined to subdivision 1. In the case of Simkins v. Railway, supra, the court says: "In most of the states having the Code similar provisions to ours in reference to the counterclaims have been adopted, and in some of the states the terms 'transaction,' 'arising out of,' 'subject of action,' and 'connected therewith' have been much discussed. The decisions are not uniform, and from them it is difficult to arrive at a definite and satisfactory conclusion. In some of the states, especially New York, the tendency has been to limit and narrow the meaning of these terms. In others the construction has been more liberal. In the first the principles of former doctrine of set-off and recoupment, which applied to actions ex contractu entirely, have controlled, more or less; in the latter it has been held that the terms 'transaction' and 'subject of action' mean something more than contract, and that, consequently, counterclaims may embrace other causes of action besides those arising in contract. This whole subject is fully discussed with great ability and per-

spicuity in Mr. Pomeroy's second edition of his Remedies and Remedial Rights, at section 734 et seq., 772. And at section 790 will be found a discussion of the 'cases in which the demands of both parties are for damages arising from tort,' in which he says: 'Counterclaims of damages from torts, when attempted to be enforced against causes of action for damages also arising from other torts, have, with few exceptions, been rejected. The courts have been inclined to adopt, or at least assume as a general principle, that such a cross-demand can never arise from the transaction set forth by the plaintiff as the foundation of his claim.'" While the circuit judge has held, in effect, the foregoing, and that the testimony was not sufficient, even if the defendant's counterclaim was admissible, to allow the jury to find for the defendant on his counterclaim, and he found as a matter of fact that all the manure moved by plaintiff from the leased premises was the property of the plaintiff; but we agree with the circuit judge that the plaintiff's demurrer should have been sustained, and this ground of appeal therefore is overruled.

2. This is set aside, being included in the first ground of appeal. It is therefore overruled.

3 and 4. For the same reasons are these exceptions set aside, and we therefore overrule them.

5. Appellant claims that the circuit judge erred in deciding that the premises leased were used for agricultural purposes. Whatever Judge Purdy may have held in the first trial before the circuit court, his ruling was not binding upon Judge Townsend, because confessedly he did not hear the case upon its merits, and any purpose that the defendant might have had in renting the dwelling house as a place of residence could have no effect, for it was apparent from the contract that it was rented for agricultural purposes. We therefore overrule this exception.

6. We do not see that the question here raised could have any effect in reversing Judge Townsend's decision, because his finding of fact is not reviewable by us. This is a law case, and as such the findings of fact by the circuit judge are beyond our powers of control. So, therefore, when the circuit judge held that all of the manure removed by the plaintiff was the property of the plaintiff, such finding is conclusive upon us. As we understand this case, the manure was removed by the defendant from the plaintiff's premises at the very conclusion of his connection with the rented premises, and could not, therefore, be entitled to be used by the defendant upon the rented premises. This exception is therefore overruled.

7. In the 19th vol. of A. & E. Ency. of Law, p. 927, it is said: "Manure made in the usual course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it becomes appurtenant to and is treated as realty." In the ground of appeal the appellant (defendant) seems to admit that the lands were used for agricultural purposes. That being so, the manure on the premises at the conclusion of the lease by the defendant was a part of the realty, and should not have been disturbed by the appellant. This exception, therefore, is overruled.

8. We do not see how the question here suggested by the appellant is pertinent to this inquiry. The counterclaim that the defendant sought to set up has been decided to have been improperly so done. Therefore this question does not arise, and this exception is overruled.

9. The value fixed by the circuit judge to the manure, for which he held the defendant responsible to the plaintiff, was ascertained from the testimony of the circuit judge to have been for $12. We have no power to interfere with such valuation. This exception is therefore overruled.

10. We do not see how we can look at what was the verdict of the jury as to the ownership of the manure taken by the defendant. That is a question of fact, and we have no right to look back at the verdict of the jury. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed, and the action is remitted to the circuit court for the enforcement of such judgment.

(71 S. C. 528)

ZIMMERMAN v. AMERICAN TELEPHONE & TELEGRAPH CO.*

(Supreme Court of South Carolina. Feb. 15, 1904.)

1. TELEPHONE COMPANY—GRANT OF RIGHT OF WAY.

A grant of a telephone company to erect a line "over and along the property which I own or in which I have an interest," with a right to place poles along the highways adjoining the property, does not give a grant to erect a line diagonally across grantor's lot.

2. SAME—CONSTRUCTION OF GRANT.

Where a grant of a right to erect telephone poles did not authorize the construction of a line diagonally across the grantor's lot, it was more favorable to the telephone company than it was entitled to, for the court to charge that the contract was silent as to the location of the line, and to submit to the jury whether the location by the telephone company was within the contract.

Appeal from Common Pleas Circuit Court of Spartanburg County; Townsend, Judge.

Action by E. J. Zimmerman against the American Telephone & Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ralph K. Carson, for appellant. D. E. Hydrick and Johnson & Nash, for respondent.

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*Rehearing denied April 25, 1905.

JONES, J. The plaintiff brought this action against defendant for damages to his lot in the town of Duncans, Spartanburg county, by reason of defendant's construction of its telegraph lines over the same, which resulted in a judgment for $300 in plaintiff's favor. The defendant sought to justify its action in the premises under the instrument executed by plaintiff, which is as follows:

"$100. Received of the American Telephone and Telegraph Co., of South Carolina, one dollar in consideration of which I hereby grant unto said company, its successors and assigns, the right to construct, operate and maintain its lines over and along the property which I own or in which I may have any interest, in the township of Beech Springs and town of Duncans, county of Spartanburg, State of South Carolina, including necessary poles and fixtures along the roads, streets or highways adjoining the property owned by me in said town, said sum received in full payment for such right, and in full satisfaction for the trimming of any trees along said lines necessary to keep the wires cleared at least eighteen inches, and with the right to set the necessary guy and brace poles, and attach to trees the necessary guy wires. Any damage done to crops in construction or repairing said lines to be paid by the said company.

"Witness my hand and seal, this 9th day of May, A. D. 1901, at Duncans, S. C."

In the complaint plaintiff alleges that said agreement was signed with the distinct understanding that only one pole was to be placed on said land, and at a different part of the lot from where the line was constructed, and at a place where the wires and poles would not interfere with the lot for building purposes, and plaintiff offered parol testimony to show the same. To this defendant objected on the ground that it tended to vary the written instrument above. The court admitted the testimony, and to this ruling in various forms the first seven exceptions are directed. The remaining exceptions charge error in the construction of said instrument.

In construing the instrument the court charged the jury that it was silent as to the location and number of poles. This charge is not wholly free from error, but the error was not prejudicial to appellant, as we construe the instrument. The instrument does not give the defendant an unrestricted right to construct its line upon any part of plaintiff's lot. Observe the language: "To construct, operate and maintain its lines over and along the property, * * * including necessary poles and fixtures along the roads, streets or highways adjoining the property." Such contracts are to be construed in the light of the circumstances. The lot in question was in the town of Duncans, fronting on Main street 172 yards and on Welford street 120 yards. The right was not given to construct the lines over and upon plaintiff's land wherever it might suit defendant's interest or convenience, but over and along the premises, with right to place poles along the streets, etc. The word "along" means by length of, as distinguished from "across." The parties, by the terms of the instrument, had in mind that the construction would be on the lot along the streets adjoining, but not across the lot. The case might have been different if the grant had been to construct the lines over and upon the property and along roads, etc., adjoining. Southern Bell Telephone & Telegraph Company v. Harris, 117 Ga. 1001, 44 S. E. 885. Where one had a way "in, through, over, and along a certain strip of land from A. to B., it was held that he had not thereby a right to a way across the strip of land." Washburn on Easements (3d Ed.) p. 255. Such instruments are to be strictly construed.

The undisputed evidence in this case was that defendant's line, entering the lot 65 yards from Main street, ran diagonally across the lot 185 yards to the corner of Main and Welford streets. As the instrument, strictly construed, did not authorize the construction of the line diagonally across plaintiff's lot, it was more favorable to the defendant than he was entitled to for the court to charge that the contract was silent as to the location of the line, and to submit to the jury to determine whether the location by defendant was within the contract. For the same reasons it must follow that there was no prejudicial error to allow plaintiff to introduce parol testimony of an understanding had with defendant's agent when the instrument was executed to the effect that the line should not cross plaintiff's lot, except at a certain corner, and that not exceeding one post should be placed upon the land. If the instrument had been such as to grant defendant the right to cross plaintiff's lot in any line defendant should locate, it would not have been competent (in the absence of allegation of fraud) to show a contemporaneous parol agreement or mutual understanding that the line should be located in a different way from that adopted by the defendant, as that would violate the salutary rule which forbids parol testimony to vary or alter a written instrument. But as defendant's location was not authorized by any written instrument, it is manifest that defendant sustained no injury by the court's ruling, as defendant was defenseless, unless a parol permission to cross plaintiff's land in the way located should be shown. To this end defendant, in its testimony, sought to establish an agreement between plaintiff and defendant at time of construction or afterwards, under which defendant was to remove the poles as located at any time that the line might interfere with contemplated improvements on the lands by plaintiff; and at defendant's request the jury were in-

structed, if such an agreement was established, the plaintiff could not recover unless defendant refused to move the poles when requested.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(71 S. C. 413)

COTTON et al. v. JOHNSON et al.

(Supreme Court of South Carolina. April 17, 1905.)

1. APPEAL FROM MAGISTRATE'S ORDER—CONSTRUCTION.

On appeal from a magistrate's order overruling a demurrer to his jurisdiction in proceedings to eject trespassers on the ground that no notice to quit had been served, reversing the judgment of the magistrate, and granting a new trial, it is the duty of the magistrate to grant the parties another hearing, and not to dismiss.

2. MAGISTRATE'S COURT—WITHDRAWAL OF DEFENDANT.

In a magistrate's court, defendant demurred to the jurisdiction, and, when his demurrer was overruled, withdrew. *Held*, that he could not object to the proceedings after such withdrawal.

3. SAME—JURISDICTION—EJECTING TRESPASSERS.

Where a proceeding is brought under Code Civ. Proc. 1902, § 2972, to eject trespassers on land, a rule to show cause, based on affidavit, is sufficient to give the magistrate jurisdiction, without service of notice to quit.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, § 52.]

Appeal from Common Pleas Circuit Court of Georgetown County; Purdy, Judge.

Action by Emma Cotton and others against Irwin Johnson and others. From an order of the circuit court sustaining a judgment of the magistrate, defendants appeal. Affirmed.

Walter Hazard, for appellants. B. H. Henderson, for respondents.

POPE, C. J. This was a special proceeding instituted May 6, 1903, by the plaintiffs in the court of Magistrate William Porter, of Georgetown county, for the ejectment of the defendants from a certain tract of land in said county under the provisions of the act of 1883 entitled "An act to provide for an expeditious mode of ejecting trespassers" (1 Civ. Code 1902, § 2972).

The following is the affidavit upon which the magistrate acted:

"The State of South Carolina, County of Georgetown. Personally appeared before me, William Porter, a magistrate of the said county, in the said State, Emma Cotton, Nellie Williams and Mary Franklin, who, being duly sworn, say: That Irwin Johnson, Charlie Crawford, Liza Johnson and Mary Crawford have gone into possession of certain lands and tenements of them, the said Emma Cotton, Nellie Williams and Mary Franklin, situate in the county and State aforesaid, without their consent and without warrant or authority of law, and refuse to yield possession of the same. Emma Cotton, Nellie Williams, Mary Franklin.

"Sworn to before me, this 6th day of May, A. D. 1903. William Porter, Magistrate."

Upon this affidavit the magistrate issued the following notice:

"State of South Carolina, County of Georgetown. To Irwin Johnson, Charlie Crawford, Liza Johnson and Mary Crawford: Whereas, Emma Cotton, Nellie Williams and Mary Franklin have this 6th day of May, 1903, made oath before me that you are in possession of certain lands and tenements of them, the said Emma Cotton, Nellie Williams and Mary Franklin, without warrant or authority of law, and that you refuse to yield possession of same.

"You are hereby required to show cause before me, at my office, at Sampit Station, in the county and State aforesaid, at 5 o'clock p. m., five days from service hereof, why you should not be ejected from the premises aforesaid.

"Witness my hand and seal, this 6th day of May, A. D. 1903. William Porter, [L. S.] Magistrate."

The following entry was made by the magistrate: "The above case coming on regularly to be heard on the 12th May, 1903, defendants entered demurrer as to jurisdiction of the court on ground that no notice to quit has been served upon parties in possession, defendants. Demurrer overruled. Defendants appear, through their attorney, and state to court that they hold possession under claim of title, and are ready to give such bond as is required by statute to defend the action. Magistrate rules that to simply assert title, without any further show of title, and without actually filing bond, is insufficient."

After hearing the testimony, the defendants tendered their bond, with L. S. Wilkinson as surety. The magistrate gave judgment, stating:

"The defendants made no formal answer whatsoever, but, through their attorney, orally asserted that they claimed title. No written answer asserting title was filed with me, as magistrate, at any time. A written instrument purporting to be a bond was formally filed with me, which in form did not comply with the law, and the sureties to which I considered insufficient, and which I refused to accept. The defendants failing to strengthen these sureties, and further failing to raise the question of title in my court according to law, I accordingly rendered judgment for the plaintiffs."

He asserts "that the rule to show cause on the 12th of May was regularly served on the defendants, and they failed to answer the rule in writing. The defendants appeared in obedience to the rule, but failed to put in any answer in writing, and failed to raise the question of title according to law. The evidence on the part of the plaintiffs was only for the purpose of showing that the defend-

ants were in illegal possession of the premises, and therefore trespassers. The defendants, though having ample opportunity, made no show of title whatsoever, and I consider I was justified in giving judgment for the plaintiffs in the absence of any defense whatever."

An appeal was taken from this order of Magistrate William Porter, and came on for a hearing before Judge Watts in the court of common pleas at Georgetown, whereupon he filed the following order (omitting the title of the case):

"This case coming on before me to be heard on appeal from the decision of William Porter, one of the magistrates of the county of Georgetown, and it appearing to the court that the question of title to real estate is involved in the proceedings, it is ordered that the decision of the magistrate be reversed, and the new trial granted."

These last words, "new trial granted," were in the handwriting of Judge Watts himself.

A new notice or summons was then issued by William Porter, magistrate, and the defendants again appeared, accompanied by their attorney, Walter Hazard, when they promptly interposed the following demurrer to the jurisdiction of the court (omitting title):

"And now come the defendants, by their attorney, Walter Hazard, and demur to the jurisdiction of the court herein, and say that this court ought not to take cognizance of this action, for the following reasons:

"(1) Because no notice to quit the premises in question has ever been issued by his honor William Porter, magistrate, and served upon these defendants, or either of them, as required by law.

"(2) Because before the expiration of five days from and after the service upon the defendants herein of the notice to show cause why they should not be ejected from the premises, they appeared before his honor William Porter, Esq., magistrate, and set up a bona fide color of claim to the possession of the premises, and tendered a bond as provided by law, with good and sufficient security, conditioned for the payment of all such costs and expenses as the persons claiming to be the owners of the land, to wit, the plaintiffs, might incur in the successful establishment of their claim by any of the modes of procedure now provided by law; and the magistrate was, therefore, and is now, without jurisdiction to proceed further herein.

"The defendants appear for the purpose of interposing the above objections to the jurisdiction of the court, and for no other purpose whatsoever."

The magistrate overruled the demurrer and proceeded with the trial, wherein he admitted that this proceeding was brought by him under section 2972, vol. 1, of the Civil Code of 1902. Judgment was rendered in favor of the plaintiffs. From this judgment the defendants appealed, which appeal came on to be heard before Judge Purdy at the court of common pleas for Georgetown county, who handed down the following judgment (omitting the caption):

"In this case, by the order of Judge Watts, the matter was referred back to the magistrate for a new trial. When I first read the order of Judge Watts and the proceedings had by the magistrate, I was of the opinion that the plaintiffs had no standing whatever in court; and, had I dictated my judgment at the time of the hearing, I would have dismissed the proceedings. A careful study of the proceeding has convinced me that Judge Watts' order, while it reversed the judgment of the magistrate in the first instance, cannot be construed as giving any authority to dismiss the proceeding, for, had such been his intention, such should have been his order. Construing his order now, upon calm reflection, I must take it just as it concludes —that the matter is sent back to the magistrate for a new trial, inasmuch as he says title to land is involved. There was another reason why I thought the plaintiffs had no standing in court, and that was because, on comparing the notice or rule with section 2972 of volume 1 of the Civil Code of this state, I thought that the notice failed to comply with the requirements of the statute, and I was prepared to so hold. But upon studying the matter and looking into the authorities I find that our Supreme Court has held exactly to the contrary in Sires v. Moseley, 60 S. C. 504, 39 S. E. 7. The case, therefore, having been sent back for a new trial because title to land was involved, and no showing having been made as to title, or, rather, no bona fide color of chain to the possession of such premises having been shown, the judgment of the magistrate followed, as a matter of course, in favor of the plaintiffs. The case above cited also holds that it is sufficient description of the premises to state that the premises are situate in the same county in which the magistrate resides, and are in possession of the defendant. Under the authority, therefore, of Sires v. Moseley, supra, the appeal is dismissed, and the judgment of the magistrate is sustained, and the case is remanded to the magistrate for the execution of his judgment, and it is so ordered and decreed."

From this judgment the defendants have appealed upon the following five grounds:

"(1) Because, it is respectfully submitted, his honor the circuit judge erred in construing the order of Judge Watts, dated 12th November, 1903, as requiring a new trial to be held, whereas he should have held that said order, by reversing the magistrate's first judgment, practically sustained the exception to the jurisdiction of the magistrate's court for want of service of a notice to quit, and was equivalent to an order remanding the case to the magistrate for such further proceedings as might be proper to carry the or-

der into effect, and that it was therefore the duty of the magistrate, under said order of Judge Watts, to dismiss the proceeding for want of jurisdiction.

"(2) Because, this being a special proceeding under section 2972, vol. 1, Civ. Code 1902, which does not provide for or require a trial of the cause upon its merits, the order of Judge Watts granting a new trial should have been construed by his honor Judge Purdy, in conformity with the plain terms of the statute, as meaning that the magistrate should dismiss the case for want of jurisdiction, and his honor Judge Purdy erred in not so holding.

"(3) Because his honor Judge Purdy, it is respectfully submitted, erred in overruling the appellants' fourth exception to the magistrate judgment, on the ground that, 'the plaintiffs having offered no testimony in support of their claim, it was error in the magistrate to render judgment for them.'

"(4) Because, it is respectfully submitted, his honor Judge Purdy erred in overruling the appellants' third exception to the magistrate judgment, which was as follows: 'Because, at first hearing of this case before the magistrate on 12th May, 1903, the defendants, appearing for that purpose only, interposed the same objection to the jurisdiction of the court upon the ground of nonservice of a notice to quit upon the defendants, and, the objection being overruled, they declined to offer any testimony or to participate in the trial; and, judgment having been rendered against them, they appealed to the circuit court upon the ground, among others, that no service of a notice to quit had ever been made. Upon the hearing of the appeal, the exceptions were sustained, the judgment of the magistrate reversed, and the case remanded. The question of jurisdiction thereupon became res judicata, and the magistrate had no power to proceed further in the case, except to enter an order dismissing the proceeding.'

"(5) Because, it is especially submitted, his honor Judge Purdy erred in overruling the appellants' second exception to the magistrate judgment, which was as follows: 'Because, this being a special statutory proceeding, brought under section 2972, vol. 1, Civ. Code 1902, for the summary ejectment of the defendants from lands which they were alleged to have entered without the consent of the plaintiffs and without warrant of law, the mode of procedure provided by the statute must be strictly followed; and it having been admitted by the magistrate, and being a fact, that no notice to quit the premises in question had ever been served upon the defendants as required by the statute, he was without jurisdiction to proceed in the case, and erred in so doing over the objection and against the protest of the defendants.'"

We will now consider these exceptions in their order.

(1) We do not think Judge Purdy failed to properly construe Judge Watts' order as requiring a new trial, for, in his own handwriting, he himself ordered a new trial. That having been done, we do not see that any construction of the terms of said order should cause us to ascribe a different meaning to the words "new trial" as used by the judge himself. That being the case, we overrule this exception.

(2) This exception is subject to the same reasoning as adopted in disposing of the first, and it is, therefore, overruled.

(3) The defendants having "pitched their battle," so to speak, upon their demurrer to the jurisdiction of the magistrate, we do not see any merit in their objection to the action of the magistrate; and this exception, therefore, is overruled.

(4 and 5) These exceptions may be considered together. This court conceded to the defendants at the hearing before us the right to attack the judgment of Sires v. Moseley 60 S. C. 504, 39 S. E. 7. This was really the ground of serious contention by the appellants' attorney. We have given his argument a patient and thorough consideration, but do not see that he has presented any grounds for overruling the case of Sires v. Moseley, supra. In the recent judgment of this court in the case of A. M. Lee v. Caleb Chaplin et al., 70 S. C. 561, 50 S. E. 501, which involved the same question, this court has rendered its judgment reaffirming Sires v. Moseley, and we will not, therefore, go over the same ground again. These exceptions are overruled.

It is the judgment of this court that the judgment of Judge Purdy appealed from be, and the same is, affirmed.

GARY, A. J., did not sit in this case, because of illness.

(71 S. C. 571)

PHILLIPS v. AMERICAN TELEPHONE & TELEGRAPH CO.*

(Supreme Court of South Carolina. May 6, 1905.)

1. TELEGRAPH COMPANIES — TRESPASS — ACTION FOR DAMAGES.

Where a telegraph company has erected its lines outside of the way granted to it, the remedy is by an action for damages, and not by condemnation.

2. DEED—CONSIDERATION—SEAL.

Though a seal is prima facie evidence of consideration for a deed, and, if no consideration is expressed, the seal would be sufficient, the principle does not apply when the question is whether the covenantor should return to the covenantee the consideration received before repudiating the deed for fraud.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 25, 585.]

3. TRIAL—INSTRUCTION ON THE FACTS.

An instruction in an action for damages to land by a telegraph company that: "You know what 'actual' means and what 'damages'

*Rehearing denied May 29, 1905.

mean. Now, in this case, what was the actual damages? Figure that out. Now go to the question of punitive damages, and figure that out"—is not on the facts.

Appeal from Common Pleas Circuit Court of Cherokee County; Gage, Judge.

Action by J. V. Phillips against the American Telephone & Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ralph K. Carson, for appellant. Stanyarne Wilson, for respondent.

POPE, C. J. Plaintiff brought his action against defendant for $1,000 damages, alleging that in the construction of its line through the plaintiff's land in Cherokee county the defendant oppressively, without right, with high hand, in reckless and wanton disregard of the rights of plaintiff, went upon the plaintiff's lands in said county, and cut a swath about 18 feet wide through his woodland, a part of said tract, by cutting down the timber for said width, and for a distance of 600 yards, while constructing its poles, wires, and lines; and also drove over and through his sown wheat on said land, and permitted stock in its service to eat upon and trample it down. The defendant, in its answer, set up that the plaintiff, for a valuable consideration, under his hand and seal, granted to the defendant, its successors and assigns, the right to construct, operate, and maintain its line of telephone over, along, and upon the property of the plaintiff described in the complaint; and that in pursuance of the said grant and license of the plaintiff the defendant did enter upon the premises described in the complaint, and constructed its line of telephone in the manner, under the terms, and in accordance with the privileges contained in said grant. The cause came on for trial before a judge and jury. Testimony was introduced on both sides. At the conclusion of plaintiff's testimony the defendant moved for a nonsuit and dismissal of the complaint on the ground that it had been proven that the defendant entered upon the lands of the plaintiff with his knowledge and consent, and that there was no proof that the plaintiff had made demand for compensation and been refused; that where entry upon land was with knowledge and consent of the plaintiff, the remedy by condemnation proceedings was exclusive, unless it had been shown by the evidence that demand for compensation had been made and refused after the line had been constructed; that, the remedy by condemnation being exclusive, the court was without jurisdiction, and the defendant was entitled to a nonsuit and dismissal of the complaint. The circuit judge declined this motion. The defendant then introduced its testimony. The following is the deed which the plaintiff was said to have made for the right of way:

"Received of the American Telephone and Telegraph Company of South Carolina, one dollar ——— dollars in consideration of which I hereby grant unto said company, its successors and assigns, the right to construct, operate and maintain its lines over and along the property which I own, or in which I have an interest in the township of White Plains, county of Cherokee, and State of South Carolina, including the necessary poles and fixtures along the roads, streets or highways adjoining the property owned by me in said township, said sums received in full payment for such right, and in full satisfaction of trimming any trees along said lines necessary to keep the wires cleared at least eighteen inches, with the right to set the necessary guy and brace poles, and attach to trees the necessary guy wires, and with the right to trim or cut down any tree that might interfere with the line.

"Witness my hand and seal, this 7th day of March, 1901, at Clifton, No. 1, S. C. [post office address].

"J. V. Phillips. [L. S.]

"Witness, C. D. Warlick [Land Owner]."

"Private Property.

"No officer or employé of this company is authorized to procure a receipt to a voucher, except upon the payment of its amount, and the company hereby gives notice that if this voucher is signed without payment being made, it is done at the signer's own risk."

After the judge's charge to the jury, they retired, and found a verdict of $100 for the plaintiff against the defendant. Thereupon the defendant gave notice of a motion for a new trial upon the following grounds: "(1) That the verdict was excessive. That the defendant, having entered with the consent of the plaintiff, was not a trespasser—punitive damages could not be awarded; and that the amount of the verdict was in excess of the damages proved. (2) That the verdict was contrary to the law as charged by the court, the jury having been instructed by the court that the contract could not be rescinded without a return or tender in return of the consideration paid, and the proof being conclusive as to the consideration. (3) Because the entry of the defendant having been made with the consent and knowledge of the plaintiff, there being no proof of a demand for and refusal of compensation, or that any timber had been cut that did not interfere with the wires, that plaintiff's remedy by condemnation was exclusive, and damages could not be awarded by the court. (4) Because there was no proof of fraud, and the verdict of the jury was contrary to the law as charged by the court."

In refusing the motion for a new trial, the judge used the following language: "First place, I don't regard the verdict punitive. A suit for $1,000 and a verdict of $100, I do not see any element of punitive damages in

it. Next, the consideration. You can always go into the consideration. Surely, if two parties made a contract, and the consideration was a dollar, you can show the dollar was never paid. But the other question is a serious question, and I have ruled on it. That is jurisdiction. It is a close question, and I may be wrong on that question; but that is the way it looks to me. Now, on the other question, about the testimony, I will be frank with you. I would give the same weight to the testimony as they did. Wallack didn't deny that he gave it to him as a present. Mr. Phillips' testimony impressed me. Mr. Wilson put it too much, and Phillips called out to him he had it too much; and, all in all, I agree with Phillips. I don't know who Wallack is. He is a young man engaged in this business, and you know how they have to get the right of way. They have a lot of people to see, and in a hurry, and have no time to talk to people. I think it was just about as Phillips testified to. Wallack didn't deny it. He said he read the contract over to him. The question of fraud is a question of fact. I don't think I could disturb this verdict. As I say, I have considerable doubts about the question of law, but the Supreme Court can settle that. It is an interesting question."

The motion being refused, and judgment being entered upon the verdict, the defendant appealed on the following grounds:

"First. In refusing defendant's motion for nonsuit and to dismiss the complaint upon the ground that the remedy by condemnation proceedings under the statute was exclusive; it having been shown that the entry was with the knowledge and consent of the plaintiff, and there being no evidence of demand for and refusal of compensation after the line was constructed; and thereby ruling that the plaintiff could not recover compensation for any special damage that had been done his premises in constructing defendant's telephone line through his land by condemnation proceedings under the statute.

"Second. In ruling and holding that the plaintiff's action was not an action for damages for entry upon and construction of the telephone line across the plaintiff's premises without plaintiff's consent, but an action for trespass upon the plaintiff's premises outside of the right of way granted.

"Third. In adding to defendant's third request to charge, as follows: 'I leave it to you, gentlemen, to say whether or not there was any consideration paid.' The error consisting in submitting to the jury as a question of fact for their determination the payment or nonpayment of a consideration, when this was established by the grant under seal.

"Fourth. In charging the jury as follows: 'What actual damages did he suffer? You know what "actual" means and what "damages" means. If a man were to meet you in the road, and you were in your buggy, and he was to run against you and break the wheel of your buggy, and it cost you $5 to put it back on, that would be what is called actual damages. Now, in this case, what was the actual damages? Figure that out. Now, go to the question of punitive damages, and figure that out.' The error being that in so charging the judge charged upon facts in assuming that the plaintiff had suffered both actual and punitive damages, and that the jury were to make calculation and ascertain the amount.

"Fifth. In charging the jury as follows: 'Now, if Phillips was not overreached, if the facts satisfy you that Phillips knew what he was doing—ought to have known—and got paid for this thing, of course, he cannot recover.' The error being that the jury were thereby instructed that Phillips was entitled to recover, unless he was paid for his grant for right of way.

"Sixth. In not granting a new trial upon the third ground of the defendant's motion, to wit: 'Because, entry of the defendant having been made with the consent and knowledge of the plaintiff, there being no proof of demand for and refusal of compensation, or that any timber had been cut that did not interfere with the wires, that plaintiff's remedy by condemnation was exclusive, and damages could not be awarded by the court;' and thereby ruling and holding that an action for damages would lie in the court of common pleas for entry and constructing of a telephone line, with knowledge and consent of the owner of the premises, without evidence of a demand and refusal of compensation after construction of the line, or that a trespass had been committed upon said premises, and that the remedy by condemnation was not exclusive under the evidence of the case.

"Seventh. In refusing to grant a new trial upon the fourth ground of defendant's motion, viz., 'that there was no proof of fraud, and that the verdict was contrary to the law as charged by the court.' The error being that the court thereby ruled and held that when a person who is able to read and write, and not laboring under any disability, signs a paper without reading it, after opportunity had been afforded to do so, is not presumed to know its contents, nor estopped from alleging that the same was procured by fraud and misrepresentations."

We will now consider these grounds of appeal in their order:

1. It is true, as defendant says, that, where condemnation proceedings are applicable, they are exclusive of any other remedy; but in this case the suit is for damages for injuries done outside of the right of way. The entry was made by the consent of the plaintiff, for it will be remembered that the timber was destroyed beyond the 13 feet of right of way of the defendant, and also the injuries done by the teams being driven over plaintiff's lands. Therefore this ground of appeal is not well taken and is overruled.

2. We think this second ground of appeal must be overruled for the same reasons given in disposing of the first ground of appeal, and it is therefore overruled.

3. We think there was no error in the charge of the circuit judge, as here complained of, under the issue as raised by defendant. Certainly, the consent signed by the plaintiff was under seal, and this court, in the case of Brown v. Brown, 44 S. C. 378, 381, 22 S. E. 412, in speaking of the consideration named in a deed, says: "The seal itself is prima facie evidence of consideration, and, if no consideration is expressed in the deed at all, that seal will be sufficient." While this principle prevents a deed under seal from being attacked for want of consideration, it does not apply when the question is whether the covenantor should return to the covenantee the consideration received before repudiating the deed for fraud. In that case it would seem to be just that the covenantor should be permitted to show that, as a matter of fact, no consideration was received, and therefore none could be returned.

4. We do not see that the circuit judge committed any error as here attempted to be pointed out. The language used by him was intended to point out to the jury the meaning of the words "actual damages," and then, also, "punitive damages." The judge did not charge upon the facts, but left these matters solely for the jury. We therefore overrule this exception.

5. We do not think the circuit judge was in error, as here attempted to be pointed out. We do not think the circuit judge instructed the jury that Phillips was entitled to recover unless he was paid for his grant for right of way. This exception is therefore overruled.

6. We do not see any error in the conduct of the circuit judge here complained of, for, as before remarked, the damages sought by the plaintiff were, or might have been, construed to relate to the land beyond the right of way. This ground of appeal is overruled.

7. This ground of appeal seems to imply that the circuit judge should be overruled, because he failed to take defendant's view of the sufficiency of the testimony offered in this case. He could very well have reached the conclusion he did from the effect upon his mind of the testimony offered by each party at the trial. We think, therefore, that this ground of appeal should be overruled.

The judgment of this court is that the judgment of the circuit court be affirmed.

PER CURIAM. After careful consideration of the petition herein the court has failed to discover that any material question of law or of fact has been overlooked or disregarded. The court, in view of the case of Jones v. Railway Company, 67 S. C. 181, 45 S. E. 188, and the evidence that the title to the crop was in another than the plaintiff, did not at all rest its opinion upon the fact of injury to the crop, and the reference to the crop in considering the sixth exception was mere inadvertence, for in considering the first exception the court was careful to avoid all reference of injury to the crop, and such reference has been stricken from the opinion.

It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(71 S. C. 518)

COLEMAN et al. v. COLEMAN et al.

(Supreme Court of South Carolina. April 22, 1905.)

TENANCY IN COMMON—DEED FROM ONE CO-TENANT—PRESUMPTIONS.

A tenant in common conveyed the entire fee to A. and her children. She conveyed the fee to B., who, with his heirs, held exclusive possession for more than 20 years. *Held* error to charge that a deed to B. from the co-tenants of the grantor of A. could be presumed as against the children of A. after they arrived at their majority.

Appeal from Common Pleas Circuit Court of Fairfield County; Gage, Judge.

Action by William H. Coleman and others against Martin Coleman and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Ragsdale & Dixon, for appellants. J. E. McDonald, for respondents.

WOODS, J. This action was instituted for the recovery of three-fourths interest in a tract of land containing 415 acres; the plaintiffs alleging that the defendants had ousted them, and now hold possession of the entire tract. The defendants set up several defenses, but none of them are involved in this appeal, except defendants' claim of title by presumption of a deed to them by adverse possession for more than 20 years. The jury found a verdict for the plaintiffs for three-fourths of one-seventh of the land, instead of the three-fourths of the whole claimed by them. The plaintiffs appeal.

The facts are not in dispute. The questions of law are difficult and interesting. Mrs. Martha N. Dawkins inherited the land from her husband, John Dawkins, and remained in possession of it until her death, February 5, 1873. She died intestate, leaving seven children as her heirs at law. Her son John T. Dawkins, who lived with his mother and managed her affairs, held possession of the land until January 13, 1880, when he, disregarding the interest of his brothers and sisters, undertook to convey the entire tract to Mary E. Coleman and her children by a deed in the usual form, with general warranty. There was some testimony to the effect that Mary E. Coleman with her husband and children was in the actual possession of the land under this deed until February 15, 1881, when she in turn undertook to convey the entire land by her deed with general warranty to Charles F. Coleman, disregarding the in-

terest of her children. Charles F. Coleman and his heirs, the defendants, have been in possession since the execution of this deed. The children of Mary E. Coleman, the plaintiffs, were infants of tender years when these deeds were made; the youngest not having attained majority until March 19, 1899. This action was commenced July 2, 1903.

The defendants' position is that although they entered under the deed from Mary E. Coleman, and so became tenants in common with the plaintiffs as to the one-seventh interest conveyed by the deed from John T. Dawkins, yet the plaintiffs showed no title to the other six shares belonging to the other children of Mrs. Dawkins, but, on the contrary, a deed to the defendants from the other Dawkins heirs would be presumed from their possession of the land, claiming it adversely to these heirs, for 20 years, and that the plaintiffs, though tenants in common with them, would have no share in the benefit of this presumption. The circuit judge sustained this position, and the plaintiffs, by their exceptions, challenge the correctness of the charge in this respect.

Where a defendant does not stand in any relation of trust or obligation to the plaintiff, and the plaintiff proves a common source, and a title from the common source, it is well established the defendant may then protect himself by showing he has acquired an outstanding title superior to the common source. Bryce v. Cayce, 62 S. C. 563, 40 S. E. 948; Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049.

The questions here are, first, whether the defendants have acquired such superior outstanding title, separate from that under which plaintiffs claim; and, second, if they have, will they be allowed to assert it against those with whom they stood in the relation of tenants in common?

In trying to answer the first question, it is essential to consider the precise legal relation to the land in which the execution of the two deeds placed the plaintiffs and the defendants, or their father, from whom they inherited. By the deed to Mary E. Coleman and her children from John T. Dawkins, the plaintiffs became infant tenants in common not only with their mother, but with the brothers and sisters of John T. Dawkins. But as they took under a deed purporting to convey, not an interest, but the entire land, the claim and possession of themselves and their mother under the deed became immediately adverse to the other tenants in common; and its date was the date of the ouster of the other Dawkins heirs, and the commencement of the period of 20 years, at the expiration of which a deed from them would be presumed. This deed would not be presumed to have been made at the expiration of the period of 20 or more years, but at its beginning. Therefore, when the other Dawkins heirs failed to assert title for more than 20 years, down to the commencement of this action, it is presumed they conveyed their shares when title was asserted against them by their co-tenant, John T. Dawkins, to those who took his title and entered under it. McLeod v. Rogers, 2 Rich. Law, 22; Metz v. Metz, 48 S. C. 491, 26 S. E. 787. The conclusion seems irresistible, therefore, that the entry and holding of Mrs. Coleman and the plaintiffs, and the subsequent entry and holding of the defendants for more than 20 years, established by presumption a deed to Mrs. Coleman and her children from the other Dawkins heirs when they received a deed from John T. Dawkins; and the defendants therefore could not postpone the date of the presumed deed from the Dawkins heirs to the date of the deed purporting to convey the entire tract from Mary E. Coleman to their father. If this view is correct, then it is clear the minority of the plaintiffs would protect their interest as well under the deed presumed to have been made to them and their mother by the six other Dawkins heirs as under the deed actually made by John T. Dawkins.

Let us take, however, another and the most favorable view of defendants' relation to the John T. Dawkins deed. Assume that, while the presumption did begin to run against the six Dawkins heirs when John T. Dawkins made his deed to the plaintiffs and their mother, yet that the defendants may support the claim that the presumption at the end of the period of 20 years was not that a deed had been made by these heirs to Mary E. Coleman and her children, the plaintiffs, but to Mary E. Coleman, defendants' grantor, alone; or even assume (though this seems most illogical) that a deed by the six Dawkins heirs would be presumed to have been made not when they were disseised by their co-tenant, John T. Dawkins, but when Mary E. Coleman, his grantee, undertook to convey to the defendants' father. Under this view, it will not be doubted that defendants' father and the plaintiffs became tenants in common as to the entire land, for neither the deed of their mother nor their actual eviction could have any effect on the interest of the plaintiffs so long as they were minors. Hence, as against the plaintiffs, the deed of Mrs. Coleman could have no other effect than to place the father of defendants in the same relation to the plaintiffs that she herself occupied. Not only did she hold as tenant in common with the plaintiffs, her infant children, but her interest was acquired under the same deed. This being so, could Charles F. Coleman or his children, who succeeded him in the relation of tenant in common with the plaintiffs, set up against them a title acquired by presumption of a conveyance of the other interests in the land? This question must be answered in the negative, for two reasons: First. The possession of one tenant in common is constructively the possession of all, and whatever rights are

acquired against strangers by possession stand for the benefit of all. Scaife v. Thomson, 15 S. C. 337. After the ouster of the Dawkins heirs, they occupied the relation of strangers, and rights acquired against them by possession belonged to all the co-tenants who were not ousted. As we have seen, neither these defendants nor their father nor Mrs. Mary E. Coleman could deprive the plaintiffs of their full rights as co-tenants by eviction or in any other way until they attained majority. The position that the plaintiffs were co-tenants as to only one-seventh of the land is utterly untenable, for under no possible view can it be denied that they had an interest, as co-tenants with the defendants and their father, in every foot of the land during the entire period of the possession. Second. As a general rule any title whatever acquired by one co-tenant by actual conveyance, presumption, or otherwise, inures to the benefit of all.

In Van Horne v. Fonda, 5 Johns. Ch. 388, 406, which is recognized as the leading case on this subject, Chancellor Kent says: "In some cases, says Littleton (section 307), a release to one joint tenant shall aid the joint tenant to whom it was not made, as well as him to whom it was made. I will not say, however, that one tenant in common may not in any case purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession under an imperfect title, derived from their common ancestor, there would seem naturally and equitably to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject by one of the owners, in which case all are entitled to the common benefit on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse title, to disseise and expel his co-tenant. It cannot be tolerated when applied to a common subject in which the parties had equal concern, and which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest." Freeman on Co-Tenancy & Partition, § 154; Venable v. Beauchamp (Ky.) 28 Am. Dec. 74, and extended note; Brittin v. Handy (Ark.) 73 Am. Dec. 497; Rothwell v. Dewees, 2 Black, 613, 17 L. Ed. 309; Carpenter v. Carpenter, 27 Am. St. Rep. 569, and note; Tanney v. Tanney, 39 Am. St. Rep. 678, and note; Franklin Mining Company v. O'Brien, 55 Am. St. Rep. 118, note; Robinson v. Lewis, 10 L. R. A. 101, note; Barnes v. Boardman, 9 L. R. A. 571, note; 1 Washburn on Real Property, *430; 17 A. & E. Ency. Law, 674. In some cases exceptions to this rule, thus stated in Keech v. Sandford, 1 L. C. in Eq., H. & W., are recognized: "But tenants in common probably are subject to this mutual obligation only where their interest accrues under the same instrument or act of the parties or of the law, or where they have entered into some engagement or understanding with one another, for persons acquiring unconnected interests in the same subject by distinct purchases, though it may be under the same title, are probably not bound to greater protection of one another's interests than would be required between strangers." Roberts v. Thorn (Tex.) 78 Am. Dec. 552; Stevens v. Reynolds (Ind. Sup.) 41 N. E. 931, 52 Am. St. Rep. 422. Such an exception is countenanced by the great authority of Mr. Freeman in his work on Co-Tenancy & Partition, § 155, but he seems to regard it with disfavor in his note to Venable v. Beauchamp (Ky.) 28 Am. Dec. 74. While we are inclined to think such an exception may be sustained, this case does not fall under it. Here Mary Coleman entered under one deed made to herself and her infant children together. If there ever was a case where the contract and the relation of the parties fixed upon one co-tenant not only the general duty implied by that relation, but a special obligation to the others, such a case arose when the mother, Mary E. Coleman, became a party with her infant children to this deed. The deed to Charles F. Coleman from her could have no other effect than to place him and those who claim under him in precisely the same relation of special obligation to these plaintiffs, as to the land, so long as they remained minors. The defendants having thus become tenants in common with these infant children, there was no means by which they could change that relation, or shake off the obligation it imposed, until the infants attained their majority. The case stands, therefore, just as if Mrs. Coleman had evicted her infant children, and then held the exclusive possession for a sufficient time to presume a deed from the six Dawkins heirs covering their aggregate interest of six-sevenths of the land. The defendants being co-tenants occupying this special relation of obligation to the plaintiffs, even if the title acquired by Charles F. Coleman and his heirs, the defendants, be regarded a separate title acquired for themselves, it inures to the benefit of the plaintiffs, as tenants in common with them.

For these reasons, the charge of the circuit judge was erroneous, and the judgment of the circuit court is reversed, and a new trial ordered.

(71 S. C. 426)

UZZELL et al. v. HORN et al.

(Supreme Court of South Carolina. April 18, 1905.)

1. APPEAL—DISMISSAL.
Where nothing has been done as to an appeal in the Supreme Court except to serve notice of intent to appeal, the circuit judge, by overruling a motion of continuance asked on account of the alleged pending appeal, virtually dismissed the appeal.

2. SECONDARY EVIDENCE—RECORD OF DEED.
On a notice to produce a deed, defendants' attorneys announced that it was not in their possession. There was evidence of its execution and record and delivery by the recorder to the grantee, and defendants lived in the house in which the grantee died. *Held*, that the record was properly admissible as secondary evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 636, 639.]

3. TRUST DEED — CONSTRUCTION — CONVEYANCE BY TRUSTEE.
Land was conveyed in trust for A. for life, then to his wife for life, and then to his children. On his death without children his trustee was to convey the land to his brothers and sisters. *Held*, that on the death of A. without children the land vested in his brothers and sisters by the statute of uses, without any conveyance from the trustee.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 175.]

4. ADVERSE POSSESSION—PRESUMPTIONS OF GRANT.
Where a trustee and his heir at law have held possession of land for 20 years, a grant will be presumed.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 596.]

5. TRIAL—INSTRUCTIONS.
Where the court, on motion to strike out evidence, said that he would hereafter instruct the jury to disregard it, it is not error to fail so to do where the judge directs a verdict.

6. SAME—DIRECTING VERDICT.
Where defendant offers no evidence, and that of plaintiff sustains his claim, a verdict may be directed.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 892.]

7. PLEADING—STRIKING OUT.
A party is not entitled to have a portion of the pleadings stricken out after verdict.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1165.]

Appeal from Common Pleas Circuit Court of Florence County; Watts, Judge.

Action by Eliza Uzzell and others against John R. and Maggie Horn. Judgment for plaintiffs, and defendants appeal. Affirmed.

Geo. W. Brown, J. W. Ragsdale, and George Galletly, for appellants. J. P. McNeill, Willcox & Willcox, and S. W. G. Shipp, for respondents.

POPE, C. J. This is an action to recover real estate. The plaintiffs in their complaint allege that Robert Peel, Sr., was seised and possessed of a tract of land containing 95 acres, situate in Florence county, but that by the deed of conveyance to him it was subject to the following trusts: First, for the benefit of Robert Peel, Jr., for and during his natural life; after his death, for his wife, Martha W. Peel, for and during her natural life; and at the death of the two the same was to vest in such child or children as were born to Robert Peel, Jr.; in case of any of such children dying leaving issue, the share of such child or children so dying shall be vested in his children; but in the event said Robert Peel, Jr., dies childless, never having had a child born to him, that then said tract of land should vest in said Robert Peel, Jr.'s, brothers and sisters; and in case any one die leaving children, such children of such deceased brother or sister should inherit his or her parent's share. That the deed was dated May 15, 1879, and Robert Peel, Jr., occupied it from that date (1879) to about 1896, and his widow, Martha W. Peel, occupied it until 1900, and after her death a daughter of hers by a first husband, Mrs. Martha Horn, together with her son, John Horn, occupied the same; and that said Martha Horn and John Horn refuse to yield possession to the plaintiffs, who are the children and grandchildren of the said Peel, Sr. Thereupon they brought this action to recover said tract of land. The cause came on for trial before Judge Watts and a jury. The judge directed the verdict for the plaintiffs. Thereupon the two defendants appealed on the following grounds:

"(1) The court below erred in ordering the cause to trial, an appeal having been taken to the Supreme Court from the order of Judge Gary, and no order having been made by the Supreme Court, its clerk, or the circuit court dismissing the same or declaring the same abandoned, but the court should have continued the same.

"(2) The court below erred in admitting in evidence the record book of Florence county, purporting to contain a copy of an alleged deed from Marinda Williams to Robert Peel, Sr., dated 15th May, 1879, and recorded in said office on 9th January, 1895, in Book J, page 326, but the said court should have held the same inadmissible, because (a) the loss of the original had not been proven; (b) there was no proof of a search or effort to find the original in the possession of the party entitled to the said possession—the trustee and his successors.

"(3) The court below erred in not directing a verdict for the defendants, in that plaintiffs failed to introduce any evidence tending to show that they had obtained a conveyance of the premises in question from the alleged trustee, Robert Peel, Sr., or his successor.

"(4) The court below erred in not granting defendants' motion of nonsuit on the grounds that the plaintiffs introduced no testimony or evidence tending to show: (a) The plaintiffs had a conveyance from the alleged trus-

tee, Robert Peel, Sr., or his successor. (b) They introduced no testimony tending to show title in themselves or out of the state. (c) There is an entire failure of testimony as to title in plaintiffs. (d) They have entirely failed to introduce evidence tending to show or prove title in themselves in any of the ways provided by law. (They have introduced no testimony tending to show that the plaintiffs have or claim under a grant from the state, or by adverse possession or a common source.)

"(5) The court below erred in not striking out on defendants' motion the testimony of Geo. W. Williams, a witness, as to who had been in the possession of the said premises after the execution of the said deed, when it appeared from the cross-examination that the same was entirely founded on hearsay, and in not instructing the jury to disregard the same.

"(6) The court below erred in instructing the jury to find for the plaintiffs, and in not instructing them to find for the defendants. (a) The same was in violation of the Constitution as to charging the jury in respect to matters of fact. (b) There was no testimony tending to show title in the plaintiffs. (c) There was no testimony tending to show that the plaintiffs had a deed from the alleged trustee, Robert Peel, Sr., or his successor.

"(8) The court below erred in not allowing the defendants to withdraw the portion of the answer of Maggie Horn as to betterments, and in holding the jury had nothing to do with that matter."

We will now pass upon these grounds of appeal.

1. It seems that the plaintiffs demurred to a portion of Mrs. Maggie Horn's answer wherein she set up betterments. Judge Ernest Gary, who heard such demurrer, overruled the same, and thereupon the plaintiffs gave notice of appeal from Judge Gary's said order, said order being dated June 10, 1903, but no steps have ever been taken since the notice of the order of Judge Gary to perfect said appeal. No return has ever been filed in the Supreme Court. No "case" has been served or received by plaintiffs' attorney, nor has any "case" been filed in the office of the clerk of court. On September 15, 1903, the following notice, signed by the plaintiffs' attorneys, was addressed to the defendants' attorneys: "We take this means of notifying you that we have abandoned our appeal from the order of Judge Gary overruling our demurrer to the portion of the answer of Maggie Horn, which we interposed at the June term of our court, and we expect to make an effort to try the case on its merits at the October, 1903, term of our court." No order was ever made by the Supreme Court or its clerk or by the circuit court dismissing the same or declaring the same abandoned. At the October term of the court of common pleas for Florence county, the said cause was called to be heard before Judge R. C. Watts and a jury. The defendants interposed objection to proceeding with the said trial on the grounds that an appeal to the Supreme Court was pending from the said order and decision of Judge Gary, and that no order had been made dismissing or declaring the same abandoned. The presiding judge overruled the same, and ordered the trial to proceed.

This is a history of so much of these proceedings as affects the first ground of appeal. It is far safer in practice to obtain the order of the Supreme Court in dismissing an appeal, but in some cases the circuit judge can and does dismiss appeals where they have not been carried to the Supreme Court. We consider that Judge Watts, when he overruled the motion of continuance on account of the alleged pending appeal in the Supreme Court, virtually dismissed the appeal, for he ordered the trial to proceed, which we scarcely think he would have done if he had not deemed the obstacle of the appeal as removed. State v. Johnson, 52 S. C. 505, 30 S. E. 592, is an authority for the contention that the circuit court in this case, no return having been filed, and the appeal not having been perfected, had jurisdiction to adjudge the appeal abandoned. Therefore we overrule this exception.

2. We do not deem the circuit judge in error in allowing in evidence the record book of Florence county, purporting to contain a copy of an alleged deed from Marinda Williams to Robert Peel, Sr., dated May 15, 1879, recorded in said office January 9, 1895, in Book J, page 326. Greenleaf, in his admirable work on Evidence, uses the following language in section 558: "And, first, in regard to production of such documents. If the instrument is lost, the party is required to give some evidence that such paper once existed, though slight evidence is sufficient for this purpose; and that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof. * * * What degree of diligence in the search is necessary it is not easy to define, as each case depends much on its peculiar circumstances, and the question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court, and not by the jury. But it seems that, in general, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. It should be recollected that the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and that this is a preliminary inquiry directed to the discretion of the judge. * * * If it belongs to the custody of certain persons, or is proved, or may be presumed, to have been in their

possession, they must, in general, be called and sworn to account for it, if they are in the reach of the court; and so, if it might or ought to have been deposited in a public office or other particular place, that place must be searched. If the search was made by a third person, he must be called to testify respecting to, and if the paper belongs to his custody he must be served with a subpœna duces tecum to produce it." Also, in section 560: "When the instrument or writing is in the hands or power of the adverse party, there are, in general, except in the case above mentioned, no means at law of compelling him to produce it, and the practice in such cases is to give him or his attorney a regular notice to produce the original. Not that, on proof of such notice, he is compelled to give evidence against himself, but to lay a foundation for the introduction of secondary evidence of the contents of the document or writing, by showing that the party has done all in his power to produce the original." In the case at bar, a written notice was served upon the attorneys of the defendants, notifying them to produce the deed in question, which is the trust deed, and is the basis of this action, and when called upon in open court they with great candor announced to the court that such deed was not in their possession. It has been proved by at least two witnesses that the deed was in existence and was in the possession of Robert Peel, Jr.; that such deed was deposited by Robert Peel, Jr., with the clerk of the court of Florence county for record, and that it was so recorded, and that such deed was redelivered by said clerk to Robert Peel, Jr., after the death of his father, Robert Peel, Sr., who was the trustee, and as such the proper custodian of the deed in question. The parties whom the attorneys represented were the defendants, who resided in the dwelling house occupied by Robert Peel, Jr., during his life and at the time of his death. The circuit judge decided, on hearing the testimony, that the plaintiffs had produced such evidence as would justify him, the circuit judge, in admitting secondary evidence of the contents of this deed. This court had held in the case of the State v. Crocker, 49 S. C. 242, 27 S. E. 49, that the records of such deeds may be introduced without notice. This being so, we do not see, as before remarked, that the circuit judge committed any error in admitting secondary evidence as to this lost deed. This exception is therefore overruled.

3. We do not think the circuit judge erred in refusing to direct a verdict for the defendants at the close of plaintiffs' testimony on the ground that the plaintiffs had not received a title from the trustee named in the deed of trust of the 15th of May, 1879, for the original trustee was then dead. Robert Peel, Jr., who by law succeeded him as trustee, was also dead, and he could not have made a deed to those parties while in life. The other son, William Peel, is a party plaintiff. By law the trusteeship was devolved upon him. The deed is as follows:

"The State of North Carolina: Know all men by these presents, that I, Marinda Williams, of the county of Duplin, North Carolina, for and in consideration of the sum of fifteen hundred dollars to me paid at and before the sealing of these presents by Robert Peel, Sr., of the county of Wayne, State of North Carolina, have granted, bargained, sold and released and by these presents do grant, bargain, sell and release unto the said Robert Peel, Sr., all that tract of land lying, being and situate in the county of Darlington, State of South Carolina, containing ninety-five acres, more or less, and bounded north by the public road known as the Lynches Creek road; east by lands of G. W. Williams, known as the Nicholds land; south by the Wilmington, Columbia and Augusta Railroad, and on the west by lands of the estate of S. Eliza Evans, the same being conveyed to me by Geo. W. Williams by deed of date the 16th of October, 1876. Together with all and singular the rights, members, hereditaments and appurtenances to the same belonging or anywise incident or appertaining. To have and to hold all and singular the premises before mentioned unto the said Robert Peel, Sr., and his heirs and assigns forever. In the trust, nevertheless, that the said Robert Peel, Sr., and his heirs and assigns shall hold the said premises subject to the following uses, trusts, limitations and provisions, that is to say: First, for the use and benefit of Robert Peel, Jr., for and during the period of his natural life, and the said Robert Peel, Sr., shall permit the said Robert Peel, Jr., to take possession of the said tract of land, and have and enjoy the free and uncontrolled use of the same for and during the period of his natural life, and from and after the death of the said Robert Peel, Jr., the said Robert Peel, Sr., his heirs and executors shall hold the said tract of land for the use, benefit and behoof of Martha W. Peel, wife of Robert Peel, Jr., for and during the period of her natural life, and after deaths of the said Robert Peel, Jr., and his wife, the said Martha W. Peel, then the said Robert Peel, Sr., his heirs and executors shall hold the said tract of land for any child or children which the said Robert Peel, Jr., may have living at the time of his death, to be delivered up to such child or children, and if more than one to be equally divided among them share and share alike, to them and their heirs forever free and discharged from all trusts and limitations hereby created the child or children of any deceased child or children to represent in such division his, her or their parent, and take the portion to which the parent if living would be entitled. In the event the said Robert Peel, Jr., shall leave no child or children, or child or children of any deceased child living at the time of his death,

then in that event, after the death of the said Robert Peel, Jr., and of his wife, the said Martha W. Peel, the said Robert Peel, Sr., his heirs and executors shall convey the said tract of land to the brother and sisters of the said Robert Peel, Jr., to be divided among them share and share alike to them and their heirs forever, free and discharged from the uses, trusts and limitations hereby created in such division, the child or children of any deceased brother or sister to represent his, her or their parent, and take the portion which the parent if living would be entitled to: Provided, further, That should the said Robert Peel, Jr., desire at any time to have the said tract of land sold and the proceeds otherwise invested, the said Robert Peel, Sr., his heirs, executors or successors upon the written request to the said Robert Peel, Jr., are hereby authorized and empowered to sell and convey the said tract of land and invest the proceeds thereof in accordance with the written request of the said Robert Peel, Jr., in other property real or personal, such other property to be held in trust by the said Robert Peel, Sr., his heirs, executors or successors subject to the same uses, trusts, limitations and restrictions as are hereinbefore expressed in regard to the said tract of land. And I do hereby bind myself and my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Robert Peel, Sr., for his heirs, assigns and successors against me and my heirs, and every person whomsoever lawfully claiming or to claim the same or any part thereof. Witness my hand and seal this 15th day of May, in the year of our Lord, one thousand eight hundred and seventy-nine, and in the 103 year of the sovereignty and independence of the United States of America. G. W. Williams, Marinda Williams. [L. S.].

"Signed, sealed and delivered in the presence of J. B. Oliver, J. Wilson."

This deed shows that the trustee had no services marked out to be performed to the plaintiffs. It looks to us, therefore, that these parties were vested with the title, the uses having been executed by the statute, and the estate vested in the grantees. Laurens v. Jenny, 1 Speer, 365; Howard v. Henderson, 18 S. C. 189. In the case of Reeves v. Tappan, 21 S. C. 1, a testator gave to his brother all the residue of his estate in trust for the children of the brother, to be divided among them share and share alike. He nominated the brother also "as executor," with full power to sell any of the estate, and to compound debts, and to invest and reinvest the proceeds of the residue at his discretion, as trustee, for the children. Held, that the brother was not charged with any duty as trustee rendering it necessary that he should retain the legal title, and hence, under the statute of uses, the title passed directly to the children. So, also, in Weiters v. Timmons, 25 S. C. 488, 1 S. E. 1, a party, by deed, after marriage, conveyed certain land in trust during the life of the grantor for the support and maintenance of the grantor's wife and her issue, and upon the death of the grantor, then as to one moiety for the sole and separate use of such wife for life, and as to the other moiety to the use of such issue and their heirs forever. The deed also provided that upon the joint request of the grantor and his wife, or of the survivor, the said trustee should sell the whole or any part of the said property, and reinvest, etc. The grantor died, leaving his wife and two children by said wife. Held, in an action for partition, brought by a purchaser of the interest of one of the children under an execution sale, that the moiety given to the issue vested in them immediately upon the grantor's death, under the statute of uses, discharged from the trust, and the operation of the statute was not delayed by the provision in the trust for the sale of the whole or any part of the property on the joint request of the grantor and his wife, or of the survivor of them, the trust being extended thereby only as to the moiety given for life to the widow. Under these circumstances we will overrule the third exception.

4. The testimony introduced at the hearing tended to show that from 1879 until the death of Martha Peel the land had been in the possession of the grantee, Robert Peel, Sr., and of Robert Peel, Jr., and his widow, for more than 20 years. Indeed, the land was in the possession of Robert Peel and his wife for more than 22 years. Such possession was sufficient to have raised a presumption of a grant from the state, and that the title to the land was vested in these parties by presumption of law. This exception is therefore overruled.

5. We do not think that when the circuit judge refused to strike out certain testimony of the witness George W. Williams, a witness for the plaintiffs, he erred, because this motion was made after the testimony had been given. The circuit judge did say that, while he could not strike out the testimony, "later on I may tell the jury to disregard such testimony." No necessity afterwards arose for the jury to critically examine the testimony of the witness Williams, here referred to, and hence there was no error committed by the judge. This exception is overruled.

6. The judge committed no error if he concluded from all of the testimony—the defendants declining to offer any testimony themselves—that the plaintiffs should recover. If there was sufficient testimony to go to the jury on behalf of the plaintiffs, the circuit judge clearly had a right, and it was his duty, to instruct a verdict for the plaintiffs. Nicholls v. Hill, 42 S. C. 28, 19 S. E. 1017; Moore v. Scott, 66 S. C. 283, 44 S. E. 737; Norwood v. Gregg, 67 S. C. 224, 45 S. E. 163; Rice v. Bamberg, 68 S. C. 184, 46 S. E.

1009; Coskery v. Wood, 52 S. C. 516, 30 S. E. 475. In these cases it is held that the circuit judge may direct a verdict for the plaintiff where the testimony points all one way. This exception is overruled.

7. As to the allegation of error by the court in not allowing the defendant to withdraw the portion of the answer and in holding that the jury had nothing to do with that matter: At the conclusion of the motions of the defendant, the last being the nonsuit, which was refused, the plaintiffs asked for direction of verdict for the plaintiffs. Motion granted, defendant objects, objection overruled, exception noted. Thereupon the court, of its own motion, turning to counsel for defendants, said: "You had better put in a claim for betterments there. You have a right under the statute to bring another case for them later on." To this suggestion there was no immediate response. After some little time had elapsed, Mr. Galletly moved to strike out of the answer of the defendants the allegation with reference to betterments. Motion denied, the court remarking that: "The motion came too late, a verdict having been ordered, and that having nothing to do with the case anyway. What I mean by that is that I don't think the jury have anything to do with the question of betterments." We do not see, after the judge had ordered a verdict, that the counsel for the defendants had the right to move to change the pleadings. Under these circumstances we think there was no error on the part of the circuit judge as here complained of, and this exception must be overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, A. J., did not sit in this case because of illness.

(71 S. C. 512)

BROWN v. ROGERS et al.

(Supreme Court of South Carolina. April 22, 1905.)

1. REFERENCE—EXCEPTIONS TO REPORT—FILING.

Where a referee in an accounting has filed his report, and thereafter files a second report on a supplemental matter not in dispute, such second report is not merged in the first, so as to authorize exceptions to the first to be filed within 20 days after filing of notice of second report.

2. SAME.

The marking of a case "heard" by the judge on the calendar in open court was not an agreement in writing not to require exceptions to referee's report to be filed within 10 days, nor was it a memorandum of such agreement noted by the presiding judge with the consent of plaintiff's attorney under rule 14 of the circuit court.

3. SAME—DISCRETION OF COURT.

Under Code Proc. § 195, the court may, in its discretion, allow exceptions to referee's report to be filed after 10 days from notice of filing.

Appeal from Common Pleas Circuit Court of Florence County; Gary, Judge.

Action by M. M. Brown against S. D. Rogers and J. F. Stackley. Judgment for plaintiff, and defendant Rogers appeals. Reversed.

Willcox & Willcox and George Galletly, for appellant. W. F. Clayton, for respondent.

WOODS, J. This action was brought by the plaintiff, M. M. Brown, to obtain an accounting for the assets of a business partnership of which he and the defendant S. D. Rogers were members. The cause was referred to a referee "to take and state an account between the several parties to this action." On March 6, 1903, the referee filed a report, showing a balance due by the defendant Rogers to the plaintiff of $2,137.13, without interest, the question of interest being specifically mentioned as one to be thereafter decided by the court. On March 6th notice of this report was duly served on defendant's attorney. On March 14th a supplemental report was filed, in which the referee reported that the sum of $50 should be added to the amount found against Rogers on account of his failure to pay to Brown a sum collected by him, which at the reference he had agreed to turn over to Brown immediately. The "case" contains the following statement as to the progress of the cause: "At the winter term (on the 28th day of March, 1903) of the court of common pleas for Florence county the presiding judge, Hon. Geo. W. Gage, by the consent of the attorneys for plaintiff and defendants, marked this cause 'heard,' and in open court, in the presence of the attorneys, so entered the same on the calendar of the court. Argument was to be made later. On April 21st, at Kingstree, Judge Gage passed an order setting down the argument for Sumter, S. C., on such day and hour as the court may notify counsel to appear. On account of the fatigue of the term at Sumter, the circuit judge did not notify counsel of a date for hearing argument, but at Chester, S. C., on the 5th June, 1903, he being then temporarily indisposed, passed an order remanding the cause back to Florence for a hearing before any circuit judge that may succeed him in the Third Circuit. * * * On the 10th day of June, 1903, at the summer term of said court, Judge Ernest Gary presiding, and the return in the appeal from the order of Judge Gage of the 5th June being then on file in the Supreme Court, this cause was called. The defendants' attorneys interposed an objection to proceeding with the trial of the cause on the ground that an appeal was pending from the order of Judge Gage, and, the return having been filed in the Supreme Court, the circuit court was without jurisdiction to proceed with the case. The circuit judge overruled the objection and ordered the cause to proceed. The plaintiff's attorneys then moved for an order confirming the

report of the referee and for judgment on the ground that no exceptions had been served within ten days from notice of the filing of the same. The defendants' attorneys resisted this motion, inter alia, on substantially the following grounds: (1) The exceptions to the report of the referee, dated 6th March, 1903, were not served within ten days from the notice of the same pursuant to an agreement made with counsel for plaintiff before the expiration of such time that the same may be served later. (2) That marking the case 'heard' in open court by Judge Gage, in the presence of the attorneys, and the written entry so made by the judge on the docket, was sufficient writing to take the case out of the rule of court against verbal agreements, and was a waiver of the service, not being within ten days. (3) That exceptions to the items in the account filed by the referee need not be filed or served within ten days, but can be made at the hearing before the court. (4) That the plaintiff's attorneys having admitted by affidavit before the court that they had agreed to extend time to serve exceptions, but only differed with defendants' attorneys as to the length of time of the extension, takes the case without the rule of court as to verbal agreements, and left the court to ascertain the facts from the evidence before it. (5) That the supplemental report filed on the 14th March, 1903, being a part of the report of the referee, the report dates from that day, and as no notice of filing the same was ever served, defendants' exceptions were within time, and were properly before the court. * * * The court ruled that, the exceptions not having been served within ten days from the 6th March, the same were not properly before it. The defendants' attorneys then in open court objected to the items in the itemized statement of the referee's report, as set forth in detail in the exceptions or objections served on plaintiff's attorneys on 28th May, 1903, and asked the court to pass on the correctness and validity of the same from the testimony, books, and records taken by the referee and then before the court. This the court refused to do. The defendants' attorneys then moved the court in the exercise of its discretion and in the interest of the furtherance of justice that they be permitted to then file and serve exceptions or objections to the report of the referee. This the court refused on the ground that it had no power to extend the time to file exceptions to master's report, the same not having been served within ten days from notice of filing same, and that it had no power to now permit the said act to be done." Affidavits from counsel on both sides were submitted, giving their respective versions of the unfortunate controversy. The court then made a decree in favor of the plaintiff for $2,137.13, confirming the first report.

No notice was served of the filing of the second report. But it was merely supplemental, covering a minor matter not embraced in the first report, and which, it seems, was not in dispute between the parties. It merely added a small sum to the liability reported in favor of the plaintiff, which he was at liberty to disregard altogether, and have the first report alone confirmed. The first report was therefore not merged in the second. In addition to this, the exceptions related exclusively to the findings of the first report, and it was therefore impossible to connect them with the second report. It follows that the exceptions were not filed within the time prescribed by the statute.

The marking of the case "heard" by the circuit judge on the calendar in open court was not an agreement in writing not to require the exceptions to be filed within 10 days, nor was it a memorandum of such an agreement noted by the presiding judge, with the consent in open court of the plaintiff's attorney, under rule 14 of the circuit court. If the case had been actually heard, and plaintiff's counsel had argued it on the merits without reference to the delay in serving the exceptions, he would be held to have waived that point. When, however, the case was merely marked "heard," it is obvious this gave the plaintiff a right in the subsequent argument contemplated to be heard on that question, as well as on the merits. Even if it be assumed, as contended by counsel for the defendants, that the report in this case had the effect of a special verdict, the law furnishes no ground for holding that the statute requiring exceptions to be filed within 10 days does not apply to such a report. The exceptions to the rulings of the circuit judge on the points above discussed are overruled.

After the circuit judge had announced his conclusion that the exceptions had not been taken in time, the attorneys for the defendants asked the court in the exercise of its discretion to allow the exceptions to be then filed. The circuit judge held that he had no power to extend the time. We think this was error. Section 195 of the Code of Procedure provides: "The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this Code of Procedure." The filing of exceptions is an act to be done within a time limited by the Code of Procedure, and there is no ground upon which it can be held to be an exception not falling under the broad terms of the law. It is true in Verner v. Perry, 45 S. C. 262, 22 S. E. 888, it is said the "appellant was obliged in law to make his exception in ten days"; but the power of a circuit judge to exercise a discretion to allow the exceptions to be filed after 10 days was not passed on, for the court continues: "But suppose, under section 195 of the Code of Civil Procedure, it is within the discretion of the circuit judge,

he has not exercised such discretion." Even if it could be considered that the last paragraph of rule 30 of the circuit court, relating to "references other than for the trial of issues in an action," is applicable to the reference ordered in this case, the rule would have to yield to the plain and unequivocal terms of the statute. Notice of appeal from the circuit court to the Supreme Court in this respect stands on a different footing. Section 195 does not apply to such notice for the reason that section 348 forbids the extension of the time for giving notice of appeal from the circuit court to the Supreme Court.

The judgment of this court is that the cause be remanded to the circuit court, with leave to the defendants to renew their motion to be allowed to file their exceptions, under section 195 of the Code of Procedure.

GARY, A. J., did not sit in this case because of illness.

(71 S. C. 506)

BROOM v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. April 19, 1905.)

1. TELEGRAM—CLAIMS FOR DAMAGES—STIPULATION.

The stipulation on printed form for telegram requiring claims for damages or statutory penalties to be presented within 60 days from the date of filing the message, is not contrary to law or public policy.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 42.]

2. SAME—BINDING EFFECT.

The stipulation of a telegraph company, printed on its messages, requiring claims for damages to be presented within 60 days from the date of filing the message, is binding on the recipient of the message sent on a form containing such stipulation in a suit for damages for mental anguish.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 42.]

Appeal from Common Pleas Circuit Court of Chester County; Townsend, Judge.

Action by A. J. Broom against the Western Union Telegraph Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

W. H. Newbold and A. L. Gaston, for appellant. Geo. H. Feasons, Evans & Finley, and J. H. Marion, for respondent.

JONES, J. This is an action to recover damages for mental anguish for failure to promptly transmit and deliver a message addressed to plaintiff, residing at Lancaster, S. C., by P. L. Wagner, at Chester, S. C., notifying plaintiff that his father could not live, and to come at once. The message was written upon a regular form furnished by the company and signed by the sender, containing, among other things, a stipulation that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." The message, as delivered to plaintiff, on the face of it contains substantially the same stipulation. No claim for damages was presented to defendant company within 60 days, as above required, and no evidence was offered to show any waiver of such stipulation. At the close of all the testimony the defendant moved for a nonsuit, which was granted. The plaintiff appeals, and his exceptions present the question whether the said stipulation, requiring claim to be presented within 60 days, is valid as a reasonable regulation, and binding on the receiver of the message so as to bar his claim for damages in an action in tort under the mental anguish statute.

Under article 9, § 8, of the Constitution, all telegraph companies engaged in the business of transmitting intelligence for hire are common carriers, and subject to liability as such. It is a well-established rule that a common carrier cannot, by contract, exempt itself from the consequences of its negligence. But the stipulation in question does not tend to limit the liability of the company for negligence. It is a stipulation against delay and neglect on the part of the sender of the message, or those who, by the transaction, are brought into business relation with the company. Such a contract is neither contrary to law or public policy nor is it unreasonable. Aiken v. Telegraph Co., 5 S. C. 358; Wolf v. W. U. Tel. Co., 62 Pa. 83, 1 Am. Rep. 387; W. U. Tel. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713; W. U. Tel. Co. v. Dougherty, 54 Ark. 221, 15 S. W. 468, 11 L. R. A. 102, 26 Am. St. Rep. 33; Kirby v. W. U. Tel. Co. (S. D.) 65 N. W. 37, 30 L. R. A. 612, 621, 624, 46 Am. St. Rep. 765; Southern Express Company v. Caldwell, 21 Wall. 264, 22 L. Ed. 556; Young v. W. U. Tel. Co., 65 N. Y. 163, cited in 45 Am. Rep. 491, note; Sherrill v. W. U. Tel. Co. (N. C.) 14 S. E. 94; Hill v. W. U. Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; W. U. Tel. Co. v. Waxelbaum (Ga.) 39 S. E. 443, 56 L. R. A. 747; Harris v. W. U. Tel. Co., 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70; Manier v. W. U. Tel. Co., 94 Tenn. 442, 29 S. W. 732; Heimann v. W. U. Tel. Co., 57 Wis. 562, 16 N. W. 32; 27 Ency. Law (2d Ed.) 1046. The case of Aiken v. Telegraph Company, supra, held that the stipulation requiring claim to be presented in writing within 20 days was reasonable and binding upon the sendee or receiver of the message as well as the sender. The reasonableness of the stipulation, as briefly stated in W. U. Tel. Co. v. Dougherty, supra, lies in "the character of the business and the great number of messages sent over the lines of a telegraph company, the importance of early information of claims to enable the company to keep an account of its trans-

actions, and the impossibility of recalling them or accounting for them from memory after a lapse of a considerable period of time." This, however, is not an action by the sender on the contract, but is by the sendee in tort for a breach of duty imposed by law. The sendee of a telegraphic message has no cause of action unless the defendant has breached some duty owing to him. The duty which a telegraph company owes by law to the sendee of a message is precisely the same duty which it owes to the sender; that is, to promptly transmit and deliver the message. This duty springs from the relation created by the contract. The contract, to the extent that it is reasonable, and not contrary to law or public policy, limits, qualifies, molds the duty which the law imposes upon the carrier in its relation to the public. Such is the reasoning in the case of Aiken v. Telegraph Company, supra: "The foundation of the contract is the nature of the carrier's occupation and the fact of employment. The legal consequences flowing from such employment are what the special contract seeks to modify or limit. Every such contract implies a sender of a message, a receiver, and an agent of transmission. The nature of a contract is in this respect the same whether the rights and duties of the respective parties are defined by operation of law or by express stipulations between themselves. It would therefore follow that the question whether the receiver of the message is a privy should receive the same solution whether the contract is the result of the operation of law or of special terms of agreement between the parties. * * * Construing his contract by the nature of the service to be performed, it is clear that the party for whose benefit the service is to be performed is to be regarded as considered and included in the obligation resulting from the fact of employment, whether that person stands to it in the relation of sender or receiver." See, also, Butler v. Telegraph Company, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893.

But, further, a telegraph company has the right to make rules and regulations for the conduct of its business which do not conflict with law or public policy, and are reasonable; and those who deal with the company with notice of such regulations enter into the relation of patron and carrier, subject to such regulations. We distinguish now between reasonable stipulations in the contract and reasonable regulations allowed by law for the conduct of business. The carrier's duty to the public is affected by the operation of reasonable regulations, whether those dealing with it expressly assent to the regulations or not. It is sufficient if they have notice of the regulation. So that in any action in tort by the sendee of a message his rights, being based upon the carrier's duty to him as limited by reasonable and valid rules and regulations, cannot be asserted independent of such regulation. There are cases which hold such a stipulation or regulation to be invalid. W. U. Tel. Co. v. Eubanks (Ky.) 38 S. W. 1068, 66 Am. St. Rep. 361, 36 L. R. A. 711; Pacific Tel. Co. v. Underwood (Neb.) 55 N. W. 1057, 40 Am. St. Rep. 490; Francis v. W. U. Tel. Co. (Minn.) 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507; Webbe v. W. U. Tel. Co. (Ill.) 48 N. E. 670, 61 Am. St. Rep. 207. These cases, in the main, rest upon the reasons (1) that such a stipulation limits the liability of a telegraph company in conflict with some express statute or provision of the Constitution, and (2) varies the statute of limitations. We have no statutory or constitutional provision which forbids a telegraph company from making such a stipulation or regulation. The mental anguish statute does not affect this question, as it merely, in alteration of the common law, adds mental suffering as an element of damages that may be recovered. Such damages do not constitute a statutory penalty within the sense of that class of cases which hold that such stipulations are valid with respect to damages, but not with respect to a statutory penalty; as, for example, Mathis v. W. U. Tel. Co., 94 Ga. 338, 21 S. E. 564, 47 Am. St. Rep. 167. The Supreme Court of the United States, in considering an analogous question in the case of Southern Express Co. v. Caldwell, supra, satisfactorily disposes of objections to such stipulation in this language: "Such stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are; and, having made his claim, he may delay his suit. * * * The contract is not a stipulation for exemption from responsibility for the defendant's negligence or for that of their servants. * * * A common carrier is always responsible for his negligence, no matter what his stipulation may be. But an agreement that in case of failure by the carrier to deliver the goods a claim shall be made by the bailor or the consignee within a specified period, if the period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, of capacity, which the strictest rules of the common law ever required."

The judgment of the circuit court is affirmed.

(71 S. C. 446)

RICHARDSON v. ATLANTIC COAST LINE R. R.

(Supreme Court of South Carolina. April 18, 1905.)

1. APPEAL—HARMLESS ERROR.

That a charge is not relevant to any issue in the case is not ground for reversal, where no prejudice is shown.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4220.]

2. CARRIERS — EJECTION OF PASSENGER—PUNITIVE DAMAGES.

Where a passenger buys a ticket to a station which the agent tells him is on the main line, and, on changing cars, is shown by a person in uniform a train for his destination, but after it starts is told by the conductor that it is a through train and will not stop, and is put off with only such force as was necessary, on refusal to pay the additional fare to the next stopping point, and is again received on payment of his fare, and carried to the station beyond, he is entitled to punitive damages.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1429, 1489.]

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; Watts, Judge.

Action by E. L. Richardson against the Atlantic Coast Line Railroad. Judgment for plaintiff, and defendant appeals. Affirmed.

Barron & Ray, for appellant. George Johnstone and Frank G. Tompkins, for respondent.

JONES, J. The plaintiff brought this action against defendant company for an alleged unlawful and willful ejection from its passenger train at Pee Dee, S. C., on the 26th day of September, 1903, which resulted in a verdict and judgment in favor of plaintiff for $875. The defendant appeals on two grounds—one complaining of the instruction to the jury, and the other of the refusal to grant a new trial.

Appellant complains of the following charge to the jury: "I charge you further, as a matter of law, if you go down to one of these railroad offices and buy a ticket and pay full fare for it, and there is no time limit, the time you are to use that ticket is not limited. You may buy a straight ticket—pay full fare—with no time limit to it. You have the right to put that ticket in your pocket, and use it whenever you see proper. But if you buy the ticket and board the train, you must make continuous passage. You cannot stop over on the ticket between two different points unless the ticket gives you that privilege. If you buy a straight ticket to a place, you need not use it immediately, but, if you do commence to use it, then you must go on through; otherwise, if you drop off, you will have to pay again." It was alleged that this charge was erroneous: "(a) That, in so far as it refers to making a continuous trip when starting, it was not relevant to any issue in the case, nor premised any fact in the case, but it was misleading and calculated to prejudice the jury. (b) That, where there is necessary changing of cars and conductors, the same ticket being used, the law does not require a continuous journey unless it is so stipulated on the ticket." This exception cannot be sustained. If, as stated under specification "a," the charge was not relevant to any issue in the case, nor premised on any fact in the case, it does not constitute reversible error, unless appellant could show wherein it was prejudiced thereby, and no such showing has been made. With reference to specification "b," it is sufficient in addition to say that appellant made no request that the court modify its general statement of the law in the particular mentioned.

With reference to the refusal of the motion for a new trial, it is excepted (1) that there was no evidence of actual damages beyond 50 cents; (2) that there was no evidence of a willful tort, such as to justify punitive damages for any sum. Punitive damages may be awarded for any intentional ejection of a person from a passenger train, no matter how slight the force used, if such ejection is unlawful. Such an act is not characterized by inadvertence or negligence, but is a willful invasion of a personal right.

The evidence on behalf of plaintiff was to the effect that he was a lawyer residing at Greenwood, S. C., and had business to transact at Latta, S. C.; that, having reached Columbia, S. C., on his way, he there, on September 28, 1903, purchased a straight ticket from Columbia, S. C., to Latta, S. C., paying full fare therefor; that the ticket had no conditions or limitations on it; that when the ticket was purchased the ticket agent at Columbia, S. C., informed him that Latta was on the main line, and that he would reach Latta that afternoon or evening; that plaintiff boarded defendant's train and went to Sumter, and, after changing cars there under instructions, went to Florence. At Florence plaintiff took a train which he was informed by one wearing a uniform and carrying a lantern, whom he took to be a servant of the defendant company, was the train for Latta, but which was in fact a through limited train that did not stop at Latta, but defendant was not aware of this, and boarded the train, supposing it would stop at Latta. This train was the next and only train due to pass Latta that night. According to the company's regulation, this train did not stop to take on or let off passengers after leaving Florence until reaching Dillon, the next stop. Latta is an intermediate station, 7 miles from Dillon and 11 miles from Pee Dee, another intermediate point 13 miles from Florence, where the fast train slacks up for registering slips. When the conductor, after leaving Florence, came along for tickets or fare, the plaintiff presented his ticket for Latta, and was then informed that the train would not stop at

Latta, but that plaintiff would be carried to Dillon upon payment of 19 cents in addition to his ticket to Latta; otherwise he would have to be ejected. Plaintiff refused to make further payment, and refused voluntarily to leave the train, and demanded to be put off at Latta. Thereupon he was ejected from the train at Pee Dee, with only such slight force as plaintiff's slight resistance rendered sufficient. After ejection from the train, plaintiff immediately tendered fare to Dillon, and was again received on board, and carried to Dillon. The next morning, plaintiff took a local train to Latta in time to fill his business appointment. The actual damages by way of additional expenses did not exceed 50 cents. This afforded some evidence to be submitted to the jury on the question whether plaintiff's rights were willfully violated. The real issue in the case was whether plaintiff's ejection was unlawful, for, if unlawful, there was sufficient evidence of willfulness to warrant punitive damages. This issue depended upon the contested question of fact whether the defendant's agent at Columbia, S. C., sold plaintiff a ticket from Columbia, S. C., under representation that plaintiff would be transported to Latta that night, and whether another agent of defendant at Florence informed plaintiff that the train he took was the train for Latta. This was submitted to the jury under instructions to which no exception has been taken. If plaintiff boarded defendant's train at Florence under these circumstances—and we must assume from the verdict that he did—and it being undisputed that there was no other train to carry plaintiff to Latta that day, we are of the opinion that he was rightfully on board that train as a passenger for Latta, and his ejection before reaching his destination was unlawful, as the rule of the company not to stop that particular train at Latta, whether reasonable or not, must be held subordinate to the right of the passenger on board under a contract made under circumstances implying that it would stop there. It was therefore no error of law to refuse a new trial on the ground that there was no evidence that the ejection was willful or wanton, so as to justify punitive damages.

The exceptions are overruled, and the judgment of the Circuit Court is affirmed.

POPE, C. J., and GARY, A. J., concur.

WOODS, J. (dissenting). Disregarding all testimony on behalf of the defendant, the plaintiff's case may be thus stated: He purchased an ordinary ticket over defendant's road from Columbia to Latta, and took the afternoon train with the assurance of the Columbia ticket agent that he would be able to take another train at Florence, and reach Latta that night. At Florence he was told by "some one with a lantern, and with a uniform on," that the train he was about to take was the Latta train. When he presented his ticket on this train he was informed by the conductor that the train did not stop at Latta, and that he would have to pay 19 cents additional fare to Dillon, a few miles beyond Latta, from which place he could return to Latta at an early hour the next morning. The plaintiff refused to pay the additional fare, and demanded to be put off at Latta. The train was stopped at Pee Dee, and the following is plaintiff's own account of the conductor's action: "He came in and said: 'I am ready for you to get off.' That was at Pee Dee. I said: 'I don't want to raise any racket with you. I know your authority. You can put me off whether I am ready or not. I think I know how to protect my rights. I can't voluntarily go out.' He said: 'All right. Where is your baggage?' I said: 'There.' The porter carried it out. He said: 'Come ahead.' I said: 'I can't go voluntarily. I won't resist. All you have to do is to put your hand on my arm. I will follow you if you are determined to do it.' He put his hand on my arm, and I walked out. I had Mr. Friday and Mr. Thomas to go to the door and see him refuse to take the money. He had said he would not take the money. I said: 'I rather pay you nineteen cents, and go to Dillon, than to stay at Pee Dee.' He said: 'I ought not to let you go, but I will.' I got on the train, paid him nineteen cents, and went to Dillon, rather than stay at Pee Dee." The verdict was for $875. The defendant moved for a new trial on the ground that there was no proof to support a verdict for punitive damages, the actual damages claimed being only 50 cents.

The rule that railroad companies should be held to the strictest responsibility for any violation of the known rights of a passenger can hardly be stated too strongly, but in this case I am unable to see any ground whatever for the finding of punitive damages, and think a new trial should have been granted unless the plaintiff should remit all the recovery except 50 cents, the actual damages proved. The defendant's evidence that the train which plaintiff took at Florence was a through train, and had not for at least the two preceding years been scheduled to stop at Latta, was undisputed. The plaintiff's reliance, therefore, to show a known violation of his rights in refusing him passage on that train to Latta, was the special representation of the ticket agent at Columbia, and of the man in uniform at Florence, that the train would let him off at Latta. When he asserted his right to go to Latta in that train, and was informed it did not stop there, common fairness and justice required that he should make known to the conductor his claim of a special contract or representation on the part of the defendant's agents which would require the rule as to the running of the train fixed by the company for the guidance of the conductor to

be suspended in his case, before he could recover a verdict for punitive damages. There is not the slightest evidence that the conductor had any notice of the special facts connected with the purchase of the ticket, and with the presence of the plaintiff on that train. On the contrary, the plaintiff testified that he did not inform the conductor that he had been told that the train would stop at Latta. In each of the cases of Myers v. Railway Co., 64 S. C. 514, 42 S. E. 598, and Chiles v. Railway Co., 69 S. C. 327, 48 S. E. 252, the passenger made a full statement of all the particular circumstances, and the conductor acted at the peril of the company, because he had explicit notice of the passenger's special rights. Here this basis for the recovery of punitive damages is entirely lacking.

I think defendant's exception, also, to the following charge, should be sustained: "I charge you further, as a matter of law, if you go down to one of these railroad offices and buy a ticket and pay full fare for it, and there is no time limit, the time you are to use that ticket is not limited. You may buy a straight ticket—pay full fare—with no time limit to it. You have the right to put that ticket in your pocket, and use it whenever you see proper. But if you buy the ticket and board the train, you must make continuous passage. You cannot stop over on the ticket between two different points unless the ticket gives you that privilege. If you buy a straight ticket to a place you need not use it immediately, but, if you do commence to use it, then you must go on through; otherwise, if you drop off, you will have to pay again." While I am sure the learned circuit judge did not intend it should have such an effect, I do not see how this charge could fail to impress the jury that the plaintiff's ticket could not have been used from Florence to Latta if he had stopped over at Florence until the next morning for the regular train to Latta. The defendant was thus placed before the jury in the position of selling a straight ticket to Latta from Columbia, which would be of no value for the portion of the journey from Florence to Latta, unless they should find the company obliged to accept it on the night train which plaintiff took immediately after his arrival in Florence.

For these reasons, I think there should be a new trial.

(71 S. C. 439)

In re BUGG'S ESTATE.

(Supreme Court of South Carolina. April 18, 1905.)

1. ESCHEAT — PROCEDURE — JUDGMENT — PLEADINGS.

Where proceedings were brought to escheat property, but failed because of appearance of heirs, and were changed by orders permitting administrator to intervene in a proceeding to marshal assets, and to provide for paying fees to the attorney of the administrator and escheator and to sell lands, at a time when all parties interested were present, and no objections were made, the judgment will not be set aside as beyond the scope of the pleadings.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 434-442.]

2. JUDGMENT—OPENING.

A motion to open a judgment and for leave to file exceptions to the master's report is addressed to the discretion of the court.

Appeal from Common Pleas Circuit Court of Richland County; Watts, Judge.

Petition by Ella Bugg Jones and others in proceedings by M. R. Cooper, Secretary of State, to escheat property of Permelia Bugg, to set aside judgment. From an order refusing petition, they appeal. Affirmed.

Halcott P. Green, for appellants. W. N. Graydon and Lawson D. Melton, for respondent.

WOODS, J. The questions to be determined in this appeal arise under a petition of Ella Bugg Jones, Hannah H. Bugg, Lydia Jane Bugg, and James W. Bugg to the circuit court to set aside the decree rendered in the cause on the grounds (1) that the court had no jurisdiction to render it, and, (2) if the court did have jurisdiction, the petitioners should be relieved from it, because their failure to except to the report of the master confirmed by the decree was due to oversight or excusable neglect on the part of their attorneys. To make the issue clear, it is necessary to state somewhat in detail the history of the proceeding. The original proceeding was instituted for the sole purpose of having escheated certain real estate in the city of Columbia belonging to the estate of Permelia Bugg, deceased. All the statutory requirements were complied with, and the cause was placed on the jury calendar. In response to the publication of notice to heirs and claimants two sets of claimants appeared, and were actively represented by counsel throughout the proceeding. By consent of all parties, the matter was referred to the master "to hear and determine all the issues of law and fact raised by the said traversers, and to make report thereof, together with the testimony taken, with all convenient speed, with leave to report any special matter." The master, under this order, heard the separate traverses together. While the taking of the testimony was in progress, it developed that J. C. Martin had administered on the estate of Permelia Bugg, and that C. C. Johnson, who had recovered judgment against the administrator, was attempting to collect his judgment by sale of the property involved in the escheat proceedings. Some of the parties in interest commenced the preparation of a proceeding to enjoin the enforcing of this judgment, but abandoned it upon the filing of a petition by W. D. Mayfield, attorney for the judgment creditors, to be allowed to intervene. Against the objection of the attorney for the petitioner Ella Bugg Jones and those in common interest with her, the master ordered the petition to be filed, and subse-

quently, in pursuance of the petition, ordered notice to be published to all creditors to come in and prove their demands, and that the administrator show cause why he should not be required to account before the master. All this was manifestly outside of the scope of the escheat proceedings, but when the order last recited was made attorneys representing all parties were present, and made no objection. Subsequently, in open court, attorneys of all parties being again present, with due notice of the motion, and making no objection, an order was made by the circuit court confirming both these orders of the master. The master then proceeded to take the accounts of the administrator, receive proof of claims, take the accounts of Ella Bugg Jones, Hannah H. Bugg, Lydia Jane Bugg, and James W. Bugg for rents of the property collected by them, and to fix the fees of counsel for the escheator and for the administrator. Not only were all these things done without objection, but counsel who were then acting for those who are now objecting to the course of the master on the ground that it was beyond the scope of the proceeding, participated in the adjustments of the accounts for rents, and, as the master says in his report, agreed to the allowance of fees by way of compromise. The master's report covered all these subjects. The claims and liabilities of all parties, including the petitioners in this proceeding, were adjusted, and a sale of the land recommended. A decree was then made by the circuit court reciting all the proceedings and confirming the report of the master, with a slight modification as to the rents due. By this decree the claimants were adjudged to be the owners of the land as heirs of Permelia Bugg, and entitled to the proceeds of sale. None of the attorneys interested made any objection to this decree, though it was submitted to all of them, and they were all present when it was signed. Under this decree the land was sold and bid off by W. Boyd Evans for $3,000. Before compliance with the bid and execution of title, the petition upon which this appeal arises was filed, and a temporary injunction obtained restraining the master from paying out the funds in his hands and from executing a deed to the property sold. Upon the hearing of the cause the petition was dismissed by the circuit court, and the petitioners appealed.

The original proceeding being solely for escheat under the statute, the first question is, did the circuit court have the power in that proceeding to marshal the assets, call in creditors, take the accounting of the administrator, and order fees to be paid, and sell the land; in short, to settle the entire estate? The appellants do not, of course, deny that the court of common pleas has jurisdiction to do all these things when they are within the scope of the pleadings, but the contention is that a judgment is not valid when it embraces matters not brought to issue in the pleadings. The general proposition that a judgment in which matters are adjudicated against a party not fairly within the scope of the pleading he is called upon to answer is invalid, and will be set aside as to such extraneous matters, is founded on the most obvious principles of justice, and is well supported by authority. For instance, if a judgment of foreclosure should be entered by default in an ordinary action on an account, the foreclosure would be set aside on motion. The ground upon which this rule rests, however, is that in rendering such a judgment the court undertakes to conclude a party upon a matter in which he has had no opportunity to be heard. 1 Black on Judgments, § 242; Munday v. Vail, 34 N. J. Law, 418; Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464. In the latter case Mr. Justice Brewer, in discussing the faith and credit to be given by the courts of one state to judgments rendered in another, says: "The requirements of that section are fulfilled when a judgment rendered in a court of one state, which has jurisdiction of the subject-matter and of the person, and which is substantially responsive to the issues presented by the pleadings, *or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined*, is recognized and enforced in the courts of another state." The language we have italicized obviously applies to this case. The case of Cooper v. Smith, 16 S. C. 331, decided a different question. There the clerk undertook to enter a formal judgment on the verdict of a jury in an equity cause, which required the decree of the court. The plaintiff participated in the contest before the jury without objecting. In setting aside the judgment the court did not decide anything as to the actual effect of the verdict, but only that the clerk could not enter a judgment on that alone without a decree of the court. While recognizing the authority of that case, the court has no disposition to extend it to cases not falling clearly within it. In the proceedings now under consideration the petitioners had the fullest opportunity given them to be heard at every step, and actually participated in the proceedings as enlarged by the orders of the master and the circuit court. While their attorneys did object to the order of the master directing the petition of the creditors to be filed in the escheat proceeding, they made no objection to the decree of the court in which this order of the master was confirmed. The authority of the former attorneys for the appellants to represent them is not denied, nor is the good faith of these attorneys at all drawn in question. The appellants having had full opportunity to be heard at every stage, the motion to set aside the judgment cannot be granted on the ground that the judgment was beyond the scope of the original proceeding. A motion to open a judgment on the ground of excusable neglect

or inadvertence is addressed to the discretion of the circuit judge, and this court cannot reverse his action thereon, except for abuse of discretion or error of law. Le Conte v. Irwin, 19 S. C. 554; Ex parte Bank, 56 S. C. 12, 33 S. E. 781. The circuit judge refused to open the judgment because of the alleged excusable neglect and inadvertence of the attorneys then representing appellants in failing to except to the master's report within 10 days. No error of law or abuse of discretion has been shown in this refusal. Indeed, the petition and the affidavit do not state any facts showing excusable neglect or inadvertence.

The judgment of this court is that the judgment of the circuit court be affirmed.

(71 S. C. 532)

LATOUR et al. v. SOUTHERN RY.

(Supreme Court of South Carolina. May 8, 1905.)

1. CARRIERS — MALTREATMENT OF PASSENGER —INSTRUCTIONS.

Where an action is brought for maltreatment of a passenger by defendant carrier, and is not based on its failure to make connections with trains of another road, an instruction that railroad companies do not guaranty connections is not reversible error.

2. SAME—STATEMENTS OF TICKET AGENT.

Where, on sale of a ticket, the agent stated that the train would make close connections at a certain point, it is not a guaranty of such connection.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1014.]

3. TRIAL—CHARGE ON FACTS.

A statement by the court in his instructions, based on admissions in the pleadings, is not a charge on the facts.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 432–434.]

4. CARRIERS—RIGHTS OF PASSENGER.

Where a passenger is carried to a place not called for by his ticket, against his will, he is entitled to recover any damages suffered thereby.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1067–1071.]

5. SAME.

A carrier must exercise such care and effort to avoid delay to a passenger as is due under the circumstances.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1039.]

Appeal from Common Pleas Circuit Court of Greenwood County; Leroy F. Youmans, Special Judge.

Action by Rosa Latour and her husband against the Southern Railway. Judgment for defendant, and plaintiffs appeal. Reversed.

Sheppards & Grier, for appellants. T. P. Cothran, for respondent.

POPE, C. J. The plaintiff Mrs. Latour seeks to recover $1,000 damages of the defendant railway company on account of the negligent, careless, wanton, and willful conduct of the defendant, its agents and officers, in the matter of the treatment of the plaintiff, who was a passenger on one of its passenger trains on the 8th December, 1902. The action came on for trial in the court of common pleas for Greenwood county before Special Judge Youmans and a jury. After full testimony and the charge to the jury, the jury rendered a verdict in favor of the defendant, on which judgment was duly entered. The plaintiff now appeals to this court on the following exceptions:

"(1) It was error in his honor to charge the jury as follows: 'Now, gentlemen, as to making connections with trains, railroad companies do not guaranty the making of connections. If they sold you a ticket and guarantied connection, then you would have a cause of action; but they do not guaranty connections,' the error being:

"(a) In so charging the jury, his honor gave them an entirely incorrect idea of the law of this case, and led the jury to believe that unless the company had guarantied connections at Greenville or Atlanta the plaintiff had no case whatever. The law is that a railway company is charged with the duty of running its train according to schedule time, and can only be excused from so doing by accident, or from causes which reasonable care could not provide against.

"(b) In so charging the jury, his honor entirely eliminated from this case the testimony of plaintiff that the agent of the company represented that she would make connection at Greenville at the time of the sale of said ticket; it being respectfully submitted that a railway company is bound by the representations of its ticket agent to the purchaser of a ticket, made at the time of the sale of the ticket.

"(c) It is alleged in the complaint that at the time of the purchase of the ticket defendant represented to plaintiff that she would connect at Greenville, upon which point testimony was offered by plaintiff and her witnesses, and in charging that defendant did not guaranty connections his honor entirely eliminated this testimony and these allegations from the case, and further charged directly on the facts of the case by telling the jury that the defendant did not guaranty connections, in violation of the Constitution, which prohibits a circuit judge from charging on the facts of the case.

"(d) If it be true, as alleged in the complaint and as testified to by plaintiff's witnesses, that defendant did represent to plaintiff at the time of the purchase of the said ticket that she would make close connection at Greenville, it is submitted that this in law amounts to a guaranty which would be binding on the defendant, and his honor had no right to instruct the jury that defendant did not guaranty connections, and in so doing, his honor, in addition to charging on the facts of the case, in violation of the Constitution, which forbids him from charging on the facts, ignored these allegations and the testimony, and also placed an entirely er-

roneous construction on said allegations and said testimony, the same amounting in law to a guaranty of connection; and his honor should not have submitted this question to the jury.

"(e) The defendant was certainly bound by the representation of its agent, and his honor committed no error to charge that it did not guaranty connections, and further instructed the jury that railroads do not guaranty connections.

"(2) It is further submitted that his honor further erred in charging the jury as follows: 'The other side claims that she abandoned her trip' because:

"(a) In so charging the jury, his honor charged on the facts of the case, and stated the testimony to the jury, in violation of the Constitution, which prohibits a circuit judge from charging on the facts, because the answer of the defendant was simply a general denial, but in the testimony of the defendant's witnesses one of the witnesses testified that plaintiff had abandoned her trip.

"(3) His honor erred in charging the jury as follows: 'She says, if she had been permitted to remain in there, she would have made connection. She says it was all caused by the carelessness, negligence, willful and wanton misconduct of the servant in charge of this train of cars, in ordering her to vacate her seat and take passage in a car that went by Anderson and Seneca. You see what she says it was all caused by?' This being a charge on the facts of the case, in violation of the Constitution, which prohibits a circuit judge from charging on the facts of a case, and his honor in charging the jury, in the language herein mentioned, in quoting the testimony to the jury, was charging the jury on the facts of the case, and repeating to the jury the testimony in the case, in violation of the Constitution, which prohibits a circuit judge from charging on the facts of the case, or from repeating the testimony to the jury in his charge.

"(a) In so charging the jury, his honor committed further error, in that he limited recovery to a failure to make connection at Seneca; whereas this is not the only element in said cause of action, and is not the only cause of grievance against said defendant, it being respectfully submitted that one of the elements of said cause of action, and one cause of grievance against the said defendant, was its authorized diversion of the plaintiff from the route indicated by said ticket.

"(b) It is submitted that plaintiff had a right to have submitted to the jury the question of her damage for being carried by Anderson and Seneca instead of by Greenville, and whether or not she would have made connection by going by Greenville is not controlling in the case, because, if her ticket called for Greenville, it was the duty of defendant to carry her there, and its failure so to do gives a good cause of action for damages against the defendant, although, as a matter of fact, it may have carried her to another point where the same connection would have been made; and, in charging the jury as hereinabove complained of, his honor entirely eliminated this element from the case, and makes the whole cause of action depend on failure to make connection.

"(4) It was error in his honor to charge the jury as follows: 'Now, gentlemen, negligence is generally said to be the want of due care.' A railroad is required to exercise care with its passengers. It takes their money and agrees to transport them, and is bound to exercise ordinary care, because:

"(a) A railroad company carrying passengers is required to exercise the highest degree of care known to the law, and it is not sufficient that they exercise only ordinary care.

"(b) A common carrier cannot discharge itself from liability to a passenger by showing that it exercised towards its passenger ordinary care, and his honor committed error in instructing the jury that all that was required of the defendant in this case was to exercise ordinary care.

"(5) His honor further erred in charging the jury that all that was required of the railway company was to exercise such care as a man of ordinary prudence would do, and in making the test that of a man of ordinary prudence or an ordinarily prudent man, it being respectfully submitted that a common carrier of passengers is required to exercise a much higher degree of care towards its passengers than is required of a man of ordinary prudence or an ordinarily prudent man.

"(6) His honor committed error in charging the jury that the burden of proof was on the plaintiff to show negligence, it being respectfully submitted, in a case of this kind of injury to a passenger, whenever injury is shown at the hands of the carrier, the law presumes negligence, and the burden of proof is then shifted, and the defendant is required to show that it was not negligent in causing the injury, or with reference to the matters complained of as producing the injury; and his honor erred in not so instructing the jury, and in charging that the burden of proof is on the plaintiff throughout to prove every allegation of said complaint, whereas his honor should have instructed the jury that if they believed from the testimony that plaintiff was a passenger, and while in the custody of the defendant as a passenger received injury at the hands of the defendant, or from any agent or instrument under the control of the defendant while a passenger, the law would presume negligence, and, unless defendant overcomes this presumption by a preponderance of the testimony, plaintiff would be entitled to a verdict.

"(7) His honor further committed error in charging the jury as follows: 'I have listened with great care to this testimony. It has,

while not extensive, covered considerable scope. Starting here, the main trouble seems to be, where does that ticket read? The ticket was lost'—the same being a charge on the facts of the case, in violation of the Constitution of the state, which prohibits a circuit judge from charging on the facts of a case.

"(a) In stating to the jury that the ticket was lost, his honor instructed the jury with reference to a matter of fact in the case, in violation of the Constitution and to the prejudice of the plaintiff, because, as the record shows, plaintiff demanded a production of the ticket, which was refused and shown to be in defendant's possession, and in such a case the presumption of the law is the production of the ticket would have been to the damage of the defendant; and, when his honor instructed the jury, as he did, that the ticket was lost, he entirely relieved the defendant of this presumption of law, and any suspicion which might attach to it by reason of its failure to produce said ticket.

"(b) In saying to the jury, 'Starting here, the main trouble seems to be, where does the ticket read?'—because, in so charging, his honor instructed the jury with reference to a question of fact in the case, and charged the jury on facts of the case, in violation of the Constitution, which prohibits him from so doing.

"(c) In stating to the jury, 'Starting here, the main trouble seems to be, where does that ticket read?' 'The ticket was lost'—his honor charged the jury on matters of fact in the case, in violation of the Constitution, which prohibits him from charging on the facts of the case.

"(8) His honor erred in charging the jury as follows: 'Before you can find for her, you must find that they were guilty of negligence, and she must prove it by the preponderance of the evidence'—it being submitted that if plaintiff, who was a passenger, proved injury at the hands of the defendant and while in its charge, the law would presume negligence, and she would not be required to prove it by a preponderance of the evidence.

"(9) It was error in his honor to permit the witness Crymes, after plaintiff had closed her case in reply, to answer the following question: 'Mr. Crymes, did either of the tickets you sold to Mr. Latour read by way of Greenville?'—the error being that defendant had closed its case.

"(a) The ticket was shown to have been in the possession of the defendant, and it was the highest evidence of how it read.

"(b) It was error in his honor to hold that, whereas a party declines to produce a ticket, he has the right to offer secondary evidence as to its contents."

We will now consider these exceptions in their order:

1. We should state at the beginning that plaintiff's action is not grounded upon the failure of the defendant to make connection with the train of another road. Plaintiff could have made connection with train No 37 at Greenville, S. C., on the very morning of the day she made connection with such train No. 37 at Seneca, S. C. Any reference, therefore, in the judge's charge to the law regulating the connections, was a purely groundless act. In order that a judge's charge may work a reversal of the judgment, it must appear that the law embraced in the charge had a direct and effective connection with the case before the court. What harm in a prosecution for assault and battery could a judge's charge on the subject of arson have upon the first prosecution? The judge's charge upon arson might or might not be the law, but his charge would have no reference to an assault and battery, and on that account would be disregarded if appealed from.

(a) There was never any question as to guarantying the connection at Greenville with the Air Line Road. The connection was made by either of two trains on that road, to wit: No. 39, which was due in Greenville at 11:10, and No. 37, at 12:30. The train from Greenwood to Greenville reached the latter at 12:01. The connection with the Air Line Road with train No. 37 was actually made. Granted that the delay was a delay, still the connection was made on that very day.

(b) We do not see that the acting circuit judge eliminated anything in the shape of testimony from this case, so far as the connection at Greenville with the Air Line Railway was concerned; indeed, if the acting circuit judge was to be criticised for anything in relation to the connection at Greenville, we might say that he laid down the law too favorably for the plaintiff.

(c) Nor is there anything in this subdivision "c" which militates against the judgment here sought to be reversed. Granted that the agent at Greenwood, Mr. Crymes, did speak of 10 or 15 minutes' interval between the time of arrival and departure of the trains at Greenville, yet such was the fact as developed by the testimony in the case.

(d) Nor do we see anything in subdivision "d" for while it may be admitted, though it is not, that Mr. Crymes, defendant's agent at Greenwood, at the time of the sale of the ticket to the plaintiff, said that she would make close connection at Greenville on that day, and the plaintiff boarded train No. 37 at Seneca, and used the same in her attempt to reach Atlanta in time for the afternoon train towards Detroit. There is therefore no visible connection with the law pertaining to this connection between the parties, so far as any guarantied connection is concerned.

(e) As to "e," as before remarked, any effort on the part of the presiding judge to lay down the law of guarantied connections would have been utterly futile if it had been attempted by him. This exception and subdivisions are overruled.

2. The error of his honor's charge in using

the words, "The other side claims that she abandoned her trip," such language was used and based upon plaintiff's admission in her pleadings, which admission went through any testimony bearing upon that point. Therefore it was no issue in the case, and does not belong to the class of cases referred to where the judge is forbidden to charge upon the facts. This exception and subdivision are overruled.

3. The words used by the presiding judge, as referred to in this third exception, are mainly taken from, and it was so announced by the judge himself, the fourteenth paragraph of the plaintiff's complaint. The judge had a right to read the pleadings to the jury. It is no charge upon the facts for a presiding judge to read, in the presence of the jury, the allegations of the complaint which are directly controverted by the answer. It but leads up to a correct apprehension by the jury of the issue between the parties litigant. We do not see how subdivision "a" could have wrought any injury to the plaintiff, for at Seneca the plaintiff and her children were placed on board train No. 37.

Nor as to subdivision "b." We had better remark that our attention was called, in reading the judge's charge, to this question: "Mr. Cothran: I wish your honor to instruct the jury that even if her ticket read via Greenville, and the passenger was deflected, diverted to another route, that the plaintiff is not entitled to damages, unless, under the allegation of the complaint, the jury believed from the evidence that, if the passenger had been carried the route called for by her ticket, she would have made connection, which she did not make at the other point." This matter was then argued pro and con. "Court: Gentlemen of the jury, I charge you that, if she bought that ticket by the way of Greenville, whether she would have missed connection, whether it was the best and most commodious route or not, she had the right to be carried by Greenville, unless she consented to go by a different route; and if by the diversion, without her consent, any damages were caused to her, whether in making connection, or any other inconvenience alleged in this complaint, she is entitled to a verdict." Now, in view of this language, what error could be imputed to the presiding judge on this particular line? This exception and the subdivisions are overruled.

6, 8. The respondent suggests that the error into which the appellant seems to have fallen arises from the appellant's confusing this with an action for personal injury received by a passenger, for he says in such case the proof of an injury by some instrumentality of the carrier raises a presumption against the carrier, but this is no such case; indeed, in our judgment, the presiding judge very properly held that the allegations made by the plaintiff and denied by the defendant must be proven by the plaintiff. These two exceptions are overruled.

7. As to the seventh exception, it seems to us that this exception and its subdivisions cannot possibly lead to a reversal of the judgment here appealed from. There was nothing to which the testimony of the plaintiff had been directed, and the presiding judge, in his charge, which was quoted but a while ago, gave her full benefit of the ticket being by way of Greenville. This exception is overruled.

9. The ninth exception could lead to no important results. It is very evident that both parties to the contention saw the importance of the ticket purchased by plaintiff being "by way of Greenville." No harm resulted to either party thereby. This exception is overruled.

4, 5. The fourth and fifth exceptions relate to the following instructions to the circuit judge: "Now, gentlemen, negligence is generally said to be the want of due care. A railroad is required to exercise care with its passengers. It takes their money and agrees to transport them, and are bound to exercise ordinary care. Well, where a man is doing anything and does not exercise such care as an ordinary prudent man would do—understand me, such care as an ordinary prudent man would do—if he does what any ordinary prudent man would not, that is an act of commission. The other is of omission. If he neglects to do what an ordinary prudent man would do, that is negligence, and it is the usual test laid down. Now, gentlemen, that is a matter for you, Did the railroad exercise ordinary care? Did it do any act that an ordinary prudent person, assuming the responsibility, would not have done, or did it neglect to do anything an ordinary prudent person would have done? If it did, it is guilty of negligence, and if damage resulted either by the omission or the commission, and such damages resulted therefrom, was the proximate cause—that is, the nearest cause—the party is liable for such damages as done; is liable for damages."

The complaint charged that, on the journey from Greenwood to Atlanta, the plaintiff, while waiting for the connection at Seneca, "was forced and required by the said defendant to remain for more than four hours in a cold room, and without sufficient accommodations for herself and children," and that from this and other negligence of the defendant she "suffered great mental strain, worry, and anxiety, and sustained on account thereof a severe nervous shock, to such an extent that she was made sick and ill, suffered great pain on account thereof," etc.

After the railroad had received the plaintiff as a passenger for transportation, it was charged, not with ordinary care, as the circuit judge charged, but with the highest degree of care for her safety and exemption

from injuries and unnecessary exposure, and there was some evidence of neglect of duty by the defendant in this regard. Even, however, if the charge is applied only to the duty of the railroad company to transport passengers on their advertised schedule time, it was erroneous. Railroads are exclusively relied on for all long-distance travel. General uncertainty as to the time of running trains must necessarily, therefore, retard the progress of business enterprises, and must materially affect the prosperity of the country. Business engagements of the greatest moment often depend on the promptness of railroads in running on their schedule time. It is therefore reasonable that something more should be required of them in this regard than the diligence and care which an ordinarily prudent man would exercise in the conduct of his own affairs. Nevertheless, safety and promptness are not to be put on the same plane, for promptness must always yield to safety. The sound and reasonable rule is to require that care and effort to avoid delay which is due under all the circumstances. In considering what is due care and effort, consideration is to be given to the immense public importance of prompt departure and arrival of trains, the ability of the particular railroad to meet the demands upon it, the degree of diligence in having engines and cars sufficient for the business of the roads, and any other facts that would tend to establish or disprove due care. A somewhat careful examination of the authorities leads to the conclusion that this is the sound principle, and that any effort to state a more definite rule would lead to confusion. 6 Cyc. 687; note to Hansley v. R. R. Co., 32 L. R. A., 543; Gordon v. R. R. Co. (N. H.) 13 Am. Rep. 97.

The fourth and fifth exceptions are therefore sustained, and the cause is remanded for a new trial.

(73 S. C. 16)

Ex parte DAVIDGE.

(Supreme Court of South Carolina, May 22, 1905. On Rehearing, June 8, 1905.)

1. PARENT AND CHILD—CUSTODY OF CHILD—EVIDENCE.
On application of a nonresident father for the custody of his children, now under the control and care of their maternal grandparents, evidence considered, and *held* not to sustain the allegation that the father is not a suitable person to have such custody.

2. SAME.
On application by a father for the custody of his children, now in the care of their grandparents, an infant child will be allowed to remain in the care of its grandmother, who had had charge of it from its birth, at which time its mother died, on account of the special attention needed by it, for which the grandmother was best qualified.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, §§ 13–32.]

3. SAME—RIGHTS OF OFFICIAL GUARDIAN.
The claim of a father, as a natural guardian of his child, to the custody of the child, is superior to that of an official guardian.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, §§ 13–32.]

4. SAME.
A father will not be refused the custody of his child because he intends to take it to a distant state.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, §§ 13–32.]

5. JUDGMENT—REOPENING.
Where, after a full hearing on an application for habeas corpus by a parent to obtain the custody of his child, judgment has been rendered granting him such custody, it will not be opened to allow respondent to offer further testimony as to existing facts on the vague intimation that additional evidence might possibly be obtained.

Petition of William M. Davidge, of New York, for delivery to him by writ of habeas corpus of his children in possession of Theodore B. Hayne, their grandfather. Order restoring Alicia Hayne to the custody of her father, with leave to renew his application for the custody of the other children.

John Gary Evans, for petitioner. George Johnstone and T. P. Cothran, for Theodore B. Hayne.

WOODS, J. The petitioner, William M. Davidge, by habeas corpus proceedings asks this court to award him the custody of his two infant children, Alicia Hayne Davidge and Robert Stewart Davidge. Mrs. Davidge, the mother of the children, left the home of her husband in the city of Brooklyn on May 31, 1904, taking with her the little girl, Alicia, about 16 months old, and went directly to the home of her father, Theodore B. Hayne, in the city of Greenville, S. C. There the infant Robert Stewart Davidge was born on October 12, 1904, and there Mrs. Davidge died October 17, 1904, leaving her infant children to the care of her father, who, as respondent in this proceeding, earnestly maintains that William M. Davidge has forfeited his right as a father to the custody of his children by treatment of their mother in her lifetime so neglectful and cruel as to prove him unfit to be intrusted with their care and education. Upon the establishment of this charge the issue depends.

The law on the subject is well settled. Even as against the mother herself, the father is held to have higher claim to the custody of the children, because upon him the law imposes the responsibility of their support and education; and, if in this duty he fails, he not only incurs the penalty of the law, but receives the brand of social disgrace. It is true, if it clearly appear that the interests of the children will be promoted by taking them from either parent and intrusting them to the other, or from both parents and intrusting them to other members of the family, or even to strangers, the

court will exercise its discretion, having regard to the welfare of the children. But none will deny that ordinarily the most valuable possession of a child is the love and care of its parent, and its most sacred right is its right to live under its father's roof. While the welfare and happiness of the child is the main consideration, the parent's right to the love and influence of his children and the happiness they bring to him must be also recognized and considered along with the interests of the child. For a legal tribunal to separate a child from its parent is, therefore, a very strong measure, justified only by convincing proof of the parent's unfitness. No inflexible rule can be laid down by which unfitness may be determined. Each case must be decided on its own peculiar facts, but manifestly it is not sufficient to prove the poverty of the parent, and that financial benefit will come to the child from separation, or that the parent has faults of disposition and behavior somewhat unusual and trying. The condition in life or the character and habits of the parent must be shown to be such that provision for the child's ordinary comfort and contentment, or for its intellectual and moral development, cannot be reasonably expected at his hands.

With this statement of the law, we proceed to the discussion of the charges against the father of these children, having given them the most anxious consideration, not only because of the importance of the issue, but because of the manifest sincerity with which they have been made. It will be observed that there is no evidence, or even imputation, of ill treatment or neglect by the father of his child before the separation of the parents; on the contrary, the petitioner submits affidavits of a number of persons that to her he was affectionate and attentive. The gravest charges of misconduct on the part of the petitioner toward his wife rest upon her written and oral statements to the members of her family. Leaving these out of consideration for the moment, we think the other evidence establishes these facts concerning the petitioner's married life: His wife was a woman of unusual refinement and delicacy of feeling, reared by devoted parents in a home of culture. Accustomed to the brightness and joy of such surroundings, it was a severe strain for her to be subjected to the isolation and loneliness of a Brooklyn flat. Absorbed in his business struggles, the petitioner failed to give her that considerate attention which was her due, and, in addition, on the ground of economy, expressed his wish for her mother to leave his home a short time after the birth of her infant. In similar ways he was rude to other members of her family without any reason that has been made to appear to the court. After Mrs. Davidge left his home and returned to her father, under the advice of counsel in New York, as he alleges, he gave public notice in South Carolina newspapers that she had left his bed and board without cause, and that he would not be responsible for her debts. These things offend one's sensibilities, and call for contrition and reformation; but after the death of the mother, when her claims cannot be asserted, we cannot reach the judicial conclusion that they should be regarded sufficient to convince the court that the intellectual and moral development of these children cannot be expected at the hands of the father. It is due to the petitioner to say, in this connection, that he sought a reconciliation and expressed regret for his lack of considerate attention, but unfortunately did not apologize for the publication.

It is established beyond all controversy that Mrs. Davidge repeatedly stated that her husband had inflicted physical violence and indignity upon her, and besought her father and other members of her family that her children should never be intrusted to him. Having received these children under such a charge from a sick and dying daughter, we profoundly respect the resolution of the respondent not to surrender them except upon the judgment of the courts of his country. It is not incumbent upon this court to determine whether the cruelty thus alleged against the petitioner has been established by the preponderance of the evidence, for it will not be denied the burden of establishing such a charge against a father in a proceeding of this kind is on the party who makes it. It will be observed that the charge does not rest on evidence such as would be admissible in an ordinary trial. The witness who makes it is dead, and, notwithstanding her very exalted character, the evidence comes to the court as hearsay, without opportunity to the husband to subject it to any legal test whatever. The court therefore has before it on one side the statements of the wife made to members of her family, and on the other the denial of the husband. Even if it could be conceded that the husband's admitted conduct gives color to the charge, all will agree that women of extreme refinement and sensitiveness in the period of great nervous tension before child-birth are sometimes deceived by their own imagination, and distress themselves over supposed wrongs, which are either altogether fanciful or greatly exaggerated. Unless allowance is made for the wife's statements made under such circumstances, the husband and other members of the family would often be unjustly condemned. It must be considered also that the petitioner has submitted many affidavits from social and business associates, who testify to his general exemplary character and to his solicitude for his family. We conclude, therefore, the respondent has failed to establish the charge that the petitioner is not a fit person to have the custody of his children.

The infant Robert Stewart Davidge has

been extremely delicate from his birth, and Mrs. Hayne has nurtured him with the most intelligent care, both before and since the death of his mother. It is clear his health and life would be greatly imperiled by depriving him of her experienced attention. Assuming that the petitioner and his mother, who lives with him, would be as careful and solicitous for his welfare, they would be lacking in knowledge of his peculiar needs. For the present, therefore, the court declined to interfere with the custody of the infant, Robert Stewart Davidge.

The judgment of the court is that the respondent, Theodore B. Hayne, restore the infant Alicia Hayne Davidge to the custody of her father, and that the petitioner have leave to renew his application for the custody of the infant named by the father, Robert Stewart Davidge, and by the mother, Theodore B. Hayne, when he may be advised the change can be made without peril to the said infant, provided such application be made not earlier than one year from this date.

On Rehearing.

PER CURIAM. Two propositions submitted in this petition for rehearing, though fully considered by the court, were not discussed in the opinion, because the law as to them was regarded too clear in principle to require special attention. Indeed, it was supposed they were not especially relied on by respondent's counsel. Elaborate argument, however, is now submitted in support of respondent's view, and the propositions will be separately considered, although they are not regarded serious enough to justify a rehearing.

Respondent first submits: "That the court has overlooked the fact that the respondent has been duly appointed by the probate court of Greenville county guardian of both the persons and estates of the infant children. The writ of habeas corpus can issue only in cases of illegal restraint, and, so long as the said order of appointment is unrevoked, the custody of said children under said order cannot be illegal." The act of 1824 (6 St. at Large, p. 248) gave to the ordinary the power to appoint guardians of the persons and estates of minors in certain cases. The act of 1839 (7 St. at Large, p. 44) entitled "An act concerning the office and duties of ordinaries," conferred the power to appoint guardians of estates of minors only. Both of these acts were repealed in 1872. While the court of probate is, by the Constitutions of 1868 and 1895, given general jurisdiction of business pertaining to minors, the jurisdiction and disposition of their persons is not expressly conferred. Section 38, Code Civ. Proc. 1902, provides as follows: "The judge of probate shall have jurisdiction in relation to the appointment and removal of guardians of minors, insane and idiotic persons, persons non compotes mentis, and in relation to the duties imposed by law on such guardians, and of the management and disposition of the estates of their wards." Certainly it cannot be contended this enactment expressly confers upon probate courts the power to appoint guardians of the persons of minors. It is to be observed further that the provisions of chapter 83, art. 1, of the Civil Code of 1902, entitled "Concerning Guardians in General," seem to relate to the estates of wards, and not to the custody of their persons. It might be argued from the omission of the express authority to grant guardianship of the person to the court of ordinary, and its successor, the probate court, that the lawmakers intended to deny to these courts the right to do more than appoint guardians of the estates of minors. But if it be conceded that the probate court may appoint a guardian of the person of an infant, nevertheless, even if our statute law was silent as to the parent's rights, while it would be most extraordinary and revolting to hold that such guardian, appointed without notice, on his own ex parte application, could obtain the custody of an infant and withhold it from the father, its natural guardian, on the ground that the guardian's custody would not be illegal, the superior claim of the father as the natural guardian to the custody of the child over that of the official guardian is universally recognized. But our statute law is not silent, for it expressly gives to the father the right to dispose of the custody of an infant by deed or will. Civ. Code 1902, § 2689. His power to dispose of its custody necessarily implies his legal right to the custody against the world, and makes the custody of a guardian and its restraint of the child from the father illegal. It is true, this right of the father as the natural guardian is subordinate to the interest of the child, and may be forfeited by him; but it is not subordinate to the claims of an official guardian.

But, aside from the provisions of our statute, courts have not hesitated to exercise their chancery powers in habeas corpus proceeding to adjudge the custody of children, especially to restore those of tender years to the father or mother as the natural guardian against the official guardian, or any other person having charge of them. As it is said in Hurd on Habeas Corpus, p. 453: "The use of the writ of habeas corpus in this class of cases infers some modification of the general idea of imprisonment and an extension of the original design of the writ. The term 'imprisonment' usually imports a restraint contrary to the wishes of the person; and the writ of habeas corpus was designed as a remedy for him to be invoked at his instance, to set him at liberty, not to change his keeper. But in the case of infants an unauthorized absence from the legal custody has been treated, at least for the purpose of allowing the writ to issue, as equivalent to imprisonment; and the duty of

returning to such custody as equivalent to a wish to be free. It has been held that the writ may not only issue without privity of the child, but against its express wishes." 15 Am. & Eng. Ency. 150-185; People v. Mercein, 8 Paige, 47; Guynn v. McCauley, 32 Ark. 97; Richards v. Collins (N. J.) 17 Atl. 831, 14 Am. St. Rep. 726; Buckley v. Perrine (N. J. Ch.) 34 Atl. 1054.

The second proposition is "that this court is without jurisdiction to order these children into a foreign jurisdiction." The court has only ordered the custody of the child Alicia Hayne Davidge to be restored to the father. Without any reference to the merits of this cause, it would hardly be contended that this court would be impotent to aid a father to recover the custody of his child illegally detained in this state, merely because he intended to take it to his home in another state. Cases might arise where the court, in the interest of the children, would refuse to permit their removal, or allow it only on terms. But, as said by Chancellor Walworth, in Wood v. Wood, 5 Paige, 596, 604, 28 Am. Dec. 451: "It must be a very extreme or special case, however, which would induce this court to interfere with the natural rights of a parent in this respect." As has already been held, such a case is not here presented.

By reference to the opinion heretofore rendered, it will be seen that other points mentioned in the petition are fully considered and decided. It only remains to say that after a full hearing it is manifest the judgment may not now be opened to allow the respondent to offer further testimony as to existing facts upon the mere vague intimation that additional evidence might possibly be obtained by further investigation.

The petition for rehearing is refused.

(71 S. C. 421)

GREENWOOD LOAN & GUARANTEE ASS'N v. WILLIAMS et al.

(Supreme Court of South Carolina. April 18, 1905.)

1. MORTGAGE — FORECLOSURE — SERVICE OF PROCESS.
Where the court has determined that there is a defect of parties on foreclosure, service of amended summons and complaint on a necessary party is sufficient, without rule to show cause to bring him in.

2. SAME—JURISDICTION—NONRESIDENT MORTGAGOR.
Under Code Civ. Proc. § 156, the court, by proceedings to foreclose and the filing of a lis pendens, has jurisdiction, though the mortgagor was a nonresident, where the subject of the action was real property in the state.

3. SAME—AMENDMENT OF PLEADINGS — NEW PARTY.
A summons and complaint in foreclosure may be amended, where the mortgagor is a nonresident, by adding a new party in possession of land, and the action may be continued against such party alone where no personal judgment is sought against the mortgagor.

4. SAME—SUPPLEMENTAL COMPLAINT.
Where, in foreclosure, a supplemental complaint was necessary because of a conveyance of the premises by the mortgagor before suit, the mortgagee having no notice thereof until suit brought, service of amended summons and complaint making the purchaser a party may be authorized by the court.

5. APPEARANCE—EFFECT.
Where defendant makes a general appearance, he waives an objection that the court has no jurisdiction of his person.

6. FORECLOSURE — VACATING SALE—BID OF PURCHASER.
Where a foreclosure sale is vacated, the bid of the purchaser at such sale should not be credited on the mortgage debt.

Appeal from Common Pleas Circuit Court of Greenwood County; Leroy F. Youmans, Special Judge.

Action by the Greenwood Loan & Guarantee Association against Hattie Williams and Rhoda Chiles. Judgment for plaintiff, and defendants appeal. Affirmed.

Ellis G. Graydon, for appellants. Caldwell & Park, for respondent.

JONES, J. On May 3, 1900, the defendant Hattie Williams executed bond to plaintiff, and mortgage to secure same on a lot in Greenwood, S. C. On March 4, 1901, Hattie Williams conveyed the mortgaged lot to defendant Rhoda Chiles, which deed was recorded May 28, 1901. Several days previous to the recording of said deed, i. e., May 22, 1901, plaintiff brought action against Hattie Williams to foreclose said mortgage, without making Rhoda Chiles a party thereto. Lis pendens was not filed until July 8, 1901. Hattie Williams, being a nonresident, was served with summons by publication, but she made no answer or appearance, and judgment of foreclosure was rendered at August term, 1901, the land sold thereunder for $250 to plaintiff, and deed was executed by the master. The plaintiff thereafter brought action against Rhoda Chiles to recover the possession of the lot, and procured an order appointing a receiver of rents and profits pendente lite, from which an appeal was taken. Upon the facts stated, this court reversed said order; holding that Rhoda Chiles, having the legal title, was a necessary party in an action to foreclose said mortgage. Association v. Childs, 67 S. C. 251, 45 S. E. 167. The action by plaintiff to recover the land of Rhoda Chiles was discontinued, and plaintiff, upon application to the court, without notice to Hattie Williams or Rhoda Chiles, obtained an order vacating said judgment of foreclosure, and giving plaintiff leave to amend by making Rhoda Chiles a party defendant. The summons and complaint were amended in conformity with the order of Judge Dantzler on August 26, 1903. The amended summons and complaint were served upon Rhoda Chiles, and she appeared and made answer to the merits. The circuit court (Hon. Leroy F. You-

mans, special judge, presiding) overruled all defenses, and gave judgment of foreclosure for $306.93, which included $50, as a reasonable attorney's fee.

The first three exceptions in behalf of appellant Rhoda Chiles question the jurisdiction of the circuit court (1) in making her a party to this action without notice and supporting affidavit; (2) because the court had never acquired jurisdiction of Hattie Williams, and therefore there was no action pending, and no authority to add another defendant; (3) the plaintiff should have proceeded by supplemental complaint. These objections to the jurisdiction cannot avail.

1. The decision of the court in Association v. Childs, supra, had determined that Rhoda Chiles was a necessary party to the foreclosure proceedings. As the circuit court needed no further information on that subject, there was no occasion to issue a rule to show cause or notice, with supporting affidavit, as is ordinarily the practice. All the ends of notice were fully subserved in this case by the service of the summons and complaint, pursuant to the order of the court.

2. With reference to Hattie Williams, the service by publication was properly made, under section 156 of the Code of Civil Procedure of 1902, as she was a nonresident and the subject of the action was real property in this state, and the relief consisted in barring her interest in the premises, whatever it might be. No personal judgment was demanded against her, and no attachment of the property was necessary to give the court jurisdiction in so far as she had interest in the property to be affected by a foreclosure, since the mortgage itself constituted a lien, and the court of equity, by the proceedings to foreclose and the filing of lis pendens, puts its hands upon the property for the purpose of the suit in rem. Hattie Williams was not a necessary party to the foreclosure proceedings, as section 188 of the Code of Civil Procedure of 1902 provides that it shall not be necessary to make the mortgagor who may have conveyed the mortgaged premises a party to any action for foreclosure where no judgment or any deficiency is demanded, but she was a proper party. Therefore, when the court vacated the judgment of foreclosure in the original proceedings against Hattie Williams, the action was still pending, and it was competent to allow an amendment to the summons and complaint, so as to make appellant, claiming the legal title to the premises, a party defendant. It was within the discretion of the court even to strike out the name of a sole defendant, and substitute another as real party in interest, if due notice is allowed for answer, as was done in this case. Coleman v. Heller, 13 S. C. 495. It is not only competent, but necessary, for the court to bring in other parties when a complete determination of the controversy cannot be had without the pressure of such other parties. Section 148, Code Civ. Proc. 1902.

3. If proceedings by supplemental complaint were necessary in this case because of the transfer of interest in the mortgaged premises by Hattie Williams to Rhoda Chiles previous to the commencement of the action, but discovered by plaintiff after its commencement, the complaint, as amended by order of the court and served upon the appellant with the summons, may well be treated as a supplemental summons and complaint by leave of the court. Furthermore, the court having undoubted jurisdiction of the subject of the action, even if appellant had not been served with summons and complaint in this case, her general appearance and answer to the merits would be a waiver of all objections to jurisdiction over her person. Sentell v. So. Ry. Co., 67 S. C. 281, 45 S. E. 155.

The fourth, fifth, and sixth exceptions seek to raise the question of usury. The Circuit Court has found, as a matter of fact, that there was no usury, and we see no ground for disturbing that conclusion.

The seventh exception complains that there was no evidence to support the allowance by the circuit court of a fee of $50 to plaintiff's attorney for foreclosing the mortgage. The mortgage provided for the payment of a reasonable attorney's fee in the event of a foreclosure. The conclusion of the circuit court cannot be said to be unsupported by any evidence, as the court had before it the record in the case, showing the character of the litigation and what service the attorneys for the plaintiff had rendered in the case, and it was quite competent for the court to form therefrom an opinion on the subject. This court should not reverse his conclusion on this subject, unless satisfied that the preponderance of the evidence is against such conclusion; and we do not find such to be the case, even if the exception could be construed as calling upon this court to review and weigh the evidence.

The eighth and last exception alleges error in not holding that the mortgage debt should be credited with the net proceeds of the sale made in October, 1901. This exception was not argued, and perhaps should be considered as abandoned. It cannot be sustained, however, because the original judgment of foreclosure was vacated by order of the court, and it would be manifestly unjust to credit the mortgage debt with plaintiff's bid at the sale under such annulled judgment. This is not a case for the application of the rule of caveat emptor.

The judgment of the circuit court is affirmed.

(71 S. C. 535)

MERCHANTS' & PLANTERS' BANK v. BLACKSBURG SPINNING & KNITTING MILL et al.

(Supreme Court of South Carolina. April 24, 1905.)

ACTION ON NOTE—COMPLAINT.

Where, in an action on a note, the consideration, promise, and its breach are alleged in the complaint, in which the note is set out, it is sufficient under Code Civ. Proc. 1902, § 183, providing that it shall be sufficient to give a copy of the instrument, and to state that there is due plaintiff thereon from the adverse party a specified sum, which he claims.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1444–1451.]

Appeal from Common Pleas Circuit Court of Cherokee County; Gage, Judge.

Action by the Merchants' & Planters' Bank against Blacksburg Spinning & Knitting Mill and others. From an order overruling the demurrer, defendants Whisonant, Porter, Cline, and Jones appeal. Affirmed.

Geo. W. S. Hart, for appellant Whisonant. N. W. Hardin, for appellants Porter, Cline, and Jones. Hall & Willis and Butler & Osborne, for respondent.

JONES, J. The appeal herein is from an order overruling a demurrer to the complaint. The suit was upon three notes, each stated as a separate cause of action. The following allegations, taken from the statement of one of the causes of action, will be sufficient to show the questions involved: "(2) That at the time hereinafter stated the Blacksburg Spinning & Knitting Mill was, and now is, a corporation created under the laws of this state, and that J. F. Whisonant was its president and William Anderson was its secretary and treasurer, and that the said J. F. Whisonant and William Anderson were its duly authorized officers and agents through whom it contracted debts, made its obligations, etc. (3) That on the 22d day of November, 1902, the said Blacksburg Spinning & Knitting Mill, being indebted by note to plaintiff, and desiring to renew said note and to give the plaintiff ample security for said debt, through its officers executed and delivered to the plaintiff the following note: '$1,000. Gaffney, S. C., Nov. 22, 1902. On Feb. 22, 1903, after date, we promise to pay to the order of ourselves one thousand ($1,000) dollars, value received, negotiable and payable at the Merchants & Planters Bank, Gaffney, S. C. If not paid at maturity, interest thereafter to be paid at the rate of eight per cent. per annum. [Signed] Blacksburg Spinning & Knitting Mill. By J. F. Whisonant, President. By William Anderson, Sec. & Treas.' That on the back of said note, and in the following order, were written the following names: Blacksburg Spinning & Knitting Mill, by J. F. Whisonant, president; by William Anderson, secretary and treasurer; Alonzo Tripp; J. F. Whisonant; William Anderson; R. E. Porter; T. L. Black; G. M. Cline; John F. Jones. (4) That the foregoing names were jointly indorsed on said note by the parties aforesaid before its delivery to the plaintiff, and for the purpose of securing the payment of said note to plaintiff. (5) That said note became due on February 22, 1903, and, payment thereof having been duly demanded on its maturity by plaintiff, and being refused, the note was duly protested, and notices of the demand, protest, and of dishonor were served upon the defendants herein. (6) That there is now due plaintiff on said note by the defendants the sum of $1,000, with interest from February 22, 1903, at eight per cent. per annum, together with eighty cents protest fees; no part of which has been paid." The several defendants, above designated as appellants, demurred to the complaint for insufficiency, in that "(1) it fails to allege any promise on the part of said defendant; (2) fails to allege any consideration for any promise on the part of defendant; (3) fails to allege any breach of any promise on the part of defendant."

We think the demurrer was properly overruled by the circuit court. The consideration, the promise, and its breach all sufficiently appear in the complaint. Section 183 of the Code of Civil Procedure of 1902 provides: "In an action or defense founded upon an instrument for the payment of money, it shall be sufficient for a party to give a copy of the instrument and to state that there is due to him thereon from the adverse party a specified sum which he claims." The complaint in this case fully complies with the above provision of the Code, and shows the nature of the action and the facts upon which it is based quite as clearly as the complaint sustained in Watson v. Barr, 37 S. C. 466, 16 S. E. 188.

The judgment of the circuit court is affirmed.

(71 S. C. 492)

BOWEN v. DAY.

(Supreme Court of South Carolina. April 19, 1905.)

1. HUSBAND AND WIFE — MORTGAGE OF WIFE'S PROPERTY—DEBT OF HUSBAND.

The wife of a partner conveyed, at the instance of her husband, certain land to the other partner, in consideration of the share of the firm debts owed by her husband and assumed by the grantee. Thereafter the land was reconveyed to the wife, who executed notes for the amount of the debt, secured by a mortgage, under an agreement that the mortgagee should apply the payments on the notes to a senior mortgage, and then to the share of the firm debts due by the husband, and pay the remainder to the mortgagor. Thereafter the wife conveyed the land to the husband, and died, leaving her husband and two children as heirs. *Held* that, as the mortgage by the wife was not void under married women's law, the mortgagee could foreclose for the balance due on the senior mortgage debt and the pro rata share of firm debts due by the husband.

2. PARTNERSHIP—ACCOUNTING.

Where personal services of both parties and their teams were used in the firm work, the account of one partner for his services and

the use of his teams in the partnership business will not be allowed on the firm accounting.

Appeal from Common Pleas Circuit Court of Pickens County; Dantzler, Judge.

Action by R. E. Bowen against Elias Day and others. Judgment for plaintiff, and Elias Day appeals. Affirmed.

J. E. Boggs and H. J. Haynsworth, for appellant. J. P. Carey, for respondent.

POPE, C. J. This is an action brought for the foreclosure of a mortgage given by Jane Day to the plaintiff on August 8, 1893. The complaint alleges: That Mrs. Jane Day on the 8th day of August, 1893, made and delivered to the plaintiff four promissory notes, each in the sum of $553.75; one due January 1, 1894, one due January 1, 1895, one due January 1, 1896, and the other due January 1, 1897; each bearing interest at the rate of 8 per cent. per annum; interest to be computed annually from the 1st day of January, 1894. That on the 8th day of August, 1893, the said Mrs. Jane Day, to secure the payment of said notes, executed and delivered to the plaintiff her deed, and thereby conveyed by way of mortgage to the plaintiff, his heirs and assigns, certain lands in the county of Pickens and state aforesaid, containing 100 acres, and having such boundaries as are set forth in the complaint. That said mortgage was duly recorded on the 4th day of January, 1894. That the said Mrs. Jane Day paid off the note which was due on the 1st day of January, 1894, and paid on the note which was due January 1, 1895, $182.65, on November 18, 1895, and paid on the note due January 1, 1896, the sum of $38.30 July 9, 1897, and also on November 8, 1898, the sum of $96. That the condition of said mortgage has been broken. That Mrs. Jane Day died on the 1st day of March, 1899, leaving as her heirs at law the defendants, her husband, Elias Day, and her two children, Jack C. Day and Bertha Day, both of which children are infants under 21 years of age. That in 1892 Mrs. Jane Day made and delivered her mortgage to the defendant James H. Morgan to secure the sum of $1,000 loaned to her by him, which mortgage is duly recorded. The two infant defendants made their answer in due time. The other defendant, Elias Day, in his answer, set up the following facts as constituting the history of the transaction between his wife and Col. Bowen. For a first defense, he denies the allegations of the complaint, except the ninth. As a second defense, that on or about February, 1893, Jane Day, who was a wife of the defendant Elias Day, made a deed of the tract of land described in the complaint to the plaintiff for the alleged consideration of $2,115, but the real consideration was to secure and indemnify the plaintiff against any more than his share of the sum of $2,115 which was then due and owing by the plaintiff and the defendant Elias Day as partners doing business under the firm name of Elias Day & Co., said sum being the total amount of money owed by said firm to various persons on account of money and materials furnished to said firm; that Jane Day neither then nor at any time owed the plaintiff any amount whatever; that no part of such sum was for the benefit of the separate estate of the said Jane Day; that said deed was made and given to the plaintiff in order that he might get the time of payment of said debts extended until the money could be procured by said firm to pay its debts, in which event said land was to be reconveyed by said plaintiff to said Jane Day; that said Jane Day, becoming dissatisfied with the transaction as it then stood, requested plaintiff to reconvey, which the plaintiff accordingly did on August 8, 1893, and that on that day the said Jane Day made and delivered to R. A. Bowen, in lieu of said first-mentioned deed, her four promissory notes, of $553.65 each, and secured said notes by a mortgage on said land executed on that day; that in making said notes above mentioned, secured by said mortgage, the said Jane Day in truth and in fact simply promised to pay, guarantied, or stood surety for the debts of her husband, Elias Day, as a member of the firm of Elias Day & Co., which she neither then nor at any other time ever had any interest in or connection with whatever. For a third defense, the defendant alleges that, as to land described in said agreement, the plaintiff has no lien by reason of said agreement and the payments made in pursuance thereof, and that plaintiff is by same estopped, and should not foreclose his said mortgage as to said land, which estoppel is hereby pleaded; that on the 22d day of March, 1897, and on July 2, 1898, the said Jane Day conveyed by way of deeds, for valuable consideration, to her husband, Elias Day, one of the defendants herein, all her interests in and title to said lands mentioned in the mortgage dated August 8, 1893, and at the time of the death of said Jane Day the said Elias Day was seised and possessed of said last mentioned lands, and is now so seised and possessed. The defendant demands the first-mentioned deed and said note and mortgage be set aside and delivered up to this court to be canceled. An order was made requiring C. E. Robinson, Esq., to take and report the testimony to the court. Witnesses were examined, and the testimony, both oral and documentary, was submitted to the court. The cause came on to be heard before his honor Charles G. Dantzler, who rendered his decree on November 10, 1903, which is as follows:

"This is an action to foreclose a mortgage given by Jane Day to the plaintiff on the 8th day of August, 1893. It was referred to a special referee to take the testimony only and report the same to the court. On the 1st

day of February, 1893, Jane Day executed and delivered to the plaintiff a deed for a tract of land containing one hundred acres, more or less, and described in the said deed. On the 8th day of August, 1893, the plaintiff conveyed by deed the said tract of land to the said Jane Day, at which time Jane Day gave to the plaintiff her four notes, each in the sum of $553.75, and a mortgage on the tract of land conveyed to her by him to secure the payment of these notes. On the 13th day of February, 1892, the said Jane Day gave a note to the defendant James H. Morgan for the sum of $1,000, and secured the same by a mortgage on one hundred and nineteen acres of land, which includes the tract of one hundred acres covered by the mortgage given to the plaintiff. During the year 1899 Jane Day departed this life intestate, and no administration has been had on her estate, and she left as her heirs at law her husband, the defendant Elias Day, and her children, the other defendants, except James H. Morgan. On the 22d day of March, 1897, Jane Day conveyed to the defendant Elias Day one hundred acres of the mortgaged lands, and eighteen acres on the 2d day of July, 1898. The heirs at law of Jane Day answered the complaint, in which they allege that the deed made to the plaintiff by Jane Day was to secure or indemnify the plaintiff against not more than Elias Day's share of the debts of the firm of Elias Day & Co., and that she was at the time a married woman, and that said deed was given to the plaintiff in order to secure the payment of said debts. They further allege that the plaintiff was to reconvey the land to Jane Day on the payment of these debts. The defendants further allege that on August 8, 1893, the notes and mortgages then given by Jane Day to the plaintiff were for the debts of Elias Day, and that, she being a married woman, said notes and mortgages are null and void.

"It is contended on the part of the plaintiff that by the deed of February 1, 1893, Jane Day sold this tract of land to the plaintiff, and that the consideration of this deed was the payment of the portion of the debts of Elias Day & Co., which the said Elias Day owed, and the payment of the Morgan mortgage, a valid lien on said property. The plaintiff further contends that on the 8th day of August, 1893, the said Jane Day purchased the property from the plaintiff as a home, and that it then became her property, and that the notes and mortgage were given as a security to the plaintiff for the purchase money of the said land. The contention of the plaintiff, I think, is correct. The deed was from Jane Day to the plaintiff, was regular in form, and, I think, was intended to be a sale of the property, and not a security. It certainly conveyed the legal title to the plaintiff. It was under her hand and seal, and on its face a conveyance. She accepted a deed from the plaintiff, dated August 8, 1893, containing a statement that the land in question was the same land which the plaintiff purchased from her. In the notes of the same date she says they are given in the purchase of a tract of land set forth in the mortgage securing the same, and the land is described in the said mortgage as the land that day deeded to her by R. E. Bowen. In the written agreement bearing the same date as the mortgage there is a statement that R. E. Bowen has 'this day' sold to Mrs. Jane Day the same tract of land that he purchased from her. It is thus seen that Jane Day herself solemnly treated this deed as an alienation of her property, and lived nearly seven years after it was made without ever raising any question as to the matter, or even complaint, and made payment of over $1,000 on the mortgage debt. The deed to the plaintiff was in form and effect a deed, and solemnly treated as such by Jane Day up to the time of her death. The plaintiff says that the deed was to be absolute; that he bought it, and has paid and assumed all the debts which was the consideration of said deed. I think, under the testimony in this case, this deed was intended to be what it appears on its face to be—a conveyance of property—and that the consideration thereof was valuable. A married woman, ever since the Constitution of 1868, has had the power to alienate her property. Under the decisions of the Supreme Court of this state, a married woman, even before the Constitution of 1895, had the right and power to convey away her property where the consideration is the payment of husband's debts. See the following cases: McLure v. Lancaster, 24 S. C. 280, 58 Am. Dec. 259; Booker v. Wingo, 29 S. C. 116, 7 S. E. 49; Langston v. Smyley, 38 S. C. 121, 16 S. E. 771; Philpot v. Cantey, 52 S. C. 513, 30 S. E. 595; Carroll v. Thomas, 54 S. C. 520, 32 S. E. 497. In Langston v. Smyley it is decided that the power of alienation of her own property given a married woman by the Constitution is not affected by the statutes limiting her power to contract. The case further decides that a married woman can transfer her property on consideration of further indulgence to her son, and assist in paying his debts, and that such transfer is a valid alienation of her property, and passes a good title. She may even alienate her property by gift, if not imposed upon, but left free to act. There is no evidence of any agreement to convey the land back to Jane Day by the plaintiff. On the contrary, the written agreement of August 8, 1893, expressly provides that if there was anything left, after the consideration on which she had conveyed the property to the plaintiff was paid, this balance, and not the land, was to go to her. There is not sufficient evidence to satisfy that the deed of February 1, 1893, was intended as a security, and not an alienation. The maker of the deed lived and died without making such claim, and I do not think, under the testimony, such claim can be sustained.

If the plaintiff, then, was the owner of the land in question from February 1, 1893, to August 8, 1893, as I have held, is he to be put in a worse position, because he sold it back to her, and took the notes and mortgage in question? I think not. I view the transaction of August 8, 1893, this way: Jane Day had conveyed the land to the plaintiff on good and valuable consideration, but desired it back as her home, and the plaintiff sold it back to her, charging only what he had paid for it—in other words, such sum as was sufficient to pay the Morgan mortgage (a valid lien) and pay Elias Day's portion of the debts of the firm of Elias Day & Co. The property then became her property, and she secured the purchase thereof by the notes and mortgage. Elias Day's portion of the debts of the firm of Elias Day & Co. was not exactly known, but estimated. The exact amount of the Morgan mortgage was known. At the same time the plaintiff and Jane Day entered into an agreement as to how the payment of her notes was to be applied, by which it is provided that what is paid on the two first notes, or as much thereof as may be necessary, shall be applied on the Morgan mortgage, and what is paid on the other notes for said lands shall be applied to the payment of Elias Day's portion of the debts of Elias Day & Co.; if anything was left, it was to go to Jane Day. The plaintiff had a valid conveyance for the land, and was under no obligation to convey it back to Jane Day, but was willing to let her have it back as a home for exactly what it cost him, and the notes and mortgage were given in purchase. I think Jane Day had the power and right to enter into these transactions, and that the notes and mortgages are valid instruments, and I so hold. The plaintiff is therefore entitled to foreclose his mortgage, but for what amount?

"The consideration of the original deed was the payment of the Morgan mortgage and Elias Day's portion of the debts of the firm of Elias Day & Co. It was deeded back to Jane Day upon consideration that the Morgan debt be provided for, and the plaintiff secured for what he had paid and agreed to pay of the debts of Elias Day. It becomes, therefore, necessary to ascertain what Elias Day's portion of these debts was. The amount of the debts of Elias Day & Co. paid and assumed by the plaintiff, I find, was the sum of $1,905.94. Under the terms of the partnership, Elias Day's portion of this amount is five-eighths. In the accounting, Elias Day contended that he has paid of the firm debts the following items: Hagood, Bruce & Co., $56.60; brick, $60; freight and express, $41.50; paints, $9.15; interest, $7.50; expenses of witnesses and attorney to Charlotte, $35; brickyards hands, $45; F. M. Day and others, $100. These amounts I will allow, and they aggregate the sum of $355.15. Elias Day's claims for services and hauling by his own team, I do not allow. Partners must act in good faith towards each other. There was no agreement by the firm that these matters were to be charged. Both of the members of the firm put in their time and services and teams. No such charges were contemplated, and I do not think they can be set up as charges in this accounting, and I so hold. The total indebtedness of the firm of Elias Day & Co. at the time of these transactions was the sum of $2,261.09. Under this accounting, the amount the plaintiff is entitled to foreclose his mortgage for is the sum of $1,050.18, with interest from January 1, 1894, computed annually at eight per cent. per annum, less the payments made by Jane Day; amount calculated up to the 1st day of November, 1903, is the sum of $1,684, which is the amount due the plaintiff on his mortgage debt, less the difference in the attorney's fees occasioned by his not applying all the payments by Jane Day to him on the Morgan mortgage. But I do not think the plaintiff can foreclose his mortgage on the fifteen-acre tract described in the agreement between himself and Jane Day, dated February 26, 1895, as in the agreement he agreed to release from his mortgage this tract, and to procure the release of the same from the mortgage of the defendant J. H. Morgan. This tract will not, therefore, be sold, unless the balance of the land should not bring enough to pay the mortgage of the defendant James H. Morgan, in which event he may apply for a further order of the court to sell the same, and in which event the other defendants would be entitled to have deducted from the amount due on the plaintiffs' mortgage debt the value of the fifteen acres, to be determined by the further order of the court. But this contingency will hardly arise. The amount due on the mortgage of the defendant James H. Morgan, calculated up to the 1st day of November, is the sum of $926, and he is entitled to a foreclosure of his mortgage for that amount."

From this decree the defendant Elias Day has appealed on the following fifteen grounds:

"(1) In holding that the conveyance from Jane Day to this plaintiff was intended as a sale of the lands, whereas he should have held that said conveyance was intended to secure the payment of her husband's debts, and that said transaction is to be regarded in equity as a mortgage.

"(2) He erred in holding that the consideration of the conveyance by Mrs. Day was the payment of her husband's debts; it being submitted that said conveyance was not a payment of said debts, and was not intended as such, but was intended to secure the payment of his share of the debts of Day & Co.

"(3) He erred in holding that said transaction was valid under the laws then of force; it being submitted that this was substantially a contract, when Mrs. Day un-

dertook to secure her husband's debts by a pledge of her property, and that the same was void.

"(4) He erred in holding that the reconveyance of said land by the plaintiff to Mrs. Day was a sale, whereas he should have held that the reconveyance was for the purpose of changing the form of security from that of a conveyance in trust in the nature of an equitable mortgage to that of a mortgage to secure the debts of her husband.

"(5) He erred in not holding that said notes and mortgage were a substitute for the prior security.

"(6) He erred in not holding that the mortgage sued on in the complaint was one which had been executed by a married woman to secure the payment of her husband's debts, and was void.

"(7) He erred in not holding that, under the laws of force at the time of said mortgage, a married woman was without power to mortgage or convey her property as security for her husband's debts, and in not holding that the said mortgage was void.

"(8) He erred in holding that the plaintiff was entitled to have the mortgage foreclosed, and in directing the sale of the premises to pay said mortgage.

"(9) He erred in holding that the plaintiff had paid on the debts of Day & Co. the sum of $1,905.94, when plaintiff testified that he had paid only $1,621.96.

"(10) He erred in disallowing the claim of Elias Day for his own services, to wit, $2 per day for 250 days, and for the use of his team $950; it being submitted that under the evidence the firm of Elias Day & Co. was liable for the payment of these matters, and that, on an accounting between the plaintiff herein and said Elias Day, he should be allowed credit for the reasonable value of his own services and of his teams.

"(11) He erred in not allowing Elias Day credit for $182.65 paid by him on November 18, 1905, and for $200 paid by him on November 4, 1895, which should have been applied to the Morgan mortgage, but was kept by the plaintiff.

"(12) He erred in not allowing two items of $38.50 paid on July 9, 1897, and $96 paid in November, 1898, both credited on the note January 1, 1897.

"(13) It appearing that no accounting had been had between the partners composing the firm of Day & Co., it is submitted that it was error to direct the foreclosure of said mortgage without an accounting, and ascertaining how the said partners stood between themselves.

"(14) It is submitted that he erred in holding that the sum of $1,684 was due on the said notes and mortgages held by the plaintiff, it being submitted that on an accounting very much less would be found to be due thereon.

"(15) It is submitted that he erred in not holding that the notes and mortgages sued on, having been executed by a married woman as security for her husband's debts, was void, and in not dismissing the complaint."

We are so well satisfied with the decree of the circuit judge that at one time we had intended to adopt his decree as the opinion and judgment of this court, but, upon reflection, have concluded to take the other course, and will consider the exceptions in their order.

(1) We agree with the circuit judge that the testimony of Col. Bowen, the plaintiff, is clear and conclusive that the deed executed by Mrs. Day to him was intended as a sale of the lands. The very agreement itself shows that it was not the intention of the parties that any other course should be adopted. It was not agreed that the land should be reconveyed to Mrs. Day, and furthermore it must be remembered that Elias Day has received deeds from his wife, now deceased, for the land covered by the mortgage of Col. Bowen. This mortgage and the notes were written and prepared by Elias Day himself. By his testimony he states that it was under his arrangements with his wife that this plan was adopted. He told Col. Bowen after his wife's death that the deeds from his wife to himself were subject to his mortgage. He requested Col. Bowen to agree to this arrangement with his wife. The two infant children of Mrs. Day have no interest in the land now in controversy. It is Elias Day himself who alone is concerned. He produced the two deeds alleged to have been executed by his wife to himself, and he is bound thereby. He is estopped by his conduct in the year 1893, 10 years afterwards, after his wife is dead, endeavoring to rip up this transaction. This exception is overruled.

(2) We do not find any error on the part of the circuit judge that the conveyance of Mrs. Day was the payment of her husband's debts. It was so intended by all parties, including Elias Day himself. This exception is overruled.

(3) We think the transaction was valid under the laws as then existing in this state (1893). Certainly the Constitution of 1868 empowered the wife to alienate her property, and the decisions of our court sustain such alienation. Let this exception be overruled.

(4) After a careful investigation of the testimony, and after a scrutiny of the argument on both sides, we are satisfied that the reconveyance of the plaintiff to Mrs. Day was a sale. Col. Bowen, whose testimony bears directly on that point, shows it was a sale. This exception is overruled.

(5) The circuit judge did not err in refusing to hold that the said notes and mortgages were a substitute for a prior security. This exception is overruled.

(6) The circuit judge did not err in refusing to hold that the mortgage sued on was executed by a married woman to secure the

payment of her husband's debts, and was void. The whole testimony shows that the circuit judge was correct in so refusing. Again, we present the view that Elias Day, who now asks this court to take this view in antagonism to the judge's decree, is estopped by his conduct from taking advantage of his own wrong. This exception is overruled.

(7) The circuit judge did not err in holding that, under the laws of force at the time of said mortgage, Mrs. Day was without power to mortgage or to convey her property, not as security for her husband's debts, but in the payment of such debts, at the instigation of her husband himself. This exception is overruled.

(8) The circuit judge did not err in holding that the plaintiff was entitled to have the mortgage foreclosed, and in directing the sale of the premises to pay said mortgage. This conclusion follows necessarily from the foregoing views that we have expressed in disposing of the exceptions from 1 to 7, inclusive. This exception is overruled.

(9) The circuit judge did not err in holding that the plaintiff had paid on the debts of Day & Co. the sum set up. On page 14 of the brief will be found an itemized statement of what the debts of Day & Co. were at the time the deed was made, amounting to $1,905.94. This amount the plaintiff had paid or had assumed, and was obliged to pay. He has agreed to do it, and Elias Day is insolvent. The providence of the good wife, who is now dead, but who lived for six or seven years after the transaction with Col. Bowen, and who never for one moment criticised Col. Bowen's conduct, has abundantly provided the means whereby Col. Bowen may pay and discharge any debts still unpaid. This exception is overruled.

(10) We agree with the circuit judge that to allow the defendant Elias Day to come in, 12 or 13 years after the work had been completed, and claim an account amounting to $1,454 for his services and those of his teams, would be simply monstrous, for he had never mentioned any such claim to Col. Bowen until the day of reference, while Col. Bowen's services were testified to be worth one-third of the whole amount; but it is useless to multiply words in disposing of such a claim. It will not be allowed to stand for a moment, and the exception is overruled.

(11 and 12) As remarked by the respondent's attorney, this is a misapprehension. Every credit made was allowed in the calculation of the circuit judge. The decree found the total indebtedness of Day & Co., $2,261.09, to which there is no exception. Of this amount, Day was liable for five-eighths, which was $1,413.33. Take from this Day's claim allowed, $355.15, and we have the balance he is liable for, $1,058.18, as the judge found, less the payments made by Jane Day, which were not applied to the note and mortgage. We are satisfied with this showing. Let these exceptions be overruled.

(13) The appellant complains that no accounting between the partners composing the firm of Day & Co. has been had. It seems to us that he ignores the fact that the reference was adjourned, and time given to both sides to produce any papers or claims that might have been overlooked in the previous investigation. This being the case, there can be no foundation in justice to this claim on the part of Elias Day. Let this exception be overruled.

(14) We cannot see with what justice the appellant, Day, complains that an accounting would make the amount due on the notes and mortgage much less than is claimed by the plaintiff. Every effort has been offered the appellant, Elias Day, to make himself fully heard and felt in adjusting the accounts between the parties. Let this exception be overruled.

(15) We think that we have already disposed of this exception by what we have held in considering the others previously disposed of. Let the exception be overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed, and the action remanded to the circuit court for the purposes of enforcing the circuit decree.

(122 Ga. 143)

McCOY v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

CRIMINAL LAW—PROOF OF VENUE—LARCENY.

Where, on a trial for simple larceny, the evidence authorized a finding that, even if the accused did not steal the property in the county alleged in the indictment, he carried the stolen property into that county before the indictment was found, the venue was sufficiently proven.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 225.]

(Syllabus by the Court.)

Error from Superior Court, Walker County; W. M. Henry, Judge.

J. R. McCoy was convicted of larceny, and brings error. Affirmed.

Payne & Payne, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

FISH, P. J. J. R. McCoy was indicted for the offense of simple larceny for stealing in the county of Walker a cow and calf belonging to J. M. Millwood, the prosecutor. On the trial Millwood testified that on the night of December 6, 1904, he lost the cow and calf described in the indictment, and that he found them about two weeks later in the possession of Miss Gossatt, who lived some distance from his house, but in the same county, Walker. On cross-examination he testified as follows: "I live within a half or three-quarters of a mile from the Tennessee line. After my wife milked that night, my

cow and calf were on the outside of any inclosure, and could go where they pleased. The cow had a bell on her, and I heard her going down the road towards Rossville, but I did not hear her after she passed Rossville. She went up Spring street in Rossville, where the Baptist Church is located. * * * She was up in there somewhere, I don't think she was on top of the hill, but she was in there somewheres, about the Baptist Church, still traveling; and I suppose the calf was with her. * * * The Baptist Church is somewhere close to the Tennessee and Georgia line. * * * I don't know where the line is. I don't think she was in Tennessee, but I don't know where the line is exactly, but it is somewhere in the neighborhood of where I last heard the cow; and, of course, I could not say for certain whether she was in Tennessee or Georgia. When I last heard her, if she was not in Tennessee, she was right at the line and going in that direction. * * * It was a little after dark when I heard her going off. I generally kept her in a pasture, and I don't know where she went when she got out. There was not much grazing on the hill where I last heard her, nor until you get beyond there in the open common, and there it is very short, but there is open common beyond the hill, and that is in Tennessee. My cow did not often graze there. I kept her about home most of the time. * * * Where I found the cow on Lookout Mountain was in this county, and this was on the 2d day of January. * * * She did not often graze up there, only occasionally, or a few times. * * * The cow was raised on the Georgia side, and generally grazed on the Georgia side." Miss Gossatt testified that she bought the cow and calf of the accused in the forenoon of December 6, 1904, at which time he came to her home with the cattle, and said that he owned a farm near Trenton; that he had raised the cow, and desired to sell her in order to get money with which to pay his taxes. She further testified that Millwood came to her house and recovered his property. McCoy said in his statement that he bought the cow and calf in Chattanooga, and introduced one witness who swore that she had seen him buy a cow and calf from a man unknown to her on the streets of Chattanooga on December 6, 1904. The jury returned a verdict of guilty. The accused made a motion for a new trial upon the general grounds, that the verdict was contrary to law and the evidence and without evidence to support it. The motion was overruled, and he excepted.

The main contention of the accused before this court is that the venue of the crime was not proven, in that it was not shown positively that the animals were stolen in Walker county. It is well established that the venue of a criminal case may be shown not only by positive testimony, but also by circumstances. Keys v. State, 112 Ga. 399, 37 S. E. 762, 81 Am. St. Rep. 68, and citations. The evidence in behalf of the state was positive that the stolen cattle were raised in Walker county, and were in the habit of grazing within its limits, and there was probably sufficient evidence to authorize the jury to infer that the cattle were stolen in that county. When last heard by the prosecutor on the night of December 5th the cattle were in Walker county, and when next seen on the following morning in the possession of the accused they were in Walker county still. He sold them in Walker county, and there they have remained. Be that as it may, however, the fact of the stolen cattle being in the possession of the accused in Walker county on the morning after they were stolen would certainly give the court of that county jurisdiction. The Penal Code of 1895, which declares that cattle stealing shall be denominated simple larceny, after defining that offense (section 155) says, "The thief may be indicted in any county in which he may carry the goods stolen." "The crime is regarded as completely committed in all its parts in each county." Tippins v. State, 14 Ga. 422. So, even if it were not positively shown that the accused did actually drive the cow and calf away from the custody of the prosecutor whilst they were grazing within the limits of Walker county, the fact of the accused being unlawfully in possession of the stolen property in that county was sufficient to give the courts of that county jurisdiction.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 272)

FIELDS v. WILLIS.

(Supreme Court of Georgia. June 14, 1905.)

GUARANTY—CONSTRUCTION.

C. and F. enter into a written contract whereby C. agrees to sell to F. a certain number of cattle at a stipulated price and is to receive a stated advance on the purchase money, and C. further agrees to pay a certain amount as liquidated damages in case he fails to comply with his agreement. After the signatures to the contract appears the following, "We the undersigned guarantee the fulfillment of the above contract," which was signed by W. The obligation of W., resting on no independent consideration, is that of surety.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, § 4; vol. 40, Cent. Dig. Principal and Surety, § 6.]

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; W. N. Spence, Judge.

Action by E. J. Willis against S. N. Fields. Judgment for plaintiff. Defendant brings error. Reversed.

Fields instituted suit in the superior court of Mitchell county against J. M. Cox, a resident of that county, and E. J. Willis, a resident of the county of Decatur. It was alleged in the petition that the plaintiff made

and entered into a written contract with the defendants, a copy of which was attached to the petition, by which the plaintiff agreed to purchase from Cox certain cattle at named prices, according to the terms of the contract. The plaintiff alleged full compliance on his part with the contract in the manner set out in the declaration, whereby the defendants became liable to him in the amount of damages stipulated, to wit, $600. The following is a copy of the contract sued on:

"State of Georgia, County of Decatur. This agreement this day made and entered into by and between S. N. Fields, party of the first part, and J. M. Cox, party of the second part, Witnesseth: That said party of the first part agrees on his part to purchase from the said party of the second part, the following described cattle, to wit: 150 two year old steers at $6.50 per head. 150 one year old steers at $5.50 per head. 150 two year old heifers at $4.50 per head. 150 one year old heifers at $5.50 per head. And all of said cattle to be good, straight, smooth, merchantable and to be of full age. All scrub stock will be rejected by the party of the first part. Said cattle to be branded thus: S—F on left hip. Bulls are not to exceed 25% in this contract and known as the S— stock ranging in Mitchell, Decatur and Gadsden counties, State of Ga. and Fla., said cattle to be passed upon and graded in Bainbridge, Camilla and Faceville, State of Ga. and this county. Said party of the second part agrees to sustain all losses on said cattle from death, escape or otherwise until they are graded and delivered as above. Said cattle are to be delivered on or before the 1st day of June, 1898. Free on board cars as above agreed, and to be paid for at time of delivery. In order to secure and guarantee to party of the second part, and to make this contract more secure and binding on both parties, the party of the first part agrees to pay and advance as part payment the sum of $600 the receipt of which is hereby acknowledged, which said sum of money, or any other sums of money so advanced or may hereafter be advanced, is part payment on said cattle, and now for the purpose of securing unto the party of the first part the afore stipulated sums of money and the amount of fixed, liquidated, stipulated and stated damages hereinafter mentioned, it is hereby expressly understood and agreed that said party of the first part shall have liens upon any and all of said cattle, and upon all of them that shall be purchased or now owned or held by party of the second part and to enforce or foreclose said lien the said party of the first part is authorized and shall have the right at any time after the above date of delivery, to take possession of any and all of the above described cattle that may be so purchased or now owned or held by said party of the second part, wherever they may be found, and thereafter, within a reasonable time, to sell the same, either in the State or out of it, either at public or private sale, and apply the proceeds thereof to the payment of said sum of money so advanced, and said fixed, liquidated, stipulated and stated damages hereinafter mentioned. And the said sum of money so advanced as well as said fixed, liquidated, stipulated and stated damages are to be paid at Bainbridge, in Decatur County and State of Ga. and all of said parties hereto further agreed that damages in this matter being uncertain and not capable of being understood and ascertained by any satisfactory known rule, the uncertainty being in the nature of the subject itself and the particular circumstances of the transaction and has been the subject of actual and fair calculation between the parties, it is agreed upon by all parties hereto that the sum of one dollar per head shall be the fixed, liquidated, stipulated and stated damages herein and settled upon by the parties hereunto and said sum to be paid by the parties hereto in default to the other upon the failure of the party in default to comply with this agreement in whole or in part. This is signed, sealed and executed and delivered in duplicate each party retaining a copy. Witness our hands and seals this 15th day of Apr. A. D. 1898.

"Attest, W. U. Fields. S. N. Fields [Seal.]
"L. N. Cox. J. M. Cox [Seal.]

"We the undersigned guarantee the fulfillment of the above contract. E. Willis.

"Witness: J. L. Thornton, N. P."

At the appearance term Willis demurred specially to the petition, and asked that it be dismissed upon the ground that the court was without jurisdiction of his person; that if he was liable he was liable under the contract declared upon as a guarantor, and not as a surety, and could only be sued in the county of his residence. The court sustained the demurrer, and dismissed the petition, and the exception is to this judgment of the court.

Sam S. Bennet, for plaintiff in error. Albert H. Russell, for defendant in error.

EVANS, J. (after stating the facts). If the liability of Willis was that of a guarantor, the court did not err in dismissing the suit, because a guarantor must be sued in the county of his residence. Geiser Manufacturing Company v. Jones, 90 Ga. 307, 17 S. E. 81. If he was liable as a surety, then he was properly joined in the suit with the principal in the county of the latter's residence. In some respects contracts of suretyship and of guaranty are identical, and the terms "surety" and "guaranty" are oftentimes colloquially used as interchangeable expressions of collateral liability. A guarantor has the same right as a surety by written notice to compel the institution of a suit against the principal. Civ. Code 1895, § 2974. The theoretical distinction between the two forms of contract is clear, but in the application of the principle the decisions of courts of last re-

sort are in a state of inextricable confusion. While the liability of both is accessorial to the principal, in the case of a surety the obligation is primary, and the guarantor's liability is secondary. "A surety binds himself to perform if the principal does not, without regard to his ability to do so. His contract is equally absolute with that of his principal. They may be sued in the same action, and judgment may be entered up against both. A guarantor, on the other hand, does not contract that the principal will pay, but simply that he is able to do so; in other words, the guarantor warrants nothing but the solvency of the principal." Manry v. Waxelbaum, 108 Ga. 17, 33 S. E. 703. Ordinarily, the surety joins in the contract with the principal; the guarantor engages in an independent undertaking. The former's liability is immediate and direct; the latter's arises upon the default or failure of his principal to perform his undertaking. Stern's Law of Suretyship, § 6. Our Code draws the distinction between the contract of suretyship and that of guaranty that the consideration of the latter is a benefit flowing to the guarantor. "The contract of suretyship is that whereby one obligates himself to pay the debt of another in consideration of credit or indulgence or other benefit given to the principal, the principal remaining bound therefor. It differs from a guaranty in this: that the consideration of the latter is a benefit flowing to the guarantor." Civ. Code 1895, § 2966. No consideration is expressed in the postscript to the contract which is relied on as creating the relation of principal and guarantor. Neither is there any allegation in the petition that there was a consideration flowing to Willis to make the contract. On the contrary, from the averments in the petition it is inferable that the contract of the principal and Willis was contemporaneously executed. The paper declared on does not indicate to the contrary. There is no date to the obligation of Fields, although the witnesses to the contract of Fields are not the same as those who attest the signature of Willis. No particular or formal phrase is required to create a contract of surety. Courts may disregard formal expressions to ascertain the real intent of the parties, and the form of the contract is immaterial, provided the fact of suretyship exists. Civ. Code 1895, § 2969. The mere use of the word "guaranty" will not make a contract one of guaranty. Baldwin Fertilizer Company v. Carmichael, 116 Ga. 763, 42 S. E. 1003. "Guarantors, viewed in reference to the consideration of their contract, are either mere sureties or more than sureties. They are more than sureties when the consideration of the guaranty moves, not to them, but to the person for whose performance they became bound." Wright v. Shorter, 56 Ga. 76. Reading together the two contracts, which appear to have been signed on a single piece of paper, it would seem that the purpose of Cox was to sell Fields a certain number of cattle of the specified grade upon stated terms, and in default of delivery of the cattle pursuant to the contract to become liable to Fields in stipulated damages. The extreme amount of damages to which Fields would be entitled to recover under the contract was $600, and this sum was advanced to Cox. The defendant, Willis, was aware that this sum was to be advanced Cox, because it was so stipulated in the contract. Willis' liability was limited to this sum, and his undertaking was the evident inducement to Fields to enter into the contract with Cox. No other consideration is even suggested by the contracts which induced Willis to sign, other than the binding effect of the executory contract between Fields and Cox. No independent consideration flowed to Willis, but the consideration of his contract was the engagement between Cox and Fields. In the case of Manry v. Waxelbaum, supra, the consideration was $1, paid to the guarantor. In another case (Geiser Manufacturing Company v. Jones, supra) the consideration of guaranty was alleged to be upon "a consideration not herein named." The liability in these cases was that of guaranty, rather than one of surety, because not only was the guarantor's undertaking independent of the principal's contract, but it was supported by its own consideration, which flowed to the benefit of the guarantor.

It might be urged that from the definition of the contract of suretyship quoted from the Code, supra, that the obligation of the surety is to pay the debt of the principal, and not to perform undertakings other than payments of indebtedness, and for that reason the liability of Willis is only that of a guarantor. This distinction cannot be sound. In the case of a forthcoming bond the undertaking of the principal is to deliver the property at a given time and place, and the liability to pay arises upon the default of the principal so to do; and yet one who signs a bond of this character with the principal is liable as surety, and not as guarantor. The analogy between the illustration just used and the instrument under consideration is very close. Willis, by guarantying the fulfillment of the contract, simply acknowledges his liability to the obligee to pay the stipulated damages in case his principal fails to perform his contract. His liability for the stipulated damages, while dependent upon his principal's failure to perform the contract, is primary and joint with the principal for the payment of the stipulated damages resulting from a nonperformance; and as the consideration moving Willis to sign the contract was not a benefit flowing to himself, but the making of an executory contract between his principal and the plaintiff, we conclude that his liability on the paper declared upon was that of a surety, and not a guarantor.

That there might be no doubt as to the character of the action or the nature of the contract declared on, the plaintiff offered an amendment to his petition, alleging that the "signing of said Willis [was] contemporaneous with and a part of the making of said contract, there being no contract between the said Fields and the said Cox until the signing thereof by said Willis, and the said Willis signing the same really as surety for said Cox, and as joint contractor with him, and became surety for said Cox and joint contractor with him, and without any consideration or benefit flowing to said Willis, and without any consideration except the credit extended to said Cox in said contract; it being the intention of all of said parties that said Willis should be such surety, and joint contractor, and not a guarantor within the strict meaning of the term, irrespective of the words used therein; and, if the words used in said contract import a different legal meaning, they were so used by mistake of all parties." This amendment in no way contradicted the terms of the writing, was germane to the cause of action set forth in the plaintiff's petition, and should, we think, have been allowed. Treating it as presenting the real truth with regard to the nature of the contract into which the parties entered, the conclusion is irresistible that the plaintiff had a right to hold Willis liable as a surety, and that the suit should not have been dismissed as to him.

Judgment reversed.

SIMMONS, C. J., absent.

(122 Ga. 267)

HARRELL v. HARRELL.

(Supreme Court of Georgia. June 14, 1905.)

1. WITHDRAWAL OF ESTATE FROM ADMINISTRATION—UNPROBATED WILL.

When a person dies without lineal descendants, his widow, as sole heir at law, cannot, upon payment of his debts, take possession of the estate without administration, when there is in existence an unprobated paper apparently executed in due form of law as the will of the deceased, until there has been a judgment of the court of ordinary that such paper is not the will of the deceased.

2. SAME—DEBT OF ESTATE—LEGACY.

A legacy is not a debt, within the meaning of that provision of the Code authorizing a widow, under certain circumstances, to pay the debts of her deceased husband's estate, and take possession of the same.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 3–12.]

(Syllabus by the Court.)

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

Action by Lizzie Harrell against S. J. Harrell, administrator. Judgment for plaintiff. Defendant brings error. Affirmed on conditions.

Mrs. Lizzie Harrell brought suit against the administrator of the estate of D. B. Harrell upon two promissory notes, each signed by D. B. Harrell—one for $500, payable to John Harrell or order, and the other for $1,000, payable to the order of the plaintiff. She alleged that she was the widow of John Harrell, who died intestate, leaving no descendants; that there were no unpaid debts owing by him; and that therefore she was the owner and holder of the note payable to her husband. The defendant filed an answer in which he denied all of the material allegations in the petition, and also filed pleas of non est factum and payment as to both notes. At the trial the plaintiff introduced the notes in evidence, and proved their execution by the intestate of the defendant. It appeared from the evidence that John Harrell died testate, and that his will had never been probated or admitted to record. The will was introduced in evidence, and, from it, it appeared that the testator gave to a person who was his niece, but who was described as his adopted daughter, a legacy of $3,000, and the rest of his estate to his wife, who was nominated as the executrix of the will. There was no evidence that his niece had been legally adopted as his daughter. There was evidence that after the death of John Harrell the plaintiff had delivered to the niece property of the value of $3,000, and taken her receipt in full payment of all claims which she had against the estate of her uncle either by will or otherwise. There was no evidence authorizing a finding for the defendant on either of the special pleas referred to. The court directed a verdict for the plaintiff, and the defendant excepted.

G. Y. Harrell, for plaintiff in error. J. B. Hudson, for defendant in error.

COBB, J. So far as the verdict relates to the note for $1,000 payable to the plaintiff, the evidence demanded a finding in her favor. But the evidence neither required nor authorized a finding in the plaintiff's favor as to the $500 note payable to John Harrell. The general rule is that the right to recover upon a chose in action payable to a person since deceased is in the legal representative of the estate of such person. One exception to this rule is where a husband dies intestate, leaving no lineal heirs, in which case the law allows his widow to pay the debts due by his estate, and take possession thereof. In such a case the widow has a right to bring suit upon a chose in action belonging to the estate of her deceased husband. The section of the Code which confers this right upon the widow is in that chapter which deals with the subject of title by descent and distribution, lays down the rule to determine who are heirs at law of a deceased person, and is in the following language: "Upon the death of the husband, without lineal descendants, the widow is his

sole heir, and upon the payment of his debts, if any, may take possession of his estate, without administration." Civ. Code 1895, § 3355, par. 1. This section has no application whatever in a case where a husband dies testate. It confers no authority upon the widow to settle with legatees. A legacy is in no sense a debt, and certainly is not a debt within the meaning of this section. A debtor is never required to pay to any person except one whose receipt would protect him against the creditor or his legal representative. A debtor to one who dies leaving a paper apparently executed in due form of law as a will would not be fully protected by a payment to the widow or heirs at law until it has been judicially determined that this paper is not the will of the deceased. It is the duty of all persons having possession of such papers, upon the death of the person whose name is signed thereto, to file the paper with the ordinary; and, more than this, it is the duty of the ordinary, upon information that such a paper is in existence, to require the same to be filed in his office. Civ. Code 1895, § 3288; Israel v. Wolf, 100 Ga. 339, 28 S. E. 109. So long as such a paper is in existence, either filed or unfiled, a debtor to the estate of the deceased pays at his peril to an heir claiming to represent the estate in that capacity. While it appears from the evidence that the legatee and the widow have settled, still the legatee is not a party to this suit, and there is nothing to prevent her from compelling a probate of the will and attacking this settlement for any reason that may exist. The plaintiff alleged in terms in her petition that John Harrell died intestate. Her right to recover depended upon proof of this allegation. The uncontradicted evidence shows that he did not die intestate, and therefore the plaintiff had no right to recover upon the $500 note.

The judgment is affirmed as to the recovery upon the $1,000 note, upon condition that the plaintiff write off all of the recovery based upon the $500 note; nothing in so doing to prejudice the rights of the legal representative to bring another suit on that note. If the recovery be not so written off, the judgment will be reversed; the defendant in error in either event to pay the costs of this writ of error.

Judgment affirmed on condition. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 254)

JACKSON v. GREEN et al.

(Supreme Court of Georgia. June 14, 1905.)

WITHDRAWING ESTATE FROM ADMINISTRATION —SUIT BY WIDOW.

Where suit was brought to recover a debt originally due to a man since deceased, the plaintiff claiming the right to recover, under section 3355, par. 1, of the Civil Code of 1895, as the widow of the deceased, on whose estate there was no administration, and whose debts she had paid, and where on the trial it appeared from her evidence that she had paid some of her husband's debts before bringing the suit, and some afterwards, a nonsuit was properly granted.

(Syllabus by the Court.)

Error from City Court of Columbus; J. L. Willis, Judge.

Action by Mollie Jackson against M. B. Green and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Mollie Jackson brought suit against M. B. Green et al., trustees of Shady Grove Baptist Church, on an open account for salary due to her deceased husband as pastor of the church. On the trial the plaintiff offered to amend her declaration, but the court overruled the motion. She testified to the indebtedness due to her husband as pastor of the church. As tending to show her right to bring the suit and recover, she testified as follows: "I am the plaintiff in this case, and the widow of Oliver H. Jackson, who was the pastor of Shady Grove Baptist Church for eleven years previous to his death, which occurred on the 26th day of October, 1890. * * * Am the sole heir at law of my deceased husband, and was at the time of his death. I paid all the debts of my husband—most of them before this suit was brought, and some afterwards. * * * All of my husband's debts were not paid before this suit was filed." At the close of plaintiff's evidence the court granted a nonsuit, and plaintiff excepted.

D. L. Parmer, Thos. W. Grimes, and Goetchius & Chappell, for plaintiff in error. Hatcher & Carson, for defendants in error.

LUMPKIN, J. (after stating the above facts). 1. This case has been twice before the Supreme Court. Jackson et al. v. Miles et al., 94 Ga. 484, 19 S. E. 708; Jackson v. Miles et al., 98 Ga. 512, 25 S. E. 569. The record now before us makes no reference to the former adjudications, but is brought up as if it were here for the first time. Whether the court correctly rejected the amendment or not is immaterial, if a nonsuit was rightly granted because the plaintiff was not entitled to maintain the action. Section 3355, par. 1, of the Civil Code of 1895, provides that "upon the death of the husband, without lineal descendants, the wife is his sole heir, and upon the payment of his debts, if any, may take possession of his estate, without administration." Prior to the act of December 12, 1882 (Acts 1882–83, p. 47), the Code declared that "upon the death of the husband, without lineal descendants the wife is his sole heir." Code 1882, § 1762. By that act the clause was added, "and upon the payment of his debts, if any, may take possession of his estate, without administration." As thus amended the section of the Code of 1882 quoted was codified with section 2484 of that Code, so as to form a

part of section 3355 of the present Civil Code of 1895. Prior to the act of 1882 the law did not dispense with administration, or vary the general rule that personalty vests in the administrator. There was a provision of this character in reference to the husband (Code 1882, § 1761), but not as to the wife. Gouldsmith v. Coleman, 57 Ga. 425–426. As to the section relating to the husband, see McLaren v. Bradford, 52 Ga. 648; Conyers v. Bruce, 109 Ga. 190, 34 S. E. 279. The right in a widow to dispense with administration and bring a suit on a debt which was due to her deceased husband being statutory, to exercise it she must comply with the statute. "The burden of proof generally lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential." Civ. Code 1895, § 5160. As to when a widow may take possession of her deceased husband's estate without administration, see Civ. Code 1895, § 3355, par. 1, supra; McElhaney v. Crawford, 96 Ga. 174, 22 S. E. 895; Johnson v. Champion, 88 Ga. 527, 15 S. E. 15; Towns v. Mathews, 91 Ga. 546, 17 S. E. 955. In Moore v. Smith, 121 Ga. 479, 49 S. E. 601, this principle was recognized in a case where the sole creditor of the deceased brought suit against his widow, not as executrix de son tort, but as being in possession of the property as sole heir without administration. In the decision it is said: "If the widow have notice of an existing debt of her husband's, she cannot take possession of his estate; and, if she does so, she is a wrongdoer." Page 482 of 121 Ga., page 603 of 49 S. E. The right of the plaintiff to bring an action is generally determined by the status of such plaintiff at the time when the suit is brought, and, if the plaintiff then has no title or right to sue, she cannot acquire it afterwards, and thus sustain the action. See McElmurray v. Harris, 117 Ga. 919, 43 S. E. 987; Wright v. Jett, 120 Ga. 995, 48 S. E. 345.

The plaintiff showed by her own evidence that at the time she brought the action she was not authorized to do so by section 3355 of the Civil Code of 1895. She produced evidence to show an indebtedness to her husband, but proved that she had no right to sue upon it when the action was brought. A nonsuit therefore resulted.

Judgment affirmed.

SIMMONS, C. J., absent.

(123 Ga. 190)

COTHRAN v. WITHAM.

(Supreme Court of Georgia. June 14, 1905.)

CONTRACT — VALIDITY — INDEFINITENESS — ACTION FOR BREACH—DAMAGES.

C. executed the following contract: "This is to certify that I have this day bought of [W.] five shares of the capital stock of [a named bank], and in consideration of the price paid, and for value received, I hereby agree not to sell all, or any part of the stock at any time, until I have first offered the same to [W.] in writing at the book value of said stock, giving him ample time to accept or refuse the purchase, binding my heirs, executors, and administrators in the above option and agreement." In a suit by W. against C. for the breach of the contract, *held:* (1) The contract was not void for indefiniteness as to the time when it should become operative. (2) It was not unilateral. (3) The allegations of special damage were too general, vague, and speculative to be the basis of a recovery. (4) W. was entitled to recover nominal damages only.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 10, 18, 26; vol. 15, Cent. Dig. Damages, §§ 31, 406–408, 412.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by W. S. Witham against J. C. Cothran. Judgment for plaintiff. Defendant brings error. Reversed.

Brown & Randolph, for plaintiff in error. E. W. Barn and Spencer R. Atkinson, for defendant in error.

FISH, P. J. W. S. Witham brought an action for damages against J. C. Cothran for the breach of the contract following:

"Stock Option. This is to certify that I have this day bought of W. S. Witham five (5) shares of the capital stock of the Bank of Cartersville, Ga., and in consideration of the price paid, and for value received, I hereby agree not to sell all or any part of the stock at any time, until I have first offered the same to W. S. Witham in writing at the book value of said stock, giving him ample time to accept or refuse the purchase, binding my heirs, executors, and administrators in the above option and agreement. J. C. Cothran. Witness, T. H. Willis."

The petition alleged that the defendant sold the five shares of stock to other parties on March 16, 1903, without having first in any way offered them to plaintiff. General damages were laid in the sum of $5,000.

Paragraph 9 of the petition was as follows:

"(9) Your petitioner shows that, by reason of the said sale of the said stock by said defendant, your petitioner lost, in the way of profits, $300; that said sale forced your petitioner to buy six shares of the capital stock of said bank at a cost of $15 per share over and above the book value of said stock, making $90; that your petitioner's expenses were $34, in the way of railroad fare and lawyer fees; that he was president and financial agent of the Bank of Cartersville, and, on account of said breach of said option, your petitioner lost control of said bank as president and financial agent, which positions paid your petitioner $500 per year, thereby greatly damaging your petitioner, to the extent of $4,500."

The petition was demurred to on the grounds: "(1) Said petition sets forth no

cause of action. * * * (2) The damages alleged to have been sustained in said petition are too remote and speculative to be the basis of any legal recovery. * * * (3) Paragraph 9 of said petition fails to allege why it was necessary for the petitioner to buy six shares of the stock referred to therein, and from whom the same were bought, and fails to set forth the market value of the stock and the price paid by petitioner, and also fails to set forth what sum or sums were paid by petitioner by way of railroad fare, and to what railroad, and when and why; and said paragraph is too vague and indefinite, and there are no sufficient allegations therein to charge this defendant with liability for the repayment of any of the sums therein mentioned." To meet the demurrer, the ninth paragraph of the petition was amended, in substance, as follows: Plaintiff, at the time he sold the five shares of stock to the defendant, and for a long period of time prior thereto, was president and financial agent of the Bank of Cartersville, and for his services as such he was entitled to and did receive the sum of $500 per annum. In making the sale of the stock to the defendant, he reserved the right to repurchase the same on the terms set out in the contract, for the purpose of retaining control of the majority of the stock, in order to secure his re-election to the presidency of the bank, all of which was well known to the defendant. For the purpose of preventing the re-election of the plaintiff to the presidency of the bank, the defendant, without offering the five shares of stock to the plaintiff, who was willing to purchase them under the terms of the contract, sold them to other parties, who were opposed to the plaintiff's re-election, and by this means plaintiff at the next annual election was defeated for the presidency. The particulars of the purchase by the plaintiff of the six shares of stock, and his expenses incident thereto, mentioned in the ninth paragraph of the original petition, were fully set out in the amendment. It was further alleged in the amendment "that it was necessary, in order for him to protect his rights in the premises, to give notice of his rights in respect of said shares of stock [the five shares he sold to defendant] to said bank, with notice not to transfer the said shares upon the books of said company; that it was necessary for him to employ counsel for said purpose, and * * * for said services he paid [named counsel] the sum of $25, the same being in all respects a reasonable charge for the services in that respect rendered"; and that by the breach of the contract by the defendant the plaintiff had been injured and damaged "in manner and by means aforesaid in the sum herein mentioned." The amendment was allowed, subject to demurrer. The demurrers previously filed were urged against the petition as amended. The demurrers were overruled, except as to the damages sought to be recovered on account of the purchase by the plaintiff of the six shares of stock and expenses incident thereto, and all allegations in the original petition and the amendment thereto in reference to this matter were stricken. The defendant excepted to the overruling of the general demurrer, and of the special demurrer as to matters other than the purchase of the six shares of stock by the plaintiff. Counsel for the plaintiff in error insist here that the court erred in overruling the general demurrer, for three reasons: (1) The contract for the breach of which the action was brought "was void for uncertainty and indefiniteness, there being no time fixed in the contract within which it was to become operative"; (2) it was unilateral, in that only Cothran was bound by its terms; (3) the damages sought to be recovered are too remote and speculative, and do not flow logically and proximately from a breach of the contract.

1. The contract was not void for uncertainty and indefiniteness, in that no time was fixed for it to become operative. Such a time was fixed in express terms, viz., whenever Cothran decided to sell. Then, before selling to another than Witham, he was to offer the stock to Witham, in writing, at its book value. Counsel for the plaintiff in error also argued that the contract was against the policy of the law, in that it placed an indefinite restriction upon the alienation of the stock, and violated "the rule against perpetuities." We cannot concede the soundness of this argument, as we think it clear that the right of Cothran to sell the stock at any time he might see fit was not restricted, save that, before selling it to one other than Witham, he was bound to offer it to the latter, in writing, at its book value, and that, in any event, the contract would have terminated upon the death of Witham.

2. The contract was not unilateral. The agreement of Cothran to offer the stock to Witham at its book value before selling it to another appears to have been part of the transaction of the sale of the stock by Witham to Cothran, and to have entered into its consideration. In view of the terms of the contract, it is presumable that Witham would not have sold the stock to Cothran at the price at which the latter bought if Cothran had not agreed that, before he sold to another, he would give Witham the right to repurchase upon the terms stated. See Hayes v. O'Brien (Ill.) 87 N. E. 73, 23 L. R. A. 555.

3. The allegations as to the loss of $300 profits were too general, and the special demurrer thereto should have been sustained. Under the provisions of Civ. Code 1895, § 3799, the fee of $25 paid to attorneys for notifying the bank not to transfer on its books the stock sold by Cothran was clearly not recoverable, and the special demurrer to

the allegations setting it out should have been sustained.

4. For the breach of a contract by one party the other may recover nominal damages. Civ. Code 1895, § 3801. Witham therefore was entitled to recover nominal damages for the breach of the contract. The allegations of damage on account of his defeat for the office of president and financial agent of the bank at the election next succeeding the alleged breach of the contract by Cothran, however, were too contingent and speculative to be the basis of a recovery. It was not alleged that, had Cothran retained the stock, he was under any obligation, legal or otherwise, to vote it for Witham in the election of officers. Apparently there was no restriction on his right to vote it for whomsoever he chose. Nor was he under any obligation to sell the stock to Witham before the election took place, thus putting it in Witham's power to control the stock independently of him. In order to recover damages on these allegations, then, one of two alternatives must be assumed, viz., either that Cothran would have sold the stock to Witham before the election if he had not sold it to the parties to whom he did sell, or that, in the event he had not sold the stock at all, he would have voted it for Witham for president and financial officer of the bank. In the nature of things, neither of these alternatives is susceptible of proof. It follows that, under the allegations of the petition, Witham is entitled only to nominal damages for the breach of the contract, and that the defendant's special demurrer should have been sustained.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness, and LUMPKIN, J., not presiding.

(123 Ga. 145)

HORTON v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

1. CRIMINAL LAW — TRIAL — RECEPTION OF EVIDENCE.

It is not error to allow a witness to deliver his testimony in narrative form, without the aid of questions from counsel, when counsel so request, provided the witness is not permitted to state anything which is inadmissible as evidence. This practice is rather to be commended than condemned.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 816.]

2. SAME—APPEAL—EVIDENCE.

The evidence, although circumstantial and not entirely satisfactory, was sufficient to warrant the verdict, and the discretion of the judge, exercised in overruling the certiorari, will not be controlled.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, § 205.]

3. SAME.

There was no error requiring a reversal of the judgment.

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Louisa Horton was convicted of crime, and brings error. Affirmed.

R. H. Lewis, for plaintiff in error. D. W Meadow, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 122)

STANLEY v. STANLEY et al.*

(Supreme Court of Georgia. May 15, 1905.)

INSANE PERSON—ACTION BY NEXT FRIEND—DISMISSAL.

When a suit is instituted by one as the next friend of a person duly adjudged insane, but the petition does not disclose that the latter has no guardian, or allege any reason why it was necessary for him to sue by a next friend rather than by a duly appointed guardian, objection to the maintenance of the action may be made by special demurrer calling on the person instituting the suit to show by what right it was so brought in behalf of the insane person named as plaintiff; and, if the special demurrer is not met by appropriate amendment, it is proper for the court to dismiss the action.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by J. F. Stanley, suing by Nancy Rusk, against Hattie Stanley and others. Judgment for defendants, and plaintiff brings error. Affirmed.

An action was instituted in the name of James F. Stanley, suing by his next friend, Nancy Rusk, against his wife, Mrs. Hattie Stanley, individually and as the natural guardian of her minor child. It was alleged that James F. Stanley was, on or about April 20, 1898, detained under a commission of lunacy issuing from the court of ordinary of Cobb county; that he was tried thereunder, adjudged to be insane, and sent to the State Lunatic Asylum at Milledgeville, Ga., from which institution he was released on or about October 28, 1899, without any certificate that he had regained possession of his mind; that he had never in fact regained his normal state of mind, is still of unsound mind, and that the judgment of the court of ordinary finding him to be insane still remains of force. The petition also set forth the following allegations of fact: While Stanley was suffering from his mental infirmity, and after he had been adjudged insane, his wife instituted proceedings against him to recover alimony for herself and child. No guardian ad litem was appointed by the court to represent him, nor had he sufficient mental capacity to defend the suit, and on December 4, 1901, a verdict and judgment for $700 was rendered against him. An execution issuing from this judgment has been levied on certain land belonging to him, and the sheriff is proceeding to bring the land to sale. The plaintiff attacked this judg-

*Rehearing denied June 23, 1905.

ment as void, because fraudulently obtained by Mrs. Stanley under the circumstances stated, and prayed that the sale of the land thereunder be enjoined, and that the judgment be set aside. The court declined to grant a restraining order, and the land was subsequently sold, A. E. Benson becoming the purchaser. By amendment the plaintiff set up these facts, also alleging that before the sale Benson had been put upon notice of the suit filed to set the judgment aside, and praying that he be made a party defendant. The plaintiff also amended the original petition by adding various allegations to the effect that Mrs. Stanley was not entitled to alimony, and that Stanley, had he been under no disability, could have urged certain meritorious defenses to her action, and defeated a recovery by her. To the petition as amended the defendants demurred both generally and specially, and the court passed an order sustaining the general and special demurrers and dismissing the action. To this judgment exception is taken.

O. E. & M. C. Horton, for plaintiff in error. J. Z. Foster, for defendants in error.

EVANS, J. (after stating the facts). Irrespective of the question whether or not the petition as finally amended set forth a state of facts showing that Stanley was entitled to have the judgment rendered against him in the suit for alimony set aside, the judgment of the trial court dismissing the action should be affirmed, for the reason that no offer was made to meet the objection, raised by one of the special demurrers filed by the defendants, that neither the original petition nor any of the amendments thereto disclosed that Mrs. Nancy Rusk had any authority to act for Stanley as next friend in bringing the suit, nor did it appear that he had no guardian, nor was any reason alleged why he did not sue by guardian. This objection was well taken, and presumably an appropriate amendment would have been made to overcome it, if the fact was that Mrs. Rusk could legally maintain the action in her capacity as next friend for Stanley, whom she alleged to be her father. In the case of Reese v. Reese, 89 Ga. 645, 15 S. E. 846, the question arose whether or not, under any circumstances, a suit could be brought in behalf of one non compos mentis by any one save a duly appointed guardian, and this court decided, in view of the provisions of Civ. Code 1895, § 4843, and the generally recognized rule obtaining in other jurisdictions, that, where no guardian has been legally appointed to represent an insane person, the courts, whether of law or of equity, have jurisdiction to entertain suits brought by one as next friend of the insane person. This decision was approved and followed in Dent v. Merriam, 113 Ga. 83, 38 S. E. 334, and in La Grange Mills v. Kener, 121 Ga. 429, 49 S. E. 300, it was held that: "A suit by a next friend for a lunatic, who has been adjudged insane, which fails to allege that the lunatic has no guardian, or any sufficient reason why she does not appear by her guardian if she has one, is maintainable, unless the failure to make allegations of this character is made ground of objection in a special demurrer or by plea in abatement." In the latter case the demurrer did not raise the proper objection to the maintenance of the action, so the judgment overruling the demurrer was affirmed. As was clearly intimated, however, the objection, if raised, would have been cause for dismissing the action, unless met by appropriate amendment. See Nance v. Stockburger, 112 Ga. 90, 37 S. E. 125, 81 Am. St. Rep. 22. Where one cannot, except under special circumstances, maintain a suit in his own behalf or for the benefit of another, it is incumbent upon him to disclose the facts giving him a right to bring the action. Thus, before the heirs at law of an intestate can recover land belonging to his estate, they must allege and prove either that there was no administration upon the estate, or that the administrator, if there be one, has assented to their bringing the suit (Greenfield v. McIntyre, 112 Ga. 691, 38 S. E. 44); and if they fail to make the necessary allegations as to their right to sue the omission to do so may be taken advantage of by appropriate special demurrer (Crummey v. Bentley, 114 Ga. 749, 40 S. E. 765).

In view of the conclusion above announced, it is unnecessary to deal with either the general demurrer or the several other grounds of the special demurrer. The judgment dismissing the action is affirmed because of the failure of Mrs. Nancy Rusk to make it appear to the court that she had authority to institute the action in behalf of James F. Stanley, irrespective of the question whether or not the petition set forth a cause of action, and without prejudice to him should suit be subsequently brought in his behalf by a person authorized to institute and maintain the action.

Judgment affirmed. All the Justices concur, except CANDLER, J., absent.

(123 Ga. 247)

McWHORTER et al. v. O'NEAL.

(Supreme Court of Georgia. June 14, 1905.)

1. REFORMATION OF INSTRUMENT—WHEN DENIED.

As a general rule, equity will not decree the reformation of an instrument at the instance of one who is a mere volunteer, and who was not a party to the instrument.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, § 91.]

2. TRIAL—INSTRUCTIONS.

It is error for a judge to instruct the jury upon an issue made by the pleadings which has been expressly abandoned in open court during the progress of the trial, and in a close case this will be a sufficient reason to require a new trial.

8. APPEAL—REVIEW.
Other than as above indicated, there was no error requiring the granting of a new trial.
(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by Joshua O'Neal against Edith McWhorter and B. F. McWhorter. Judgment for plaintiff, and defendants bring error. Reversed.

See 49 S. E. 592.

Joshua O'Neal filed an equitable petition against Edith McWhorter and her guardian, B. F. McWhorter. The petition alleged that Anna O'Neal, wife of the plaintiff, had died intestate, leaving the plaintiff as her sole heir; that she left no debts, and plaintiff was entitled to take possession of her estate without administration; that after the death of his wife the plaintiff was approached by B. F. McWhorter, who fraudulently represented to the plaintiff that his wife had left a valid will giving her property to the defendant Edith McWhorter; that McWhorter thereupon, by the use of fraud and misrepresentations, induced the plaintiff to sign a paper relinquishing his interest in his wife's estate to Edith McWhorter, his wife's niece. The paper thus signed was a contract between B. F. McWhorter, as guardian of Edith McWhorter, and the plaintiff, and recited that the plaintiff "agrees to release unto the said second party all claims or titles to all live stock of every kind, all provisions and supplies, farming utensils, all growing crops for the present year on lands in Penfield, Ga., owned by Mrs. Anna O'Neal at the time of her death, that he, the said first party, might have to any of said property." The contract then provided that McWhorter, as guardian, released to the plaintiff certain other property owned by Mrs. O'Neal, and not included in the foregoing description. It was also declared that "this contract is to adjust and settle all differences between the parties to this contract, and is made for the special purpose of avoiding any litigation between said parties." The plaintiff delivered to McWhorter a large amount of the personalty, a list of which is attached to the petition. The petition alleges that McWhorter was the brother of plaintiff's wife, that plaintiff had great confidence in him, and that the contract was the result of surprise, and gives an undue advantage to McWhorter. The plaintiff prayed for a cancellation of the contract. The defendants filed an answer in which they denied the allegations of fraud, surprise, misplaced confidence, etc. By way of special plea they alleged that, prior to her marriage to plaintiff, Mrs. O'Neal (then Mrs. Grant) executed a will in which she left practically her entire estate to Edith McWhorter; that after the marriage, for the express purpose of making the will effective, plaintiff and his wife entered into a contract, the material parts of which are in substance as follows: "Joshua O'Neal agrees, for a consideration herein contained, to bequeath and give to Anna O'Neal in fee simple all rights that he may have in" described real estate; "and in consideration of such gift, Anna O'Neal agrees to relinquish her right to dower, homestead, year's support, or in any way whatever, in property of Joshua O'Neal other than that above described. The object of this agreement is to prevent any disagreement that may occur in the event of the death of either of the parties hereto." It is alleged that, at the time this agreement was entered into, it was the intention of the parties that neither should inherit from the other in case of his or her death, and that the purpose of the contract was to make the will effective; that the contract made by plaintiff with McWhorter was for the purpose of carrying out this intention; that plaintiff well knew of his wife's will, and knew that it was the only will in existence after her death which was made by her. The prayer of the answer was that the contract of plaintiff with McWhorter and the agreement between plaintiff and his wife be carried out. At the trial the defendants offered an amendment to their plea, in which it was alleged that the plaintiff did not have any rights as heir at law of his wife, because he had relinquished the same by his agreement with her; that, if the paper does not show this to be a proper construction of its terms, it is ambiguous; that, if it should be construed so as not to prevent the plaintiff from inheriting from his wife, the defendants pray that it may be reformed so as to contain such provisions. On August 10, 1904, the court passed an order refusing to allow this amendment. The plaintiff filed a written demurrer to the special plea of the defendants above referred to, and moved to strike that portion of the answer and the exhibits relating thereto, for the reason that it was not alleged that the will was a valid will or had ever been probated; that the contract between O'Neal and his wife is unambiguous and irrelevant to the present issue, and nothing alleged in the plea or set out in the exhibits constitutes any defense to the action; and also upon the further ground that the contract between Mrs. O'Neal and her husband is void, not having been approved by a judge of the superior court. On August 10, 1904, this demurrer was sustained, and the exhibits and allegations referred to stricken as a defense. The trial resulted in a verdict in favor of the plaintiff, and a decree for cancellation. The defendants made a motion for a new trial, which was overruled. In their bill of exceptions they assign error upon the exceptions pendente lite which were taken to the refusal to allow the amendment, and also on the judgment overruling the motion

for a new trial. No exception was taken to the judgment sustaining the demurrer to the plea.

James Davison and Jas. B. & Noel P. Park, for plaintiff in error. Saml. H. Sibley, for defendants in error.

COBB, J. 1. The amendment to the plea was offered and rejected on the same day that that portion of the plea which was sought to be amended was stricken on demurrer. It does not appear which order was passed first. If the original plea was actually stricken before the amendment was offered, that would have been a good reason for disallowing the same. On the other hand, if the amendment was offered and rejected before the plea was stricken, the amendment should not have been rejected unless it was bad in substance. But without reference to this question, we think the amendment was properly disallowed because it was bad in substance. The contract between O'Neal and his wife was sought to be reformed at the instance of Edith McWhorter, who was a mere volunteer, and who had no interest whatever in the subject-matter of the contract at the time of its execution. Even the contingent interest as a prospective legatee which she had under the will of her aunt, executed before the latter's marriage to O'Neal, did not exist at the time this contract was signed. The power of a court of equity to reform contracts is one exercised with caution, even at the instance of the parties or claimants for value, and the circumstances must be peculiar in their nature before a court of equity will interfere at the instance of a volunteer, if it will interfere at all at the instance of such a party. Gould v. Glass, 120 Ga. 51, 47 S. E. 505 (5). There was nothing in the averments of the plea which would make the case such a peculiar one as to take it out of the general rule refusing the equitable relief of reformation to a mere volunteer.

2. The plaintiff attacked the contract ought to be canceled upon two grounds, alleging, first, that it was obtained by fraud; and, second, that it was without any consideration. He would have been entitled to prevail if he established either of these propositions. Counsel for the plaintiff in error in open court abandoned the contention that the contract was without consideration, and thus practically admitted that, if the fraud alleged was not established, the defendant would be entitled to prevail. The judge, in his charge, submitted to the jury both the issue of fraud and the question of consideration, and error is assigned upon a portion of the charge in which it is stated that one of the contentions of the plaintiff was that the contract was without consideration. We think this was such an error as would require the granting of a new trial. The evidence was sharply conflicting on the question of fraud, and was of such a character that a jury might with propriety find either way. It is possible that some of the jurors might have been unwilling to find for the plaintiff on this issue, and still have thought that they were authorized, under the charge, to consider the question whether the contract was without consideration, and may have erroneously reached the conclusion that it was. The effect of the charge, therefore, was to give to the plaintiff the benefit of a theory set up in the pleadings, but which had been expressly abandoned in open court.

3. With the exception above indicated, the charges complained of were free from any substantial error. Those grounds of the motion for a new trial which allege that the verdict is contrary to specified portions of the charge raise no question for decision, and it is useless to incumber a motion for a new trial with such grounds. If the verdict is contrary to the charge of the court, and the charge is correct, the general grounds of the motion, when considered in the light of the evidence, are sufficient to authorize the granting of a new trial. There was no error in rejecting the evidence of witnesses as to what was the intention of the parties at the time the contract between O'Neal and McWhorter was made. The contract was unambiguous, and spoke for itself. Nor was there any error in rejecting the evidence of declarations by Mrs. O'Neal to third persons of affection for her niece. The cordial and affectionate relations existing between the two could be proved by acts and conduct, as was held by the court. The deed from the near relatives of Mrs. O'Neal, who would have been her heirs if she had been unmarried at the time of her death to Edith McWhorter, was irrelevant to the issue on trial, and properly rejected. The evidence as to the existence of relatives of Mrs. O'Neal's former husband was irrelevant, but its admission would not alone have been sufficient to require the granting of a new trial. There was no error in any of the other rulings complained of.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 216)

RICHMOND HOSIERY MILLS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Georgia. June 14, 1905.)

1. JUDGMENT ON DEMURRER — CONCLUSIVENESS.

A judgment on demurrer not excepted to is conclusive between the parties as to the points necessarily decided.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1167.]

2. SAME.

The overruling of the demurrer which was filed in the case at bar was a conclusive determination that a right of action existed, but did not adjudge what was the measure of damages.

3. TELEGRAPH COMPANY—AGENT OF SENDER—LIABILITIES.

In Brooke v. Western Union Telegraph Co., 46 S. E. 826, 119 Ga. 694, it was held that, "In the transmission of a telegraphic message the telegraph company is the agent of the sender, to whom, and not to the company, the recipient must look for damages arising out of error in the transmission."

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 34.]

4. SAME—MISTAKE IN TELEGRAM—ACTION BY RECIPIENT.

If a telegram is sent containing a proposal to sell goods, but by mistake of the telegraph company, as delivered, it does not state the proposal correctly, the receiver cannot recover from the telegraph company compensatory damages on the ground that, if the message had been correctly transmitted so as to contain the proposal as intended by the sender, it would have been accepted in that form and certain benefits or profits would have accrued to the receiver therefrom; it not appearing what actual loss, if any, resulted to the receiver from such error.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 64, 72.]

5. SAME—NOMINAL DAMAGES.

Under the facts of this case, a judgment by the presiding judge, to whom the case was submitted without a jury, in favor of the plaintiff, against the defendant, for nominal damages, was not erroneous.

(Syllabus by the Court.)

Error from Superior Court, Walker County; W. M. Henry, Judge.

Action by the Richmond Hosiery Mills against the Western Union Telegraph Company. Judgment for plaintiff for nominal damages, and it brings error. Affirmed.

The Richmond Hosiery Mills, a corporation having its principal office at Rossville, in this state, brought suit against the Western Union Telegraph Company, alleging, in brief, as follows: Plaintiff is engaged in the manufacture of cotton hosiery, and uses large quantities of cotton yarns and other fabrics. Finding it desirable to purchase a considerable amount of such yarns, plaintiff addressed a letter on September 6, 1900, to Holland & Webb, a firm of commission merchants in New York City, requesting them to give to it a price on yarns. On September 10th they replied to said letter by telegram. As written and delivered to the company for transmission, the telegram read: "Your letter sixth. Sixteen and one half cents best our Eastern Mill will take, same quantity as you refer to, delivery commencing in October. Let us hear from you at once. It is a low figure, and mill will not sell under present market for January delivery." This telegram was carelessly and incorrectly transmitted, so that when delivered to the plaintiff, instead of reading "delivery commencing in October," it read, "delivery commencing in December." There were other minor changes, but none material. As soon as this telegram was received, and acting on it in good faith, plaintiff telegraphed to Holland & Webb to purchase of them 100,000 pounds of yarn for December delivery, accepting the offer in the words and figures of the message as received. But Holland & Webb declined to fill the order for December delivery. The difference between October and December was not essentially material to plaintiff, and, if it had known that the real time of delivery as written in the original telegram was October, it would have ordered the yarn for that month, instead of for December. Plaintiff avers that Holland & Webb would have filled the order if it had been made for October, but that the time of delivery was material to them, and they would not accept an order for December. Before plaintiff discovered, by the exercise of due diligence and care, that errors had been made in the message, the price of cotton yarns of the kind ordered by it had materially advanced, whereby it lost a large sum of money, and by the failure to effect said purchase lost trade, and had to discharge a large number of its hands and curtail production. By reason of these facts, it alleged that it was damaged in the sum of $2,000.

The defendant demurred to the declaration, and the presiding judge overruled all the grounds of the demurrer, except the fifth, which he sustained, and which was as follows: "The damage alleged to have been suffered by the plaintiff on account of loss of trade, discharge of hands, and curtailment of production are too remote to sustain a recovery." No bill of exceptions, pendente lite or otherwise, was filed to this ruling. Defendant admitted the sending of the telegram, and that as delivered it was not the same as when sent, but denied that it was guilty of any negligence in regard to the matter. It denied that plaintiff telegraphed to Holland & Webb to purchase of them 100,000 pounds of yarn for December delivery, and alleged that they were mere commission merchants, that they had no yarns on hand and had none to sell, and whether they could buy the 100,000 pounds of yarn depended on the condition of the market at the time they received the telegram from the plaintiff in reply to their telegram. It denied that Holland & Webb were in a condition to fill the order if it had been made for October, and alleged that they depended on their ability to negotiate with some Eastern mill; and whether or not such mill would have sold the yarn at the price quoted by Holland & Webb is a mere matter of opinion, and not a proper foundation on which to base a right of recovery. It denied that plaintiff had suffered any injury on account of the mistake in the telegram. Other allegations of the answer need not be set out. It is unnecessary to state the evidence in detail. The telegram referred to above was shown to have been sent by Holland & Webb, and the plaintiff sent the following reply: "Telegram received. Enter us for one hundred thousand pounds at 16½, deliveries beginning in December. Please confirm your acceptance by

wire. Clinch this for us." Holland & Webb replied by telegram as follows: "Your two telegrams received; mill will not accept your offer, but will accept one hundred thousand pounds, delivery in December, seventeen and a quarter cents." Plaintiff replied: "Can't raise our offer of yesterday; think mill should protect our offer of sixteen and a half; we accepted same immediately." It sent another telegram saying: "Can't raise our offer of yesterday. We accepted same immediately." And another later, saying: "We look to you for one hundred thousand pounds sixteen and a half; we accepted your offer made Sept. 10th, have written."

The vice president and general manager of the plaintiff testified that he first found out that there was an error in the telegram from Holland & Webb dated September 10th, about September 23d, when he received a letter from them. When asked: "Did you make any effort to purchase this yarn? and what was the condition of the market after making this discovery?" he replied: "Everything was demoralized; it was the week of the Galveston flood, and the market rose on cotton three or four cents a pound, and it was a very difficult matter to get an order placed at any price, and we didn't succeed immediately in placing an order. We placed an order subsequently for an inferior quality of yarn at two cents advance." He did not state how large an order the plaintiff placed at that advance, or how much actual loss accrued to it. He further stated: "The delivery was not material to me. I say I would have accepted the yarn for October delivery just the same as I would for December. I was the purchasing agent for the plaintiff." Evidence was also introduced showing the price of yarns on September 16th, 17th, 18th, 20th, and 22d to have been 19¾ cents per pound for October delivery, and on October 12th, 20¼ cents per pound; that the highest price between September 10th and 22d was 19¾ cents per pound for October delivery, and the highest price between September 10th and October 12th was 20¼ cents per pound, and that "the controlling price of yarns was around twenty cents during the above period of time."

One of the firm of Holland & Webb testified that he sent the telegram involved in this litigation, and received an answer, the purport of which was that they should enter the plaintiff's order for a quantity of yarn, about 100,000 pounds as per their telegram, but stating that it was for delivery in December instead of October, as they had written the telegram. If plaintiff had accepted the offer for yarn to be delivered in October instead of December, Holland & Webb would have filled it. They refused to do so solely on the ground of being unable to meet the conditions of delivery, the difference being that they could deliver in October and could not deliver in December. Holland & Webb were commission brokers, and sold the output of the mill. They did not control the mill nor its entire output.

On September 18th, Holland & Webb sent a telegram, saying: "Telegram received. Have done nothing. You wanted December delivery, and mill would not accept." On September 10th they did not have 100,000 pounds of yarn of the quality and character described in the telegram. In fact, they did not have any of it on hand. They contemplated placing the order with a mill as a commission transaction.

The case having been submitted to the presiding judge without a jury, he found in favor of the plaintiff, against the defendant, $1 as nominal damages, and costs of suit. The assignment of error was in the following language: "To the amount of which judgment this plaintiff excepted, and now assigns the same as error, and alleges the same should have been $2,000, and that the proof authorized and demanded said sum of $2,000 in damages."

Smith & Carswell and R. M. W. Glenn, for plaintiff in error. Geo. H. Fearons, Brown & Spurlock, and McHenry & Maddox, for defendant in error.

LUMPKIN, J. (after stating the facts). The sole question in this case is, what amount of damages was the plaintiff entitled to recover? The transaction between the plaintiff and Holland & Webb may be considered in two possible views: First, that the plaintiff had a binding contract with that firm; and, second, that it did not. If Holland & Webb made a proposition by telegram to sell yarn and deliver it at a certain time, and by mistake in transmission a different time was stated in the telegram as delivered, and, acting on it as thus delivered, the plaintiff accepted the proposition, according to the ruling in Brooke v. Western Union Telegraph Co., 119 Ga. 694, 46 S. E. 826 (citing W. U. Tel. Co. v. Flint River Lumber Co., 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36), this constituted a valid, binding contract between the plaintiff and Holland & Webb, and the plaintiff would be entitled to recover nothing from the telegraph company on account of the error. In that case it was held that, "In the transmission of a telegraphic message, the telegraph company is the agent of the sender, to whom, and not to the company, the recipient must look for damages arising out of error in the transmission." Whether this ruling is in accord with the decisions in other jurisdictions or not, it is the law of this state while it stands unreversed.

The demurrer of the defendant however, was overruled, and no exception was taken thereto. Hence, whether this judgment was correct or erroneous, until excepted to and reversed, it was binding on the parties. Kelly v. Strouse, 116 Ga. 874 (7), 43 S. E. 280. It was an adjudication that the plain-

tiff was entitled to recover something of the defendant, if it sustained the allegations of its declaration by proof. An examination of the grounds of the demurrer, however, will show that, with the exception of the fifth ground, they all went to the general question of whether the plaintiff was entitled to recover anything of the defendant or not. The fourth ground does say, in general terms, that there are not facts alleged sufficient to entitle plaintiff to recover the damages sued for, or to maintain this action. But this is really a general demurrer. The fifth ground attacked certain elements of damage claimed, as being too remote to sustain a recovery, and the judge so held. The result of the ruling on the demurrer, therefore, was to determine that on the face of the declaration the plaintiff was entitled to recover something. But it adjudicated nothing as to the amount of such recovery or the measure of damages. If, therefore, we treat the telegrams as constituting a valid contract between the plaintiff and Holland & Webb, the question remaining for adjudication may be thus stated in the form of a paradox: If a plaintiff in law is entitled to recover nothing, but the defendant, by reason of failing to except to a ruling on a demurrer, is estopped from saying so, what is the legal measure of recovery? The judge of the superior court who made the ruling on the demurrer, and who also heard the case without a jury, both upon the law and facts, decided that nominal damages furnished the most appropriate answer to the question above propounded, and we cannot say that he erred.

So far as the plaintiff seeks to rely upon estoppel by judgment, it may, perhaps, have cause for regret that the defendant did not go further and specifically attack the measure of damages set up, and thus entangle itself in the web of estoppel, both as to right of action and amount of recovery. Such appears to have been the case in Georgia Northern Ry. Co. v. Hutchins & Jenkins, 119 Ga. 504, 46 S. E. 659. There the defendant raised by its demurrer not only the question of the right to recover, but also the question as to whether the damages claimed by the plaintiff were of such a character as to be recoverable. The demurrer attacked not only the whole petition, but also the different paragraphs on the subject of damages. After it had been overruled, the defendant failed to except to the ruling, and thus went to trial facing a species of compound estoppel, both as to right of action and as to measure of damages. But what, in real substance, did the transaction between the plaintiff and Holland & Webb amount to? That firm were commission brokers in the city of New York. They did not have yarns of their own, but placed orders with mills. Looking at all the communications between the two, it seems at least doubtful whether the plaintiff thought that it was contracting with Holland & Webb on their individual responsibility. Its telegram of acceptance says: "Enter us for one hundred thousand pounds. * * * Clinch this for us." In another telegram plaintiff says: "Think mills should protect our offer." If the matter of an anticipated dealing by Holland & Webb with a third party be left out of view, however, and the transaction be considered solely as between that firm and the plaintiff, how does it stand? The plaintiff does not pursue Holland & Webb, or seek to hold them on the ground that it had a binding contract with them. It proceeds against the telegraph company on the ground that it lost the benefit of making a contract with that firm by reason of its mistake. Looked at in this light, it would seem that Holland & Webb gave to the telegraph company for transmission a telegram offering certain yarn for October delivery; that, by error in transmission, the telegram as delivered offered the yarn for December delivery. The plaintiff telegraphed its willingness to accept the shipments for December delivery. These telegrams, therefore, either made a complete contract, or an offer on one side which was not accepted as it was made by the other. The offer was for October delivery; the acceptance was for December delivery. Thus viewed, the plaintiff's complaint is that, by reason of the defendant's negligence, an offer or proposal to sell on certain terms was not properly brought to it. While there is some conflict in the authorities, the more satisfactory line holds that "compensatory damages cannot be recovered of a telegraph company for failure to send or deliver a mere proposal to sell, * * * as they are contingent upon its acceptance." Beatty Lumber Co. v. Western Union Telegraph Co., 52 W. Va. 410, 44 S. E. 309, and authorities there cited. Compensatory damages, as here used, mean such as measure actual loss, and not mere nominal damages or the cost of transmission. On page 414 of the authority just cited (52 W. Va., page 310, 44 S. E.), Brannon J., uses the following language: "But the trouble facing the plaintiff in this case is that there was no finished contract between the parties, but only a proposal for a contract, and there can be no contract without both a proposal and its acceptance. The failure of the telegraph company did not cause the breach of a consummate contract. It only prevented one that might or might not have been made. * * * To repel the argument that the acceptance of the proposals to sell in this case was uncertain and contingent, we are told that Elias stated as a witness that his firm would have accepted that proposal if it had been received. This will not prove the fact. That evidence does not make the fact certain. The opinion of this witness

months afterwards cannot go to that length." Page 418, 52 W. Va., page 312, 44 S. E. See, also, Smith v. Western Union Telegraph Co., 83 Ky. 104, 4 Am. St. Rep. 126; Western Union Telegraph Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; Johnson v. Western Union Telegraph Co., 79 Miss. 58, 29 South. 787, 89 Am. St. Rep. 584; Clay v. Western Union Telegraph Co., 81 Ga. 285, 6 S. E. 313, 12 Am. St. Rep. 316; Western Union Telegraph Co. v. Watson, 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151. Mr. Justice Simmons, in delivering the opinion in the last-cited case, said: "This action is based on the theory that, if the telegram had not been shown Pitner, Watson would have made a different arrangement with him; that he would have induced Pitner to consent to use another gin until the gins he was expecting to receive should arrive, and thus get his commission on the sale of those gins. In order to do this, it would have been necessary to obtain the consent of Pitner, and Pitner might or might not have made the new arrangement with Watson. It is true, Pitner says now that he would have made it, but we cannot tell whether he would have done so or not; he might have been in a different state of mind then from the state of mind he was in at the trial of the case." So, in the present case, treating the contract as not completed, the contention is that an offer as received by the plaintiff was for December delivery, and that if it had been for October delivery it would have been accepted. There is little doubt that the plaintiff, or its vice president, thinks now that it would have accepted the offer; but it is exceedingly speculative, as a basis for damages, to say that, if an offer had been received, the plaintiff would have accepted it, and would have derived certain advantages from it. While there is some evidence that the plaintiff placed an order at an advanced price, there is none as to how large an order was so placed, or how much the actual loss of the plaintiff was. The decision in Hollis v. Western Union Telegraph Co., 91 Ga. 801, 18 S. E. 287, is in harmony with those just cited, making the recovery depend upon the actual loss. See, also, U. S. Telegraph Co. v. Wenger, 55 Pa. 262.

Several of the authorities cited by plaintiff in error were cases brought by the senders of telegrams. In some of the other cases there was a failure to correctly transmit or promptly deliver a message which would have closed a contract, the direct result of which failure was to cause a loss. The latter class of cases is well illustrated by Western Union Telegraph Co. v. Fatman, 73 Ga. 285, 54 Am. Rep. 877 and Dodd Grocery Co. v. Postal Tel. Cable Co., 112 Ga. 685, 37 S. E. 981.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(122 Ga. 123)

SPENCER v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

1. INDICTMENT — DEFECTS — AIDER BY VERDICT.

While an indictment which charges that an offense was committed on a day subsequent to the finding of the bill is open to special demurrer before pleading to the merits, the defect in the indictment cannot be taken advantage of after verdict. Adkins v. State, 29 S. E. 432, 103 Ga. 5, and cases cited.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 647.]

2. CRIMINAL LAW—APPEAL—EVIDENCE.

Though the evidence upon which the state relied for a conviction was not altogether satisfactory, it was sufficient to authorize the jury to find the accused guilty of the offense with which he was charged.

(Syllabus by the Court.)

Error from City Court of La Grange; Frank Harwell, Judge.

Grant Spencer was convicted of crime, and brings error. Affirmed.

E. T. Moon, for plaintiff in error. Henry Reeves, for the State.

EVANS, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(122 Ga. 258)

FULGHUM et al. v. STRICKLAND.

(Supreme Court of Georgia. June 14, 1905.)

WILLS—CONSTRUCTION—BEQUEST TO A CLASS—BENEFICIARIES.

A testator made the following bequest: "If I should die before my wife, I give to her a life estate in all my property both real and personal, of all kinds whatsoever, as long as she may remain a widow. But in the event of her marriage, then the whole of the estate both real and personal, shall immediately go to and be distributed or divided equally among the children of my two sisters [Mrs. T. and Mrs. F.] and my brother [A. A. J.] each of the above families to share equally, to have one-third of my property both real and personal." *Held*:

(1) The bequest was to the children of the named sisters and brother as a class.

(2) Only the children of the named sisters and brother take under the will, and the descendants of children, who died before the testator, take no interest thereunder.

(3) The phrase, "each of the above families to share equally," serves to indicate the plan of division, and does not enlarge the meaning of the word "children" so as to include grandchildren.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1080–1082.]

(Syllabus by the Court.)

Error from Superior Court, Terrell County; W. N. Spence, Judge.

Action by Mabel C. Strickland against T. J. Fulghum and others. Judgment for plaintiff. Defendants bring error. Reversed.

Mrs. Mabel C. Strickland brought suit against the executors of S. T. Jordan, deceased, to recover a legacy claimed under the

will of S. T. Jordan. It appears from the petition that Jordan died testate after the execution of his last will and testament, which is as follows:

"I, S. T. Jordan of the county of Terrell, and State of Georgia, being of sound and disposing mind and memory, and being desirous to settle my worldly affairs while I have the strength so to do, do make and publish this my last will and testament, hereby revoking all wills by me at any time heretofore made, and I commit my soul to God who gave it, and my body I desire to be buried in a neat and Christian manner beside my daughter in the cemetery at Albany, Ga., or if more convenient at the feet of my sons at Dover, in the Baptist cemetery. I desire that all my debts that I may owe be paid as they mature, and the remainder of my worldly estate I dispose of as follows: If I should die before my wife, I give to her a life estate in all my property both real and personal, of all kinds whatsoever, as long as she may remain a widow. But in the event of her marriage, then the whole of the estate both real and personal, shall immediately go to and be distributed or divided equally among the children of my two sisters, Mrs. Miles Tanner, Mrs. W. H. Fulghum, and my brother Amos A. Jordan, each of the above families to share equally, to have one-third of my property both real and personal. My half brothers, N. H. Cornelius, A. Y. H. Jordan and sisters, Mrs. S. E. Wilson and Mrs. Roberta H. Hannan, each I will one dollar.

"It is my wish and will during the life of my wife and as long as she remains a widow, she shall have for her support monthly fifty dollars, arising from the income of my estate, by my executors monthly, and whatever amount the income of my estate shall exceed this amount above expenses, shall be divided equally between my two sisters named and brother's children, each sister's children one-third each, and my brother's children the remaining third."

His widow elected to take a certain amount of money in lieu of her life interest in the estate, which sum has been paid by the executors, and she has agreed in consideration thereof that the remainder of the estate may be divided at once according to the terms of the will. At the time of the execution of the will Mrs. Fulghum was dead, and none of her children were minors or living as one family under the same roof. Her children were Amos A. J. Fulghum, the father of petitioner, Mrs. Rogers, Mrs. Page, Mrs. Bryan, William H. Fulghum, and Thomas J. Fulghum. Of these, Amos A. J. Fulghum and Mrs. Rogers were dead when the will was executed. Mrs. Rogers left eight children surviving her. Petitioner is the sole child of her father, Amos A. J. Fulghum. At the time the will was executed the other sister of the testator named in the will, Mrs. Tanner, was dead. Mrs. Tanner left several children, all of whom were adults, and had families of their own. Amos A. Jordan was dead at the time the will was executed, and his children were all adults, with families of their own. Petitioner claims that she is of the blood of Mrs. W. H. Fulghum, and is a member of her family, and, as such, is entitled to a one-sixth part of the estate devised to the children of Mrs. W. H. Fulghum, now in the hands of the executors for distribution, which estate amounts to $27,000. The executors deny that petitioner is a legatee and her suit is brought to recover her interest in the legacy. By amendment, petitioner alleged that at the time of making his will the testator well knew his said brother and sisters were dead, that their children had families of their own, and that some were dead, leaving children who were his grandnieces and grandnephews; that said testator was fond of his grandnieces and grandnephews, and was especially fond of petitioner, and had often caressed her and expressed his sympathy and love for her because she had been left fatherless so young in life; that, at the time the will was executed, petitioner was only 14 years of age, and without means of support. The executors demurred to the petition on the ground that it appeared therefrom that the devise was to certain nephews and nieces of the testator, and that petitioner was not embraced in that class; that the devise was to the children of the two sisters and brother of the testator as a class; and that petitioner, being a grandniece, was not comprehended within the meaning of the word "children," as used in the will. The court overruled the demurrer, and the exception is to this judgment.

Jno. R. Irwin, for plaintiffs in error. L. R. Ray and Jas. G. Parks, for defendant in error.

EVANS, J. (after stating the facts). The general rule is that, in a devise to children as a class, the word "children" is to be construed as immediate offspring, and will not include grandchildren. So universal has this rule of construction obtained, that Sir William Grant said he "never knew of an instance where there were children, to answer the proper description, that grandchildren were permitted to share along with them." Oxford v. Churchill, 3 Ves. & Beam, 53. This principle is firmly intrenched in the law of this state, and grandchildren cannot take under a bequest to children unless there be something in the will to indicate such intention by the testator. Walker v. Williamson, 25 Ga. 549; Willis v. Jenkins, 30 Ga. 167; White v. Rowland, 67 Ga. 546, 44 Am. Rep. 731. It is evident from a casual reading of the will that the testator intended that his estate, on the marriage of his widow, or upon her death without having again married, should be divided into three equal parts, one of which was to be distributed among the

children of Mrs. Miles Tanner, another among the children of Mrs. W. H. Fulghum, and the third among the children of Amos A. Jordan. Unless the use of the word "families" enlarges the meaning of the word "children," the bequest is to the three classes of children, each class to take one-third of the estate, and the part devised to the children of Mrs. Fulghum would be divided among her children in life at the testator's death, to the exclusion of the issue of a child who predeceased the testator. Springer v. Congleton, 30 Ga. 976; Davie v. Wynn, 80 Ga. 673, 6 S. E. 183; Martin v. Trustees, 98 Ga. 320, 25 S. E. 522. The bequest is not to the "families" of the two sisters and the brother, but is to their children. The language of the will is, "then the whole of the estate, both real and personal shall immediately go to and be distributed or divided equally among the children of my two sisters, Mrs. Miles Tanner, Mrs. W. H. Fulghum, and my brother Amos A. Jordan." The personæ designatæ are the children of the testator's sisters and brother. Apparently the testator had in mind a division of his estate among these children, so that all of the children should not share per capita in the whole estate, but that each set of children should participate per capita in the moiety devised to the particular class. That is to say, the children of Mrs. Fulghum were to share per capita in one-third of the estate, the children of Mrs. Tanner were to share per capita in one-third of the estate, and the remaining third of the estate was to be divided per capita among the children of Amos Jordan. To make this testamentary scheme perfectly clear, he stated, "each of the above families to share equally, to have one-third of my property both real and personal." By the use of the word "families" the testator had no intention to broaden or enlarge the word "children," but intended to furnish a plan of division. His intent manifestly was to give a third of his estate to each class of persons, ascertained to be the families of his sisters and brother, consisting of their children. This would seem to be the natural meaning to give to these words, used in the particular context. "Each of the above families" was evidently intended by the testator to refer to the three sets of children to whom, as three distinct classes of persons, he had devised the residuum of his estate.

The English courts have frequently been called on to define the word "family," and to construe wills where the bequest or devise was to one's family. In some instances this term has been given a very limited and circumscribed meaning, and in others a more enlarged operation; varying according to the subject-matter of the gift and the context of the will. The question has been rather infrequent before the courts of this country. In all of the cases examined (and I have examined quite a number) the legacy or devise was to a family. I have not been able to find a case where the legacy was to sets of children according to families. Now, it has been held that a bequest to one and his family is equivalent to a bequest to one and his children. 12 Am. & Eng. Enc. L. (2d Ed.) 870. The testator's intent in such cases is the controlling question, interpreted in the light of the testamentary scheme. What was the scheme of this testator? Firstly, it was to divide his estate into three equal parts; secondly, it was to give one part to each of three named sets of children; thirdly, that each set of children was to take their separate portion as a class. That this was his general scheme is made still clearer by the words used in disposing of the surplus above the income devised to his wife: "And whatever amount the income of my estate shall exceed this amount above expenses, shall be divided equally between my two sisters named and brother's children, each sister's children one-third each, and my brother's children the remaining third." Here we find the same general purpose of the testator in dividing the surplus income into three equal parts, and a division thereof between three sets of children, each set taking a third. In directing a division of the surplus income the testator did not designate the different sets of children as different families, but the language which he employed throws a flood of light on the meaning he gave to the word "families" in the prior clause of his will.

But it may be said that this construction will exclude descendants of children who predeceased the testator, and who were equally dear to him as his nieces and nephews. The reply to this is twofold: If to exclude these would work a hardship, so, also, it would be a hardship to the nieces and nephews to reduce their share. But the all-sufficient answer is that the testator, in his will, did not name them as the objects of his bounty. The plaintiff's petition discloses that at the time the will was made her father was dead, and the testator knew that fact. Yet, with this knowledge, he bequeathed his property to his nieces and nephews, without providing for the children of a deceased nephew. The hardship resulting from excluding plaintiff from taking under the will could not be greater than it was in the case of Crawley v. Kendrick, 122 Ga. 183, 50 S. E. 41, and the court there said: "When he [testator] made his will he knew that his son then had a child in life, with the possibility of others being born, and that the plaintiff in error, a child of a deceased daughter of a son, was also then living. There is not a word in his will which indicates that the grandchild of his son should take under the plain designation of children of his son." Courts are to construe wills, and cannot make wills. Only the children of the named sisters and brother take under this will, and the descendants of children who died before the will was made take no interest thereun-

der. The court should have sustained the demurrer.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 270)

ALBANY PINE PRODUCTS CO. v. HERCULES MFG. CO.

(Supreme Court of Georgia. June 14, 1905.)

DEFAULT JUDGMENT—CORRECTION OF ENTRY.

Where it appears that an entry was made by the judge on the docket of "in default," and it also appears that on the same day the judge defaced the entry by passing his pen through it, in the absence of proof to the contrary such mutilated entry will be treated as the correction of an inadvertence, and not as an "in default" judgment.

(Syllabus by the Court.)

Error from City Court of Albany; D. F. Crosland, Judge.

Action by the Hercules Manufacturing Company against the Albany Pine Products Company. Judgment for plaintiff, and defendant brings error. Reversed.

The Hercules Manufacturing Company brought suit in the city court of Albany against the Albany Pine Products Company upon an open account. The process was returnable to the May term, 1904, and was duly served upon the defendant. At the trial term the plaintiff made a written motion to strike the defendant's plea upon the following grounds: "First. Said plea was not filed at the first term of said court, as required by section 5052 of the Code of 1895. That said plea was not filed in said case until after said court had fully and completely adjourned. Second. Defendants then sought to file said plea after said court had adjourned as above stated, by an order of said court (R. Hobbs), which now appears on the foot or bottom of said plea, authorizing the filing thereof. Third. Plaintiffs aver that said order admitting said plea to be filed as aforesaid is a nullity; that the said court had no legal right or authority to pass such an order admitting and authorizing said plea to be filed at said time, and thereby opening said case, which had gone by in default." Upon the hearing of the motion to strike the plea, the deputy clerk testified as follows: "The May term, 1904, of said court convened at about 9 o'clock a. m. on the 9th day of May, 1904, and was in session for only about two hours, during which time the appearance docket was called (his honor Richard Hobbs, now deceased, then judge of said court, presiding), and at about 11 o'clock a. m. of the same day the court took a recess to the 23d day of May, 1904; said Hobbs, the then judge of said court, announcing from the bench that the court would take a recess until the 23d day of May, 1904. That during the afternoon of said day (May 9, 1904) he was handed the plea in said case, with the following order, in the handwriting of the then judge of said court, at the bottom of the same: 'Ordered filed May 9th, 1904. Richard Hobbs, Judge C. C. A.,'—which he filed in office on said 9th day of May, 1904, and that at the time said plea and order were filed the costs which had accrued in said case were not paid, and have not yet been paid. That the docket of said court shows said case first to have been marked, 'In default, May Term, 1904,' and then the words 'In default' stricken out, and the words, 'Plea filed, May Term, 1904,' written on the docket, opposite said case, all in the handwriting of said Judge Hobbs, and that he did not know when said entries were made by Judge Hobbs on said docket." Upon this evidence the court sustained the motion to strike the plea, and the defendant excepts and assigns the same as error.

John D. Pope, for plaintiff in error. Wooten & Hofmayer and L. W. Nelson, for defendant in error.

EVANS, J. (after stating the facts). The evidence does not show that the case was in default. Before a case can be considered in default the appearance docket must be called, and the entry, "In default," must be entered. Gordon v. Hudson, 120 Ga. 698, 48 S. E. 181. While it appears that an entry was made by the presiding judge, "In default," it also appears that the same judge defaced the entry by passing his pen through it. Such mutilated entry should not have the effect of a judgment of "in default," and is rather attributable to an effort on the part of the judge to correct an entry inadvertently made. In calling the appearance docket, it sometimes happens that the presiding judge enters a case "in default" by mistake where a plea has been filed, and such erroneous entry is corrected by a total or partial defacement. It is rather to be presumed from the evidence in the record that the entry of the judge was due entirely to inadvertence and not to an attempt to formally open an "in default" judgment. A default cannot be opened except in the way prescribed by the statute (Civ. Code 1895, §§ 5070, 5072). There was no attempt to comply with the statutory requirement. The plea may have been filed with the judge, and at the time of the entry he may have forgotten the fact that he had it in his possession. The possibility of such an occurrence may explain the entry on the plea. At all events, a case is not "in default" unless so entered on the docket by the judge, and, where the entry is marked off or defaced by the judge on the day the appearance docket is called, such marred entry should not have the effect of an "in default" judgment. The presumption is that the case was not in default, but that the entry was heedlessly made by the judge through mistake, and that he disfigured the entry with his pen in order to correct his mistake. We hold it was error on the part of the court to strike the defendant's plea.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 177)

DAVIS v. SANDERS et al.

(Supreme Court of Georgia. June 18, 1905.)

1. WILLS — CONSTRUCTION — BEQUEST TO A CLASS.

A bequest to B. and her children is a bequest to a class. The class consists of B. and such of her children as survive the testator.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1115.]

2. SAME.

If B. has no children at the death of the testator, she will take the whole estate.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1117.]

3. SAME.

If B. had a child who died before the testator, leaving issue, such issue would not share with B. in the legacy.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1196, 1203.]

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Proceedings to construe a will between R. L. Davis, guardian, and Elizabeth Sanders and others. Upon the judgment, Davis brings error. Affirmed.

In 1895 W. C. Leverett executed his last will and testament, the fourth item of which is as follows: "Having heretofore disposed by deed or otherwise of all my real estate, I desire and direct that my personal property be divided equally between my wife, Fannie J. Leverett, my daughter-in-law, Ella Leverett, and her children, my daughter Sallie Pound and her children and Bettie Sanders and her children, now or hereafter born, my idea being to divide said personalty into four shares my said wife to have one, my daughter-in-law and two daughters and their children to have the other three." Subsequently, in 1898, he executed a codicil, the second item of which is as follows: "It is my will that the division of my personal property contemplated and provided for by the fourth item of my said will, shall be made only of my personal property left remaining after my said wife shall have received the personal property given to her by items one and two of said will; that is to say she shall first receive the property given her in items one and two and shall then receive one-fourth of the remainder or balance of my personal property." The testator died in 1902, and Mrs. Fannie Leverett and W. A. Reid qualified as his executors. At the time of the execution of the will, Mrs. Sanders had two children, Leola and Lyman. Between the time of the execution of the will and the death of the testator both of these children died, Leola leaving no issue, and Lyman leaving a wife and child. The executors filed a petition for direction and construction of the items of the will and codicil above quoted, the precise question being whether Mrs. Sanders, under the facts, was entitled to all of the bequest to herself and her children, or whether the heirs of the deceased child were entitled to participate with her as tenants in common. The case was submitted to the judge without the intervention of a jury, and he rendered the following decree: "After argument heard, it is considered and adjudged that Mrs. Elizabeth Sanders takes under the will of W. C. Leverett all of the one-fourth of the residuum of said personal property devised by item 4 of said will and item 2 of the codicil thereto, and that neither the said B. H. Sanders, Annie May Sanders, nor Annie Lee Sanders, minor, take any share or interest or part of said residuum or of said estate of said W. C. Leverett. It is further ordered and adjudged that said executor and executrix do pay unto the said Mrs. Elizabeth Sanders all of said one-fourth of said residuum, and pay nothing to the said B. H. Sanders, Mrs. Annie May Sanders, or Annie Lee Sanders, minor. It is further considered that the costs of this proceeding be borne and paid by the said executor and executrix as a part of the expenses of administration. This December 7, 1904." The exception is to the construction of these two items given by the judge in his decree.

Turner & Adams, for plaintiff in error. F. Jordan & Son and Greene F. Johnson, for defendants in error.

EVANS, J. (after stating the facts). A gift to a class does not lose its character as a class gift because some of the individuals of the class are named. If the devise or legacy is to named individuals of a definite moiety, the devisees or legatees do not take as a class, notwithstanding they may sustain to the testator the same relation, and all might have been included under a general description, such as children, nephews, or the like. But where one of the persons who is to take with the class is named, and the others are uncertain in number, to be ascertained in the future, the share of each dependent upon the actual number, the devise is to the class as a body of persons, and not as individuals, unless the will or the attendant circumstances require a different construction. 30 Am. & Eng. Enc. L. (2d Ed.) 718. Mr. Jarman, in his treatise on Wills (1 Jar. Wills, § 232), says that the question does not depend upon the classification of the persons under a general name, "but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons." In the case of Aspinwall v. Duckworth, 35 Beav. 307, it was held that a gift to A. and the children of B. was a gift to a class, and that, if one of them happened to die in the testator's lifetime, the survivors would take the whole.

and, if only one survived, he would take the whole fund. As was said by the Master of the Rolls in Re Stanhope's Trusts, 27 Beav. 203: "A person may make a bequest to a class, as to the daughters of A. and the daughters of B., and he may add any other person to them, making together one class; and that is what is done here, and only those daughters who survived the testator take vested interests. It is not a question of taking as tenants in common or joint tenants, but, whether they take as tenants in common or joint tenants, they take nothing unless they survive the testator."

The learned counsel for the plaintiff in error contends that the bequest is to Mrs. Sanders of one moiety in the legacy, and to her children, as a class, of one or more moieties, dependent upon the number of members of the class who take under the will; or, to express it differently, that Mrs. Sanders is not comprehended in any class, but that she and the class, i. e., her children, take under the will as tenants in common; that under the common-law rule the legacy would have lapsed, but that such lapse will be prevented by Civ. Code, § 3330, which provides: "If a legatee dies before the testator, or if dead when the will is executed, but shall have issue living at the death of the testator, such legacy, if absolute and without remainder or limitation, shall not lapse, but shall vest in the issue in the same proportion as if inherited directly from their deceased ancestor." Mrs. Sanders' interest could not be enlarged or reduced by the number of the children, unless she is included in the class. If her share in the bequest is distinct to herself, then the only construction which could be placed on the will would be that she would take one-half of the bequest and her children the other half, and such a construction would manifestly do violence to the testator's intention. A case in point is Mitchell v. Mitchell (Conn.) 47 Atl. 325. There the devise was to Lawrence Mitchell and his children, and the court said: "The words in this part of the will, 'Lawrence Mitchell and his children,' standing alone, must be taken to mean Lawrence Mitchell and all his children. They can have no other meaning. It is a devise to a class. A class is a number of persons or things ranked together for some common purpose. Bou. Law Dict. And, when a legacy is to a class, all those will take who are embraced in the class at the time the legacy takes effect in point of enjoyment. * * * The class consists of Lawrence Mitchell and all his children." Mrs. Sanders was included in the class with her children, and her share in the legacy is measured by the number of her children surviving at the testator's death, and, if none survive, she takes the whole estate bequeathed to herself and children. Martin v. Trustees, 98 Ga. 320, 25 S. E. 522. See, also, Parker v. Churchill, 104 Ga. 122, 30 S. E. 642.

The section of the Code on the subject of lapsed legacies quoted above has no application to the case where the legacy is to a class and one or more of the class is in esse at the testator's death. It is only when all the members of the class predecease the testator that a lapse will be prevented by this Code section. In Cheney v. Selman, 71 Ga. 384, the bequest was to the "children of Tilda Cleckler." Neither at the execution of the will nor at the death of the testator were there any children of Tilda Cleckler in life. She had one son who was dead, but who left surviving him his children. Under these circumstances the court held that the son's children took under the will by virtue of Code 1895, § 3330. The rule is different where the devise is to a class and some member of the class survive the testator. The survivors take the entire legacy. Davie v. Wynn, 80 Ga. 673, 6 S. E. 183; Tolbert v. Burns, 82 Ga. 213, 8 S. E. 79; Martin v. Trustees, supra. The fact is admitted that the children of Mrs. Sanders died before the death of the testator. She was the sole survivor of the class, and took the entire legacy devised to her and her children.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 242)

CONRAD v. KENNEDY et al.

(Supreme Court of Georgia. June 14, 1905.)

1. WILLS—PROBATE IN ANOTHER STATE—EVIDENCE—TRANSCRIPT.

In order to admit in evidence in this state a transcript of a will and its probate in another state of the Union, it is not sufficient that the clerk of the court where the probate was made should certify under the seal of the court that the transcript is correct as appears of record in his office, but it is also necessary that the judge, chief justice, or presiding magistrate of the court shall certify that the attestation is in due form. Civ. Code 1895, § 5237.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1376, 1377.]

2. APPEAL—HARMLESS ERROR.

Where the correct rejection of a transcript of a will and its probate from another state necessitates the grant of a nonsuit, rulings as to other evidence, whether correct or erroneous, will not cause a reversal.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action by Holmes Conrad, Jr., against J. A. Kennedy and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Jno. M. Stubbs, S. B. Baker, and Akerman & Akerman, for plaintiff in error. J. H. Martin, Wm. Faircloth, G. H. Williams, W. E. Simmons, and J. K. Hines, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J. absent.

(123 Ga. 218)

VESTEL v. TASKER.

(Supreme Court of Georgia. June 14, 1905.)

1. RECEIVERS—RIGHT TO SUE.

While, as a general rule, a receiver cannot bring suit except by express authority of court (Screven v. Clark, 48 Ga. 42), this rule does not apply to a petition for injunction brought by the receiver in the court by which he was appointed. The fact that the court entertains his petition is tantamount to a grant of authority to sue.

2. SAME—INTERFERENCE WITH PROPERTY—INJUNCTION.

"It is the duty of the court to protect from interference the property in its possession through its receiver, an officer of the court, and the writ of injunction is a mild remedy when attachment and imprisonment for contempt might have been used by the chancellor." Marshall v. Lockett, 76 Ga. 290. The granting of an injunction to restrain any unauthorized interference with property in the possession of a receiver "is a necessary incident to the power of appointing receivers." Woodburn v. Smith, 22 S. E. 966, 96 Ga. 245. It follows that the demurrer to the petition was properly overruled.

(Syllabus by the Court.)

Error from Superior Court, Fannin County; Geo. F. Gober, Judge.

Action by Charles Tasker, receiver, against J. P. Vestel. Judgment for plaintiff. Defendant brings error. Affirmed.

T. A. Brown, N. A. Morris, Wm. Butt, and D. W. Blair, for plaintiff in error. J. Z. Foster and O. R. Dupree, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 246)

McCOMB et al. v. HINES.

(Supreme Court of Georgia. June 14, 1905.)

1. APPEAL—REVIEW—BRIEF OF EVIDENCE.

The Supreme Court will not review the evidence in a case when it is apparent that there has been no bona fide effort to brief the evidence as required by law, and when the document purporting to be a brief of the evidence is extensively interspersed with objections to testimony, statements, motions, and arguments of counsel, rulings of the court, evidence to which objections were sustained, and also with colloquies between counsel and court, none of which could properly have been placed in a brief of evidence. Equitable Mtg. Company v. Bell, 42 S. E. 82, 115 Ga. 651; Graham v. City of Baxley, 43 S. E. 405, 117 Ga. 42; Wall v. Mercer, 46 S. E. 420, 119 Ga. 346.

2. SAME—AFFIRMANCE.

Where, in such a case, no question is presented for decision which can be determined without reference to the evidence, the judgment of the court below must be affirmed.

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action between A. V. McComb and others and J. R. Hines. From the judgment, McComb and others bring error. Affirmed.

D. B. Sanford, D. S. Sanford, and J. T. Allen, for plaintiffs in error. Hines & Vinson, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 230)

PHINAZEE v. BUNN.

(Supreme Court of Georgia. June 14, 1905.)

1. ADMINISTRATION OF ESTATES — CLAIMS AGAINST DECEDENT—EVIDENCE.

The evidence, taken in that light which was most favorable to the plaintiff, authorized a finding that, under all the circumstances proved, and considering the character of the services rendered by the adult daughter to her father during his last illness, she was not prompted solely by the natural duty owing by her to him, but that both parties contemplated that she should be compensated out of his estate after his death; and the judgment refusing a second new trial will not be interfered with.

2. WITNESS—EXAMINATION—LEADING QUESTIONS.

The interrogatories were not leading, but, so treating them, there would have been no abuse of discretion in allowing the answers to be read.

(Syllabus by the Court.)

Error from City Court of Forsyth; W. M. Clark, Judge.

Action by Frances Bunn against John Phinazee, administrator. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action by an adult child against the administrator of her father's estate to recover for services rendered her father in nursing and caring for him during his last illness, and in doing other work on the farm and in the house of her father. There was a verdict for the plaintiff. The defendant made a motion for a new trial, based upon the grounds that the verdict was without evidence to support it, and that the court allowed answers to certain interrogatories to be read over an objection that the questions were leading. The motion was overruled, and the defendant excepted.

Persons & Persons, for plaintiff in error. J. R. Williams and Wightman Bowden, for defendant in error.

COBB, J. 1. Children being under a moral duty to nurse and care for their infirm parents, a promise to pay is not implied from the mere fact of service, as in case of strangers. But the performance of such service is a sufficient consideration for an express promise to pay. Hudson v. Hudson, 87 Ga. 678, 13 S. E. 583, 27 Am. St. Rep. 270; Butler v. Billups, 101 Ga. 102, 28 S. E. 615; Weaver v. Cosby, 109 Ga. 310, 316, 34 S. E. 680. While a contract to pay will not be implied from the mere performance of the services, there are cases where the law will imply a contract by a parent to pay a child for services of the character above referred to. In Murrell v. Studstill, 104 Ga. 606, 30 S. E. 750, Mr. Justice Lewis said: "This court has never decided that on account of relationship, however near, there can be no re-

covery for services rendered by one relative to another, without proof of an express contract." In Hudson v. Hudson, 90 Ga. 581, 16 S. E. 349, it was held that a recovery might be had if an express contract was shown, or if the "surrounding circumstances * * * indicate that it was the intention of both parties that compensation should be made, and negative the idea that the services were performed merely because of that natural sense of duty, love, and affection arising out of this relation." This ruling was reaffirmed in O'Kelly v. Faulkner, 92 Ga. 522, 17 S. E. 847, though in that case the evidence was not sufficient to show that payment for the services was in the contemplation of both parties. See, also, Weaver v. Cosby, 109 Ga. 316, 34 S. E. 680; Walker v. Brown, 104 Ga. 361, 30 S. E. 867. In the cases of Murrell v. Studstill, 104 Ga. 604, 30 S. E. 750, and Hurst v. Lane, 105 Ga. 506, 31 S. E. 135, no express contract was shown, and it was held that the circumstances were such as to show that the parties contemplated that the plaintiffs (one a grandchild and the other a niece) should receive compensation for their services. We hardly think the evidence in this case is sufficient to show an express contract. While some of the witnesses did say there was a contract between the plaintiff and her father, taking their testimony as a whole no express contract was shown. There was evidence that the plaintiff was 35 or 40 years of age; that she nursed and cared for her father for a long period of time while he was stricken with paralysis; that she also hoed and plowed in the field for him during this time; that the father stated several times that he had given the plaintiff the "home place, or the money it would bring," for waiting on him; that he had stated this in the presence of the plaintiff; that he frequently said the plaintiff must have pay, as she had earned it, and the plaintiff would make no response to the statement; that the father was taken sick in the fall of 1897, but made the statement in the spring of 1898 about wanting the plaintiff to have pay, and that he died about February, 1899; that the services performed by the plaintiff were worth $30 per month, and extended over a period of 17 months. We think the jury could find from the evidence that, considering all the circumstances, both the father and the daughter contemplated she should receive compensation for the services rendered—especially so in view of the character of the services rendered. See Murrell v. Studstill, supra. The judgment refusing to grant a second new trial will not be interfered with.

2. An examination of the interrogatories objected to shows that they were not leading. They did not suggest the answer expected. Franks v. Gress Lumber Co., 111 Ga. 87, 36 S. E. 314. Besides, the allowance of leading questions is a matter within the discretion of the trial judge. Ga. R. Co. v. Churchill, 113 Ga. 14, 38 S. E. 336, and citations. And his judgment will be reversed only where it is apparent that injustice has been done. City of Rome v. Stewart, 116 Ga. 738 (2), 740, 42 S. E. 1011. Greater liberality should be allowed as to the form of interrogatories than in the case of ordinary questions to a witness when on the stand. Ewing v. Moses, 51 Ga. 410, 419.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 194)

EDMONDSON v. STATE (two cases).

(Supreme Court of Georgia. June 14, 1905.)

1. JUDGE—DISQUALIFICATION—AUTHORITY OF ANOTHER JUDGE TO ACT.

Neither under the act of 1885 (Acts 1884–85, p. 475, § 30), nor under the constitutional provision allowing the judge of the superior court to preside in the city court in cases where the judge of the latter is disqualified to preside, did the judge of the superior court of the Macon circuit have authority to administer an oath and attest an affidavit made as a basis for an accusation in the city court of Macon on the ground that the judge of the latter court was disqualified from attesting the affidavit because of relationship to the defendant. A judgment based upon such an affidavit and accusation should be arrested on motion.

2. SAME—DISMISSAL OF PROCEEDINGS.

The case being controlled by the foregoing ruling, the writ of error based on the overruling of the motion for new trial is dismissed, with direction that all proceedings in the case be vacated.

(Syllabus by the Court.)

Error from City Court of Macon; W. M. Clark, Judge.

Sam Edmondson was convicted of carrying a concealed weapon, and brings error. Reversed.

An affidavit was made before the judge of the city court of Macon as a foundation for an accusation charging the defendant with the offense of carrying a concealed weapon under the act of August 14, 1885, creating the city court of Macon (Acts 1884–85, pp. 475, 476). The defendant was related to the judge of that court. The judge considered himself disqualified to act, and an application was made to the judge of the superior court of the circuit. He administered the oath to the prosecutor and attested the affidavit, and upon it an accusation was framed. When the case came on for trial, the judge of the superior court was absent. The judge of the city court passed an order declaring himself disqualified, and calling upon the judge of the city court of Forsyth to preside and dispose of the case for him. The last-named judge presided, and after conviction the defendant made a motion in arrest of judgment; one ground being because the affidavit on which the accusation was based showed on its face that it was sworn out before the judge of the superior court of the Macon circuit without authority of law, and that the accusation and conviction based

thereon were illegal. There was another ground of the motion, which need not be set out. The defendant also made a motion for a new trial. Both motions were overruled, and the defendant excepted.

M. G. Bayne, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

LUMPKIN, J. (after stating the above facts). 1. The act of August 14, 1885 (Acts 1884–85, pp. 475, 476, § 30), provides "that the defendants in criminal cases in said city court of Macon may be tried on written accusation setting forth plainly the offense charged, founded on affidavit made by the prosecutor; said affidavit shall be made before said judge and said accusation shall be signed by the prosecutor and the prosecuting officer in said court." It is contended that the judge of the city court was disqualified from taking and attesting the affidavit because of his relationship to the defendant. It is not altogether certain that there was any disqualification, so far as administering the oath and attesting the affidavit was concerned, although the judge was disqualified from presiding on the trial of the case. See, on this subject, Thornton v. Wilson, 55 Ga. 607; Savage v. Oliver, 110 Ga. 636, 638, 36 S. E. 54, and cases cited; 17 Am. & Eng. E. L. (2d Ed.) p. 753; Civ. Code 1895, § 4045. On the subject of the disqualification of ministerial officers, see Herring v. State, 119 Ga. 710, 715, 46 S. E. 876; Ex parte Gist, 26 Ala. 156, 161; Flury v. Grimes, 52 Ga. 341; State v. Jeter, 60 Ga. 489; Johnson v. Shurley, 58 Ga. 417. It is unnecessary to decide whether the judge of the city court of Macon was disqualified to administer the oath and attest the affidavit or not. In any event, no authority was conferred by the act of 1885 upon the judge of the superior court to do so. The Constitution authorizes the judge of the city court and the judge of the superior court to preside in the courts of each other, respectively, in cases where either is disqualified, in any county where a city court exists (Civ. Code 1895, § 5851); but where a legislative act provides that a prosecution in a certain city court shall be begun by affidavit made by the prosecutor, which shall be made before the judge of that court, the constitutional provision referred to does not of itself authorize the judge of the superior court of the circuit to take and attest such an affidavit, on the ground that the judge of the city court is disqualified from acting by reason of relationship to the defendant. This is not presiding in a case in the city court, within the meaning of the Constitution. Northwestern Mut. Life Ins. Co. v. Wilcoxon, 64 Ga. 556; Ivey v. State, 112 Ga. 175, 37 S. E. 398. The affidavit made before the judge of the superior court, and attested by him, and the accusation based thereon, being without authority of law, the judgment should have been arrested on motion.

2. On the trial the judge of the city court of Forsyth presided at the request of the judge of the city court of Macon, on the ground that the latter was disqualified. Acts 1899, p. 48. Inasmuch as the ruling above made controls the entire case, it would be useless to refer to the rulings made on the trial. The writ of error bringing up the overruling of the motion for a new trial is dismissed, with direction that all proceedings in the case be vacated.

Judgment reversed in the first case. Writ of error dismissed in the second case, with directions. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 243)

WARREN v. GAY.

(Supreme Court of Georgia. June 14, 1905.)

1. SPECIFIC PERFORMANCE — PAROL SALE OF LAND—INSTRUCTIONS.

When the charge of the judge is considered as a whole, the instructions as to the degree of proof required to authorize a decree for the specific performance of a parol contract for the sale of land were simply that the minds of the jury must be clearly satisfied by unequivocal testimony that such a contract had been entered into, and, when so construed, the instruction was not erroneous.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 388.]

2. SAME—EVIDENCE.

The evidence warranted the verdict, and no reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action by Norman T. Gay, by his next friend, against D. T. Warren. Judgment for plaintiff, and defendant brings error. Affirmed.

Norman T. Gay brought an action of ejectment in the common-law form against Warren and Conner to recover possession of a lot of land, in the Twelfth District of Laurens county, and mesne profits. Subsequently he brought, through his next friend, C. M. Gay, an equitable petition against the same parties, alleging that they were in possession of the lot of land above referred to, and were destroying the growing trees thereon, and prayed for an injunction and for a recovery of the land. Attached to the petition was an abstract of title originating in a grant from the state, and showing that the plaintiff claimed to derive title through McRae, who claimed under a conveyance from Powell, who by various conveyances had derived title from the original grantee. It also appeared from the abstract that Powell had obtained a conveyance from Emanuel Gay, who seems to have had some claim to the land not connected with the original grantee. Warren filed an answer, in which he alleged that he was in possession and claimed title to the land; that Conner was merely his tenant; that he had bought the land in dispute from McRae

before McRae sold and conveyed to the plaintiff; and that O. M. Gay, the father of the plaintiff, a minor, who represented his son in the transaction, had notice, at the time he purchased from McRae and received the deed to his son, of the contract of sale which had been entered into between McRae and the defendant. The defendant alleged that McRae agreed to sell the land in dispute to him for $500; that he had paid $310 of the purchase money, and had tendered to McRae on various occasions the balance of the same; that he had gone into possession on the faith of this contract, and had been ever since in peaceable possession of the property. He denied the trespasses alleged, and that the land was worth for rent the amount claimed; prayed that McRae be made a party, that the parol contract between him and McRae be specifically performed, that a decree be entered declaring that he was the owner of the land, that his possession be quieted as against the claim of the plaintiff, that the deed from McRae to the plaintiff be canceled, and for general relief. McRae was by proper order made a party to the case. The two cases were by order of the court consolidated, and on the trial a verdict was rendered in favor of the plaintiff for the premises in dispute and $442 mesne profits, and in favor of the defendant against McRae for $10, which had been paid as earnest money to bind the bargain which the defendant claimed had been made between him and McRae for the sale of the land. The plaintiff made a motion for a new trial upon the general grounds, and on various grounds assigning error upon different portions of the charge of the judge. The motion was overruled, and Warren excepted.

J. K. Hines and Griner & Adams, for plaintiff in error. E. D. Graham, for defendant in error.

COBB, J. 1. The judge charged the jury as follows: "I charge you that, in order to establish a parol contract for the sale of land that would be a basis of recovery for defendant and a verdict in his favor for specific performance, the evidence must be so clear and unequivocal as to satisfy your minds to a reasonable certainty that such a contract was made." This charge was alleged to be erroneous because it required a higher degree of proof than the law demands. Error was also assigned upon other portions of the charge, in which the judge used similar language. He also stated, in the concluding portion of the charge, that the jury were to be governed in this case, as in all other cases, by the preponderance of testimony, and by the rules of law to which he had called their attention, and stated that by the preponderance of testimony was meant that superior weight of testimony in favor of one contention rather than the other, and while it might not relieve the minds of the jury entirely from doubt, if it was of such character and force as to incline their minds to one contention rather than to another, it was sufficient to authorize them to base a verdict upon.

In Printup v. Mitchell, 17 Ga. 558 (16), 63 Am. Dec. 258, it was held that a parol contract for the sale of land, like the reformation of a deed by parol proof, should be made out "so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement." As to the rule in reference to the reformation of written instruments by parol evidence, see Wyche v. Greene, 11 Ga. 160 (4), 171. In Shropshire v. Brown, 45 Ga. 175, it was said that, to entitle a complainant to a decree for specific performance of a parol contract for the sale of land, the contract must be established "with reasonable certainty." In Schnell v. Toomer, 56 Ga. 170, Judge Bleckley, in referring to the rulings in 11 and 17 Ga. Reports and in another case, said that what was meant by proof beyond a reasonable doubt in such cases was such proof as would "clearly satisfy the minds of the jury of the truth of the plea." He took occasion to suggest that, as "reasonable doubt" was a phrase more appropriate to criminal cases, its employment to instruct the jury in civil cases had best be avoided. In Beall v. Clark, 71 Ga. 818, the ruling in 17 Ga. was followed in terms. See, also, in this connection, Poullain v. Poullain, 76 Ga. 420, 4 S. E. 92 (2). In Harper v. Kellar, 110 Ga. 423, 35 S. E. 667, the rulings in 17, 45, and 71 Ga. Reports, were quoted with approval, and other authorities to a similar effect were referred to. In Dwight v. Jones, 115 Ga. 744, 42 S. E. 48, it was said: "It is well settled that a parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement." The judge in the charges complained of seems to have followed the suggestion of Judge Bleckley in 56 Ga., and avoided the use of the expression "reasonable doubt," but he did use the phrase "reasonable certainty." It has been held that an instruction to the jury that they must be satisfied to a "moral and reasonable certainty" is the same in effect as saying that they must be satisfied beyond a reasonable doubt. See Bone v. State, 102 Ga. 387, 30 S. E. 845. When the various portions of the charge in reference to the degree of proof are considered together, the effect of the instructions was simply that this was a civil case, that the jury were authorized to reach a conclusion from the preponderance of the evidence, but that this preponderance should be such in this particular case that before they could find in favor of the parol contract they must be clearly satisfied of the existence of the contract. This is the law. It may be that, under the rulings which have been referred to, an instruction that the jury

should be satisfied of the existence of the contract beyond a reasonable doubt would not have been erroneous, but it is not necessary in this case to make a ruling to this effect. The judge did not place this burden upon the defendant in his charge when it is considered in its entirety. The use of the words "reasonable certainty," when taken in connection with other portions of the charge, imposed upon the plaintiff no greater burden than to satisfy the minds of the jury by clear and unequivocal evidence that the parol contract which he relied on had been entered into. We desire to take this occasion to emphasize the suggestion, made by Judge Bleckley, that the instruction in cases of this character should be simply to the effect just indicated.

2. The charge, when considered as a whole, fairly submitted to the jury the issues involved in the case, and, if there were any errors at all in the charge, they were not of such a character as to require the granting of a new trial. The evidence, though conflicting, amply warranted the verdict, and no reason appears for reversing the judgment.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 209)

LOONEY v. MARTIN.

(Supreme Court of Georgia. June 14, 1905.)

PARENT AND CHILD—RIGHT TO CUSTODY—EVIDENCE.

Prima facie, the right to the custody of an infant is in the father, and, where this is resisted upon the ground that the father has relinquished his parental rights by contract, a clear and strong case must be made, and the terms of the contract, to have the effect of depriving the father of his control, must be definite and certain.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, §§ 4–32.]

(a) Such a case was not made on the trial in the city court, and the superior court did not err in sustaining the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Franklin County; R. B. Russell, Judge.

Habeas corpus by B. A. Looney against William H. Martin. Judgment for defendant, and plaintiff brings error. Affirmed.

This was a habeas corpus proceeding for the possession of two minor children, Forest and Devery Martin, aged respectively seven and four years. It originated in the city court of Carnesville, and was brought by Looney, the maternal grandfather of the children, against their father. The judge of the city court awarded the children to the grandfather, whereupon the father took the case by certiorari to the superior court. The certiorari was sustained, and the case remanded for another hearing. Looney brought the case to this court by bill of exceptions. The evidence for the plaintiff in the city court was substantially as follows: Martin's wife, who was the daughter of Looney, has been dead about three years. Since the death of their mother the two children, Forest and Devery Martin, have been staying at Looney's house. Their father has contributed only a small sum to their support. About September 1, 1902, Martin was at Looney's house, when Looney asked him if he was not going to give him the children, and Martin replied that Looney could keep them for his lifetime. Looney had frequently made the same request of Martin prior to this time, and Martin had always said that he would not give his children away. Looney is able to take care of the children. Some time during the fall of 1901, Looney and Martin had a conversation relative to Martin's marrying a second time, and Looney told Martin that he ought to marry some one that would be good to his first wife's children. Martin admitted that he intended to marry again, and said that he and the young lady had talked over the matter of the children; that he had told her that if she did not feel that she could take them all three, and be a mother to the two children, they had better not marry; and that she had expressed a willingness to do as he wished. Looney then told Martin that he did not think he could do better than to marry. In April after the promise made by Martin that Looney should have the children for his lifetime, Martin came to Looney's house and took the children home with him. Subsequently Looney demanded possession of the children on the contract, and the demand was refused. The evidence for the defendant was substantially as follows: After the death of Martin's wife all of his household effects were moved to Looney's house, and the children went to live with the Looneys. Some time in August, 1902, Martin, with a friend, went to get his furniture from Looney. Looney asked him if he was not going to let him have the children. Martin replied that he would not; that the children could stay part of the time with him and part of the time with their grandparents, but that he would not give the children to anybody. Mrs. Looney, who was present, remarked that she would have a better understanding than that, and Martin replied that it was either that or nothing. The Looneys had frequently asked him to give them the children, and he had always refused, as he never had the remotest idea of giving them to anybody. About three or four weeks before the issuance of the writ of habeas corpus, Martin went to Looney's house and took the children home with him, Looney giving his consent at the time. When Looney afterwards came and tried to get the children again, he told him that the only way anybody could get them would be first to take his life.

J. B. Jones and W. A. Bailey, for plaintiff in error. J. A. Neese and A. G. Golucke, for defendant in error.

CANDLER, J. (after stating the foregoing facts). No question is made as to the fitness of either of the parties to the action to have charge of small children, or of their financial ability to take care of them. The only issue raised by the evidence is whether or not such a clear and definite contract of relinquishment was made by the father as to warrant the habeas corpus court in awarding the minor children to the grandfather rather than to the father. This case, in its facts, bears a striking resemblance to the case of Miller v. Wallace, 76 Ga. 479, 2 Am. St. Rep. 48. That case, like this, was a contest between the father and the maternal grandparents of a minor child. It appeared that the mother of the child, shortly before her death, expressed the wish that her mother and father should take, care for, and raise her child; and that the father of the child stated that, as his wife wanted her mother to have the baby, she should do so. About a month after his wife's death the father of the child stated that he wanted his mother-in-law to take the child, and raise her as she had her own daughter, and make such a woman of her. The father subsequently, by stratagem, gained possession of the child, and the grandparents brought habeas corpus. The trial court awarded the child to the grandparents, but on writ of error to this court the judgment was reversed. It was held: "Prima facie, the right of custody of an infant is in the father, and where this is resisted upon the ground of his unfitness for the trust, or other cause, a proper regard for the sanctity of the parental relation will require that the objection be sustained by clear and satisfactory proofs; and a clear and strong case must be made to sustain an objection to the father's right. Where it is insisted that the father has relinquished his right to the custody of his child to a third person by contract, the terms of the contract, to have the effect of depriving him of his control, should be clear, definite, and certain." Tested by this rule, we think the judge of the superior court was justified in holding that the habeas corpus judge had not made a proper use of the discretion vested in him. It is true that there was positive evidence that the father promised the grandfather that he should have the children during the latter's lifetime; but this evidence was as positively contradicted by witnesses for the defendant, and the surrounding circumstances were not such as to make out the clear, convincing case required by the ruling in Miller v. Wallace, supra, before the father could be deprived of the custody and control of his children. Looney and his wife had persistently urged Martin to give them the children, and he had stubbornly refused to listen to such a proposal. On all occasions, whenever the circumstances warranted, Martin had asserted his right to the possession of the children, and had stated that he would never give them to anybody. Apparently he had placed the children with the Looneys only temporarily, until he could make some arrangement of a permanent nature. During this time he had continued to contribute to their support. In contracting a second marriage he had made special provision for his children, and had it clearly understood that they were to have a home with him. All these circumstances throw a cloud over the statement of the witnesses that Martin agreed that Looney should have the children during his lifetime, and give the case a doubtful aspect. It is not the "clear and strong case" which the law requires as showing a relinquishment of the parental right. As was said in the case of Lamar v. Harris, 117 Ga. 997, 44 S. E. 868, "the law does not fly in the face of nature, but rather seeks to act in harmony with it"; and therefore more than the usual proof is required to sustain a case based upon the contention that a father, fit and able to care for his offspring, has voluntarily relinquished his right to its custody and control. For these reasons we conclude that the court below properly sustained the certiorari.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 167)

FOLDS v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

1. CERTIORARI—REFUSAL OF CONTINUANCE.
No abuse of discretion is shown in the refusal by the court to postpone the hearing of a certiorari case because of lack of opportunity to file a traverse to the answer of the county judge, when it does not appear from the record that the plaintiff in error did not have such opportunity.

2. GRAND JUROR—DISQUALIFICATION — PLEA IN ABATEMENT.
Previous residence in the county for six months before service is a necessary qualification of a grand juror. Disqualification on this ground is propter defectum, and, when urged by plea in abatement, before the indictment should be quashed it must affirmatively appear that the accused did not have notice and opportunity to make the question by challenge before the finding of the indictment.

3. CRIMINAL LAW—EVIDENCE—CONFESSION.
The evidence admitted was not objectionable for the reason assigned.

4. DISTURBING PUBLIC WORSHIP.
"Indecently acting," as used in Pen. Code 1895, § 418, must be taken in its comprehensive sense, and embraces all improper conduct which interrupts and disturbs a congregation of persons lawfully assembled for divine worship.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Disturbance of Public Assemblage, § 4.]

5. SAME—DISPERSAL OF CONGREGATION.
Where a congregation assembled for divine worship after the morning service had adjourned for dinner to be served on the church grounds, with the intention of returning after the meal to the churchhouse for an afternoon service, in contemplation of the statute the congregation had not dispersed while partaking of

their dinner, but were still assembled for the purpose of divine worship.
(Syllabus by the Court.)

Error from Superior Court, Putnam County; H. G. Lewis, Judge.

Charlie Folds was convicted of interrupting public worship. A writ of certiorari was overruled, and he brings error. Affirmed.

The defendant was tried and convicted in the county court of Putnam county for the offense of interrupting and disturbing a congregation of persons lawfully assembled for divine service. He sued out a writ of certiorari, which was overruled, and the bill of exceptions is to the refusal of the court to sustain the certiorari and order a new trial.

W. T. Davidson, for plaintiff in error. J. E. Pottle, Sol. Gen., and S. T. Wingfield, for defendant in error.

EVANS, J. (after stating the facts). 1. It appears from the petition for certiorari and the answer of the judge that upon the call of the case in the county court the defendant, through his counsel, asked a postponement of the hearing until he had an opportunity to prepare and file a traverse to the answer of the judge. It does not appear other than that all of the proceedings were had at the return term of the writ when the answer of the judge was filed. The defendant in certiorari may at the first term, and before the hearing, traverse the truth of the answer or return, which traverse shall be in writing. Pen. Code 1895, § 767; Civ. Code 1895, § 4651. Should it appear that the answer was filed at such a time as not to give the plaintiff in certiorari an opportunity to prepare and file a traverse, the court should allow time sufficient to prepare the traverse; but, as the record does not disclose that the plaintiff in certiorari did not have ample time to prepare and file his traverse to the answer of the county judge, it cannot be said that the court abused its discretion in refusing to allow additional time within which to prepare and file the traverse.

2. One of the errors alleged in the petition for certiorari was the overruling of the plea in abatement filed by the defendant. It was alleged in the plea that one of the grand jurors who served upon the jury that returned the bill had not resided within the county for a period of six months. The evidence submitted established the truth of this allegation, but there was no evidence submitted to the court to show that the accused did not have full notice of the fact and an opportunity to make the question by challenge before the finding of the indictment. A necessary qualification of a grand juror is residence in the county for six months preceding the time of serving. Pen. Code 1895, § 811. The disqualification of a grand juror who has not resided in the county the requisite time before service is propter defectum, and must be made by the accused before the finding of the indictment, unless it appears that he did not have full notice and opportunity to make the challenge. Edwards v. State, 121 Ga. 590, 49 S. E. 674. The evidence offered by the accused failed to show that he did not have notice that it was probable that an indictment would be preferred against him, so as to give him an opportunity to challenge the competency of the juror. There was therefore no error in overruling the plea in abatement upon the evidence submitted.

3. The plaintiff in error complains that the court erred in allowing a witness to testify that while the defendant was in his custody, under arrest, he stated that the pistol dropped out of his pocket, and was accidentally discharged, with no intent on the part of the defendant to shoot it. The objection was that this statement amounted to a confession, and was obtained under such circumstances as to show that it was not voluntarily made. In the first place, the evidence was not a confession of guilt. The defendant distinctly disclaimed any intention to discharge the pistol, and asserted that its firing was the result of accident. Even if the statement amounted to a confession, it was not inadmissible because made while he was under arrest, when it appears that it was voluntary, and not induced by the slightest hope of benefit or the remotest fear of injury. Hilburn v. State, 121 Ga. 344, 49 S. E. 318 (3).

4. After defining the offense of disturbing divine service in the language of the statute (Pen. Code 1895, § 418) the court charged as follows: "I charge you that to shoot a pistol on a church ground, or near thereto, while a congregation of persons were lawfully assembled there for divine service, would be a violation of this section. Whether the persons were assembled in the church, or were out on the church ground for dinner, would make no difference. I charge you that if you believe from the evidence that the defendant shot the pistol, and that the shooting was not accidental, then it would be your duty to convict him." Error is assigned upon this charge, first, because the disturbance of a congregation assembled for divine worship by the discharge of a pistol on a church ground, or near thereto, was not comprehended in Pen. Code 1895, § 418; and, secondly, that the charge instructed the jury that they might convict if they found that the pistol had been discharged (not accidentally) by the defendant after the persons assembled at the church had left the building, and were upon the ground for the purpose of serving dinner. The section of the Penal Code last cited was designed primarily for the protection of congregations of persons lawfully assembled for divine service. Any interruption caused by cursing or using profane or obscene language, or by being intoxicated, or otherwise indecently acting, would be a violation of the statute. The words "indecently acting," used in the stat-

ute, must be given a comprehensive meaning. Indecent conduct, in its general sense, means improper conduct; and, in determining what conduct would be indecent, the proprieties of the occasion must always be considered. A congregation may be disturbed by the discharge of firearms in the church building, and the persons assembled more greatly frightened than by the mere presence of an intoxicated man. If a person were to use an oath in church during the progress of the service, so as to distract the attention of any member of the congregation, his conduct would be within the exact letter of the statute. The commotion caused by the discharge of firearms very probably would be greater than the disturbance occasioned by the utterance of a single oath, and it would be giving the statute entirely too narrow and restricted a meaning to hold that, unless the conduct amounted to profanity or obscenity, it would not be indecent. Thus, in Hicks v. State, 60 Ga. 464, the second count in the indictment was as follows: The defendants "did then and there indecently act and attempt to prevent the administration of the holy sacrament of the Lord's supper at the First African Baptist Church in Savannah"; and it was held that this count sufficiently charged indecent behavior in attempting to interrupt the communion of the Lord's supper. "Any attempt to do so is indecent." If an interruption of one of the church ceremonies would amount to indecent conduct, the disturbance of the congregation while assembled for divine service by boisterous, tumultuous, or unseemly behavior would be indecently acting, in the terms of that phrase as used in the statute.

5. The second criticism made upon the charge is without merit. It was ruled in Minter v. State, 104 Ga. 752, 30 S. E. 989, that a congregation of persons which had been lawfully assembled under a bush arbor for divine service could be disturbed by such acts as are specified by section 418 of the Penal Code of 1895, although the persons composing the congregation may have been dismissed from the arbor, but remained assembled around it for the purposes of administering to the wants of their domestic animals, and preparing and eating their own dinners. The evidence submitted on the trial of the present case authorized the conclusion that the defendant, within a hundred yards of the church, and immediately after the congregation had left the church building for the purpose of preparing dinner, did intentionally discharge his pistol, to the disturbance of the congregation. On this particular day two services were held—one in the forenoon, and the other in the afternoon —and dinner was served upon the church grounds between the time of holding these two services. In the contemplation of the statute, the congregation had not dispersed, but was still lawfully assembled for the purpose of divine worship; and proof of an intentional discharge of a pistol by the defendant in the near vicinity, to the disturbance of the congregation, was sufficient to authorize his conviction of the offense with which he was charged. Accordingly there was no error in overruling the petition for certiorari. Judgment affirmed.

(123 Ga. 173)

HALL COUNTY v. GILMER.

(Supreme Court of Georgia. June 13, 1905.)

1. WRIT OF ERROR — EXCEPTIONS PENDENTE LITE—CERTIFICATE OF JUDGE.

Where exceptions pendente lite are filed to the overruling of a demurrer, and are duly certified by the judge whose ruling is complained of, and are entered of record, no further certificate by the judge as to that ruling is required. If the exceptions pendente lite are properly brought to this court in the transcript of the record, error may be assigned thereon in this court, though no complaint be made in the main bill of exceptions of the ruling complained of in the exceptions pendente lite.

2. SAME—DISMISSAL.

Therefore, where a defendant demurred to a petition, and the demurrer was heard and overruled by one judge, and exceptions pendente lite to his ruling were duly presented, certified, filed, and entered of record, and the case referred to an auditor, who found adversely to the defendant, and where, at a subsequent term of court, exceptions to the auditor's report were heard by another judge, and overruled, a writ of error to this court, complaining both of the overruling of the demurrer and the overruling of the exceptions to the auditor's report, duly certified by the judge who heard the latter, will not be dismissed on the ground that it should have been certified by the judge who heard and overruled the demurrer.

3. SAME—CERTIFICATION.

While a judge cannot properly certify to what did not take place before him, he may certify to matters of record in the case before him; and therefore a judge may certify that a bill of exceptions pendente lite was certified, filed, and appears of record in the case, though the ruling complained of by the exceptions pendente lite may have been made by another judge than himself.

4. SHERIFFS—FEES—LIABILITY OF COUNTY.

A county is not liable to its sheriff for his costs, allowed by Pen. Code 1895, § 1107, for conducting prisoners before a judge or court to and from jail, but these costs must be collected by the sheriff from the prisoners after conviction.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action by M. O. Gilmer against Hall county. Judgment for plaintiff, and defendant brings error. Reversed.

F. M. Johnson, for plaintiff in error. Dean & Hobbs, for defendant in error.

CANDLER, J. 1-3. This case comes from the superior court of Hall county. It was an action of complaint brought against the county by Gilmer for certain sums alleged to have been due him for services as sheriff of the county. A demurrer to the petition was filed by the county, and this demurrer was heard and overruled by Judge Russell, of the Western circuit, presiding in place of

Judge Kimsey. Exceptions pendente lite to the overruling of the demurrer were duly presented, certified by Judge Russell, and filed as part of the record in the case. This was at the January term, 1903, of Hall superior court. At the July term, 1904, of that court, Judge Russell referred the case to an auditor, who, at the January term, 1905, filed his report, which in every important particular was favorable to the plaintiff. The defendant filed exceptions of law to the auditor's report, which were heard and overruled by Judge Kimsey, of the Northeastern circuit. Within the time prescribed by law, the defendant presented its bill of exceptions to Judge Kimsey, complaining of the overruling of its demurrer by Judge Russell, and of the overruling of its exceptions to the auditor's report by Judge Kimsey. The bill of exceptions was certified as true by Judge Kimsey, and the portions of the record specified as material to a clear understanding of the alleged errors, including the exceptions pendente lite, were transmitted to this court. Upon the call of the case here, the defendant in error moved to dismiss the writ of error, because the bill of exceptions excepts to acts of Judge Russell more than 30 days before the bill of exceptions was sued out; because the bill of exceptions should have been presented to Judge Russell, and not to Judge Kimsey; because no litigant should be allowed to join in one bill of exceptions complaints of the acts of two judges, one at one term of court and another at a subsequent term; because the plaintiff in error does not except to the final judgment in favor of the plaintiff against the defendant; and because the bill of exceptions does not plainly specify the errors complained of.

The motion to dismiss is without merit. The only object of exceptions pendente lite is to preserve as part of the record, by means of the certificate of the trial judge, that which transpired on the trial of the case, and which would not otherwise appear of record. This is accomplished by the certificate of the trial judge to the bill of exceptions pendente lite, and so, in the present case, it was not necessary that the bill of exceptions on final writ of error be certified by Judge Russell, as he had already certified the bill of exceptions pendente lite. In South Carolina R. Co. v. Nix, 68 Ga. 572, it was held: "Where bills of exceptions pendente lite are certified, filed, and entered of record, when the case is brought up after final judgment, error may be assigned thereon upon motion in this court, though no mention be made of them in the main bill of exceptions. They are part of the record, and, having been certified once, need not be certified again." See, also, Hardee v. Griner, 80 Ga. 559, 7 S. E. 102. Nor do we know of any reason why a litigant may not join in one bill of exceptions complaints of the rulings of two different judges, so long as they pertain to the one case in hand, and are in due and legal form presented to this court. It is true that Judge Kimsey could not properly certify to what took place on the hearing of the demurrer before Judge Russell. Cutts v. Scandrett, 108 Ga. 620, 34 S. E. 186. But it was entirely within his province to certify to what appeared of record in the case before him, and, as the exceptions pendente lite were duly entered of record, there was nothing to prevent Judge Kimsey from certifying to that fact, and ordering the clerk to send those exceptions to this court as part of the record material to a clear understanding of the alleged errors. It was not necessary for the plaintiff in error to except to the judgment entered on the report of the auditor, for, had either of the rulings of which it complains been made as it contends they should have been made, the case against it would necessarily have been at an end. There is no merit in the contention that the bill of exceptions does not plainly specify the errors complained of.

4. The sole question presented by the bill of exceptions is whether a county is primarily liable to its sheriff for the amount of $1.25 allowed that officer by Pen. Code 1895, § 1107, for each prisoner conducted before a judge or court to and from jail, or whether this fee must be made by the sheriff out of the defendant after conviction. The Code section referred to enumerates the fees allowed to sheriffs for various designated services, and at the conclusion of this enumeration provides that "mileage fees, executing criminal, and for guards, herein provided, shall be paid by the county, and no criminal cost herein provided for shall be collectible out of the defendant until after conviction, except costs accruing upon forfeited recognizances." Nowhere in the section is there any direct and explicit provision as to how the costs now under consideration shall be paid; but certainly there is a clear inference in the language quoted that they shall be made out of the defendant, and that the county shall not be primarily liable for them. For, if it was intended that the county should pay them in the first place, what reason could there have been to provide that they should not be "collectible out of the defendant until after conviction"? In other words, if they were not to be made out of the defendant, why should it have been necessary to state when the liability of a defendant should arise? We can conceive of no answer to these questions except that it was the intention of the General Assembly that the officer should look to the prisoners themselves for his costs for conducting them before a judge or court to and from jail. The case of Sapp v. Rozar, 70 Ga. 722, is not in point. It was there decided that a sheriff is only entitled to be paid once for bringing a prisoner confined in jail into court for trial, and once for returning him, and that he cannot claim a fee for each time he may conduct a prisoner to and

from the jail pending trial. The question as to who was liable for the costs did not enter into the decision. It is true that the defendant in error in that case was the ordinary of the county, and, presumably, he considered the county liable for the costs which were really due; but as that question was not made or decided in the case, that decision is not authority either for or against what is now held. The court below should have sustained the demurrer to the petition.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 173)

BROWN v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

CRIMINAL LAW—APPEAL—REVIEW.

The evidence authorized the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Nathan Brown was convicted of crime, and brings error. Affirmed.

J. W. Shell, W. L. Stallings, and A. H. Freeman, for plaintiff in error. Jno. C. Hart, Atty. Gen., and J. R. Terrell, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 197)

MOSELEY v. J. S. SCHOFIELD SONS CO.

(Supreme Court of Georgia. June 14, 1905.)

1. INJURIES TO SERVANT—PLEADING—NEGLIGENCE CHARGED.

In a suit for damages on account of personal injuries, brought by a servant against his master, where, among various allegations of negligence, it is charged that the defendant failed to furnish the plaintiff a safe place in which to work, and it affirmatively appears from the petition that the plaintiff's injuries were not caused by the character of the place in which he was put to work, or in any manner connected therewith, such an allegation of negligence cannot be made the basis of a recovery.

2. SAME—CONCURRENT NEGLIGENCE.

A master is liable for injuries to his servant caused by the concurrent negligence of a vice principal of the master and fellow servants of the servant injured.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 515–534.]

3. SAME—PETITION — CONTRIBUTORY NEGLIGENCE.

The petition in the present case was not open to the objection that it did not make it appear that the servant was himself free from fault, or that he had not equal means with the master of knowing of the defective condition of the appliance which caused his injuries.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by F. M. Moseley against the J. S Schofield Sons Company. Judgment for defendant, and plaintiff brings error. Reversed.

T. S. Felder and Arnold & Arnold, for plaintiff in error. Malcolm D. Jones, for defendant in error.

CANDLER, J. This case comes up on exceptions to the sustaining of a demurrer to the plaintiff's petition. The material allegations of the petition were, in substance, as follows: The defendant, a corporation, is engaged in a general iron business, and in the business of erecting smokestacks and iron structures, taking contracts and subcontracts for that purpose. At a time designated the defendant, as a subcontractor, was "doing certain work" upon the plant of a corporation in Alabama, and the plaintiff was employed by the defendant in connection with that work. He was a new man in the defendant's employment, having just been employed on the day before the occurrence out of which the suit arose, and having just gone to work on that day. He "was employed by the superintendent or foreman in charge of said work," and was told that his duties were to do such things as might be required of him. He was at first put to work helping unload a car of material, but subsequently one of the defendant's employés engaged in working on the smokestack quit, and the superintendent ordered the plaintiff to take his place. Accordingly, he mounted the structure through which the stack went. This structure was described more or less minutely, but its description has little bearing upon the questions at issue. At the top of the smokestack was a pole, or shaft, and at the end of this was a block or pulley over which a rope ran. One end of the rope was pulled by an employé standing on the brick structure already mentioned, while the other end, which had a hook in it, was attached to a piece of steel or iron, and by this means the different parts of the smokestack were raised into position. The plaintiff was a newcomer, and was not familiar with the appliances which the defendant was using. He was ordered to pull the rope for the purpose of raising the iron sheet up the stack to a point where other employés were to work on it. While he was engaged in this work, the iron dropped from the hook, and fell upon him, inflicting injuries for which he sued. The allegations of negligence were as follows: "Defendant was negligent in divers particulars. Defendant failed to exercise ordinary care in furnishing plaintiff a safe place in which to work. Defendant's superintendent and employés other than plaintiff had negligently put a weak and defective hook at the end of the rope where it was attached to the said piece of iron. The said hook, being a thin piece of wire bent up, and being only about one-eighth of an inch in diameter, was wholly inadequate to hold the said piece of iron, which piece of

iron weighed about one hundred and fifty pounds. And when the said sheet of iron was being lifted up, the said hook, on account of its inadequacy and weakness, bent out, lost its shape, and straightened and bent to such an extent that the iron slipped and pulled off of it. Plaintiff had no knowledge of said defective condition, and had not hooked the hook to the iron piece, and was a newcomer, and was not aware of the danger he was placed in. Defendant failed to exercise ordinary care in using said weak and inadequate hook. Defendant's superintendent and other employés at work knew that the said hook was defective, and had warning thereof, but failed to secure a good and strong one. Defendant's employés negligently placed a sheet of iron weighing one hundred and fifty pounds or thereabouts on said hook. Defendant failed to furnish plaintiff a safe place in which to work. In all of these particulars defendant was negligent." The demurrer was upon the grounds that (1) no cause of action was set out; (2) the petition fails to show that the plaintiff was free from fault; (3) it affirmatively appears that the plaintiff was at fault; (4) the petition fails to show that by the exercise of ordinary and reasonable diligence the plaintiff could not have avoided the injury complained of; (5) it affirmatively appears that the defect in the hook alleged to have caused the injury was patent, and could have been discovered by the plaintiff by the exercise of ordinary diligence; (6) the petition fails to show that the plaintiff did not have equal means with the defendant of knowing of the defect in the hook; and (7) the petition shows that the injury complained of was due to the negligence of the plaintiff's fellow servants. The defendant also demurred specially to the following language in the ninth paragraph of the petition: "Defendant was negligent in divers particulars. Defendant failed to exercise ordinary care in furnishing plaintiff a safe place in which to work."

1. It will be observed from a reading of the allegations of negligence contained in the petition, which we have quoted in full, that the charge that the defendant failed to furnish the plaintiff a safe place in which to work is repeated, being contained in two different paragraphs of the petition. The special demurrer went only to one of these paragraphs, and so, even if sustained, would leave this charge of negligence still in the petition. It may be conceded, however, that the place where the plaintiff was put to work by his employer was all that it was intended to charge against it, and the plaintiff could not recover on these allegations; for it affirmatively appears that the injury of which he complains was in no way due to the character of the place in which he was put to work. The use of a defective appliance was, according to his petition, the real cause of his injuries. It is therefore unnecessary to discuss further the allegations that the defendant was negligent in failing to provide a safe place for the plaintiff to work, for it needs no citation of authority to sustain the proposition that negligence, to be the basis of a recovery, must be connected with the injury which is the subject of the suit.

2, 3. The grounds of the demurrer which are general in their nature may, for the sake of convenience, be divided into two general classes, viz., those which attack the petition on the ground that it does not show that the plaintiff was himself free from fault, and those which contend that it appears from the petition that the plaintiff's injuries were the result of the negligence of a fellow servant, for which the master is not liable. Considering the last contention first, we think it clear that the allegations of the petition were sufficient to put the defendant on proof as to the real authority of its alleged superintendent. While that individual is described as a "superintendent or foreman," and while neither of these words necessarily imports that the one to whom they were applied was the alter ego of the defendant, it was alleged that he had authority to employ laborers, and was in charge of the work; and under repeated rulings of this court such a person would be the vice principal of the master. Atlanta Cotton Factory Co. v. Speer, 69 Ga. 137, 47 Am. Rep. 750; Woodson v. Johnston & Co., 109 Ga. 454, 34 S. E. 587; Taylor v. Georgia Marble Co., 99 Ga. 512, 27 S. E. 768, 59 Am. St. Rep. 238. The fact that the plaintiff's injuries were caused by the concurrent negligence of the vice principal and other employés of the defendant who were undeniably fellow servants of the plaintiff would not relieve the master from liability. Jackson v. Merchants' Transp. Co., 118 Ga. 651, 45 S. E. 254. Nor do we think there is any merit in the grounds of the demurrer which attack the petition upon the idea that it was not alleged that the plaintiff himself was free from fault. It appears that the plaintiff was a newcomer; that he had been employed only the day before his injuries were received, and was put to work on that very day; that he had not had an opportunity to become familiar with the appliances in use by the defendant; that he had just been ordered from one piece of work to the one in performing which he was injured; and that he was bound to rely upon the diligence of the superintendent in furnishing him safe appliances with which to work. It cannot be said as matter of law that the plaintiff was obliged to know that the hook used in lifting the heavy sheets of iron was insufficient for the purpose for which it was used. That was a question for the jury to determine. We conclude that the court erred in sustaining the demurrer to the petition.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 212)

HALL v. WESTERN & A. R. CO.

(Supreme Court of Georgia. June 14, 1905.)

RAILROADS—TRESPASSER ON RIGHT OF WAY—EVIDENCE.

The only duty which a railroad company owes to a trespasser on its right of way is to observe ordinary diligence to avoid injuring him after his presence thereon becomes known to the employés in charge of the train. Consequently, in a suit by a widow for the homicide of her husband, where it appeared from the undisputed evidence that the deceased was a trespasser; that he went upon the railroad track in an intoxicated condition; that shortly thereafter his dead body was found near the track, wounded in such a manner as to indicate that he had been struck by a passing train while lying down on or near the track; and that the employés of the defendant in charge of the train which was supposed to have struck him never at any time saw him on the track or right of way, and did not learn until a considerable time afterwards that he had been killed—it was not error to direct a verdict for the defendant.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1238, 1239.]

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Elizabeth Hall against the Western & Atlantic Railroad Company. Affirmed.

W. C. Martin and Cantrell & Ramsaur, for plaintiff in error. R. J. & J. McCamy, for defendant in error.

CANDLER, J. There is no dispute as to the material facts brought out by the evidence. The plaintiff's husband, for whose homicide she sued, went upon the right of way of the defendant company in an intoxicated condition, and proceeded to walk along the track. This was between 2 and 3 o'clock in the afternoon. His condition was such as to attract the attention of persons who saw him from a distance. Some time afterwards his lifeless body was found by the side of the track. The skull was crushed, but there were no wounds on the body. There were no eyewitnesses to the occurrence, but apparently the unfortunate man had lain down on the side of the track and gone to sleep, when he was struck in the head by the pilot, or some other part of a passing engine, and killed. The place where the body was found was not at or near a public crossing. The track at that point was straight for a distance of from a quarter to a half mile in the direction from which the train approached that is supposed to have struck the deceased. The engineer and fireman of that train testified that they knew nothing whatever of the occurrence until that night or the following morning, when they were informed of it by others. When they passed the place where the deceased was afterwards found, each was attending to his customary duties on the engine. It was the duty of the engineer to keep a lookout ahead all the time, and it was also the fireman's duty to look ahead when he was not firing the engine. The fireman could not say whether he was firing the engine at this point or not; but both he and the engineer were positive that a lookout was kept all the time by one or both, and that neither of them saw the deceased on or near the track. At the conclusion of the evidence the judge directed a verdict for the defendant, and the plaintiff excepts.

We find no error in the direction of a verdict for the defendant. It is well settled that the only duty that a railroad company owes to a trespasser upon its right of way is to observe ordinary care to avoid injuring him after his presence has become known to the employés of the train. Atlanta R. Co. v. Leach, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47; Atlanta R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145; Hambright v. Western & Atlantic R. Co., 112 Ga. 36, 37 S. E. 99. In one important respect this case differs from that of Parish v. Western & Atlantic R. Co., 102 Ga. 285, 29 S. E. 715, 40 L. R. A. 364, in which Mr. Presiding Justice Lumpkin and Mr. Justice Atkinson dissented from the majority opinion. In the Parish Case a nonsuit was granted, and it was the opinion of the dissenting justices that, in the absence of any evidence as to the facts surrounding the death of the deceased, the presumption raised by the law upon proof that she was killed by the running and operation of the defendant's train was sufficient to carry to the jury the question of negligence. In the present case that presumption was fully met by the evidence for the defendant, which was not contradicted in the smallest material particular. As was said in the case of Holland v. Sparks, 92 Ga. 753, 18 S. E. 990, section 2321 of our present Civil Code of 1895 "imposes the burden of proving the observance of such diligence as was due, not the burden of proving that none was due." The defendant company in this case even went to the extent of proving that no diligence was due, for it was clearly shown that neither the engineer nor the fireman ever saw the plaintiff's husband on the track or right of way. The fact that the track was straight at this point for more than a quarter of a mile does not alter the principle involved, for the engineer and fireman had no reason to expect the presence of a trespasser on the track, and, relatively to him, it was not negligence even if they failed to keep the usual lookout at this point. Besides, in view of the evidence as to the manner in which the deceased was struck by the passing train, it is quite conceivable that the engineer and fireman may have been looking ahead in the full performance of their duties and yet not have seen a man lying on or near the track. Certainly a lookout for such objects cannot be exacted from railroad companies as the measure of diligence due to trespassers. A verdict for the plaintiff would

have been contrary to law, under the evidence in the record, and it was therefore not error to direct a contrary finding.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 129)

JONES v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

1. WRIT OF ERROR—CITY COURT.

The act approved December 16, 1895 (Acts 1895, p. 257), had the effect to reincorporate what had formerly been the town of Moultrie as the city of Moultrie; and a writ of error from the city court of that city will not be dismissed on the ground that the act creating that court, which was approved November 13, 1901 (Acts 1901, p. 136), was passed before the passage of the act approved November 20, 1901 (Id. p. 591), granting a new charter to the city of Moultrie.

2. CRIMINAL LAW — TRIAL — ARGUMENT OF COUNSEL.

On the trial of an indictment for a misdemeanor, counsel are entitled as a matter of right to 30 minutes for each side for argument, and it is error for the court to limit the argument to a shorter time.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1657.]

3. SAME.

It was improper for the solicitor to say in his argument to the jury, "I know defendant was guilty, or he would not have fled," there being no evidence of flight in the case; and the court should either have instructed the jury to disregard such argument, or else have granted an appropriate motion for a mistrial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1669.]

4. SAME—INSTRUCTIONS.

It was error in the present case for the court to charge the jury that flight might be considered as a circumstance of guilt, for the reason that the agreed brief of evidence in the record fails to show anything upon which to base such a charge.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1985.]

(Syllabus by the Court.)

Error from City Court of Moultrie; W. S. Humphreys, Judge.

Alexander Jones was convicted of a misdemeanor, and brings error. Reversed.

Walter A. Way and James Humphreys, for plaintiff in error. T. W. Mattox, Sol., for the State.

CANDLER, J. 1. By an act approved December 27, 1890 (Acts 1890–91, vol. 2, p. 575), the General Assembly incorporated the town of Moultrie, in Colquitt county. The act approved December 16, 1895 (Acts 1895, p. 257), purported in its title "to reincorporate the town of Moultrie as the city of Moultrie, to confer additional powers on said corporation, and to codify, amend and supersede all previous acts incorporating the town of Moultrie, and grant a new charter to said town under the name of the city of Moultrie." On November 13, 1901, an act was passed establishing the city court of Moultrie (Acts 1901, p. 136), and on November 20, 1901, the General Assembly passed "An act to create a new charter for the city of Moultrie, in the county of Colquitt, and for other purposes" (Acts 1901, p. 591). On the call of this case in this court, a motion was made to dismiss the writ of error, "upon the ground that a bill of exceptions will not lie from the city court of Moultrie to this court, because Moultrie had not been made a city prior to the establishment of the city court therein." It is contended by counsel for the defendant in error that the act of 1895 did not have the effect to change Moultrie from a town into a city and clothe it with the powers of a city; that not until the passage of the act of November 20, 1901, which was subsequent to the passage of the city court act, did Moultrie become a city; and that therefore, the court in question having been established in a town, and not a city, no writ of error will lie to this court. We cannot agree with counsel in this contention. The act of 1895 evinces very plainly the legislative intent that the town of Moultrie shall cease to exist, and the city of Moultrie come into being, from the date of its passage. The purpose of the act, as stated in its title, is "to reincorporate the town of Moultrie as the city of Moultrie," etc. The fact that the title also sets forth the intention to "supersede all previous acts incorporating the town of Moultrie, and grant a new charter to *said town*," does not indicate, in our opinion, an intention that the charter is to be granted to it as a town, especially in the face of the express purpose that Moultrie is to be reincorporated as a city. The italicized words were perhaps loosely used, but in view of the very evident intention of the act, which throughout is in harmony with its title, this inaccuracy will not be allowed to defeat its purpose. What we now hold is in no sense in conflict with the decision of this court in the case of Savannah R. Co. v. Jordan, 113 Ga. 687, 39 S. E. 511. It was there held that "a place once incorporated by an act of the General Assembly as a town will not become one of the cities of this state until there is a legislative enactment expressly declaring that such place is a city, and the mere fact that in different legislative acts referring to such town it is sometimes designated as a 'city' will not make it a municipal corporation of the character indicated by that term." The act of 1895 did not casually and inaccurately refer to Moultrie as a city; it expressly repealed the act by which it was incorporated as a town, and reincorporated it as a city. It came up to the full measure of the requirement laid down by the decision in the Jordan Case. See, in this connection, Sessions v. State, 115 Ga. 19, 41 S. E. 259. It follows that the motion to dismiss the writ of error must be overruled.

2. When the evidence had closed, the court stated that 5 minutes would be allowed to each side for argument. Counsel for the ac-

cused protested, and asked for further time, stating that he could not do justice to his client in the time allowed. The court then stated that 10 minutes would be allowed to each side, and counsel for the accused again protested, asking for further time. The court replied: "All right, Major, go ahead, and I will see." Counsel then proceeded with his argument, and, after speaking for 11½ minutes, closed, not having been ordered by the court to stop, though the clerk had been instructed to stop him at the end of 15 minutes. This action of the court is assigned as error, "as it deprived the defendant of the right to have the evidence and issues fully and clearly presented to the jury." In misdemeanor cases, counsel are entitled as a matter of right to 30 minutes for argument. Civ. Code 1895, § 5637. Upon a proper showing, it is error to refuse to extend this time. Chance v. State, 97 Ga. 346, 23 S. E. 832. Certainly, then, any limitation which curtails the time allowed for argument to less than 30 minutes is cause for a new trial. Nor can it be said that the fact that counsel closed his argument in less than 12 minutes is evidence that his client was not injured by the improper limitation put upon him. Naturally, the knowledge that he would be required to stop speaking at the end of 15 minutes would lead him to hasten through his argument, so as to cover as much ground as possible. We are clear that the ground of the motion now under discussion was well taken, and that a new trial should have been granted.

3. The solicitor, in his argument to the jury, made use of the following language: "I know defendant was guilty, or he would not have fled from Mr. Hartsfield at Norman Park." Thereupon counsel for the accused made a motion for a mistrial, on the ground that this was an improper argument, and in his motion for a new trial he assigns as error the refusal to grant a mistrial. There can be no doubt that this argument was improper, and that the motion for a mistrial should have been granted, or the solicitor rebuked and the jury instructed to disregard such argument. The evidence fails to show flight on the part of the accused, and therefore, for the solicitor to state his knowledge or opinion to the jury, based upon what he may have known to be a fact, but which was not proved, was not proper. It is unnecessary for us to discuss this question at length, for Mr. Justice Cobb, in his opinion in the case of Broznack v. State, 109 Ga. 514, 35 S. E. 123 (3), has fully stated the law in regard thereto. See, also, 1 Enc. Dig. Ga. Rep. 504.

4. The case made out by the state was substantially as follows: The accused was in the employment of the proprietor of a cleaning and pressing room in Moultrie. One Hartsfield sent his overcoat to the establishment to be cleaned and pressed. Two or three days before this time there was a pair of kid gloves in one of the pockets of the overcoat, but shortly after the coat was returned, Hartsfield missed the gloves. When the overcoat was sent to the pressing room, the proprietor turned it over to the accused to clean and press, while he went out on other business. When he returned he saw a pair of kid gloves on the dresser, and asked the accused where they came from, to which the accused replied that he had found them on the street. The accused remained in his employ but a short time after—just how long the evidence does not disclose. Some three or four weeks after getting his overcoat back from the presser, Hartsfield was at Norman Park, in Colquitt county, and hired a team to go a little way into the country. The accused was sent to drive the team, and while driving he wore gloves which Hartsfield recognized and identified as the gloves which had been in his overcoat pocket just prior to the time the coat was sent to the cleaner. Hartsfield told the accused that they were his gloves, and that he ought to charge him $10 for them, but that if the accused would pay him $2.50 he would not prosecute him. "He agreed," says Hartsfield in his testimony, "to pay me on his return to Norman Park, but he never did, although I waited where he told me, and he did not come back to me and pay me for the gloves." The accused offered no evidence. The court charged the jury as follows: "You take the evidence in this case as given by the witnesses, and determine his guilt or innocence. You may consider all the evidence. The court charges you that flight may be considered as a circumstance of guilt." We are clear that the latter part of this charge was error, for the reason that there was nothing that could in any way be distorted into evidence of flight on the part of the accused. The fact that he left the employment of the proprietor of the cleaning and pressing room shortly after Hartsfield's overcoat was sent there to be cleaned and pressed certainly did not constitute a flight, especially in view of the fact that there is nothing in the evidence to indicate the length of the interval between these two occurrences. Nor was the failure of the accused to keep his promise to pay Hartsfield for the gloves in any sense a flight. The charge referred to was necessarily harmful to the accused in its tendency, and was cause for a new trial.

The remaining grounds of the motion are without merit. Those which we have discussed, however, constrain us to reverse the judgment refusing a new trial.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 240)

PENNSYLVANIA CASUALTY CO. OF SCRANTON v. THOMPSON.

(Supreme Court of Georgia. June 14, 1905.)

1. JUDGMENT BY DEFAULT.

In the absence of a legal return of service, the court is without jurisdiction to render a judgment by default.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 25.]

2. RETURN OF SERVICE—AMENDMENT—PLEADING.

Where an entry of service which failed to show that the defendant had been served was cured by amendment at the trial term, it was error to refuse to allow the defendant to demur and plead instanter to the suit.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action by B. F. Thompson against the Pennsylvania Casualty Company of Scranton. Judgment for plaintiff, and defendant brings error. Reversed.

Gleaton & Gleaton, for plaintiff in error. Brown & Brown, for defendant in error.

FISH, P. J. Suit was brought by B. F. Thompson against the Pennsylvania Casualty Company of Scranton, Pa., returnable to the April term, 1904, of Henry superior court. The sheriff made the following return of service: "I have this day served E. T. Moore, agent, personally, with a copy of the within bill and process. This April 1, 1904." Judgment by default was rendered at the appearance term. At the trial term the defendant appeared, and moved to dismiss the case for want of service, which motion was overruled. On motion of the plaintiff the sheriff was then allowed to amend his entry of service, as follows: "By permission of the court I hereby amend my entry of service by saying that I served the defendant company, the Pennsylvania Casualty Company of Scranton, Pa., by personally serving E. T. Moore, their agent, with a copy of the within writ and process. This April 1, 1904." As a matter of fact, this amendment was allowed October 17, 1904. The defendant then moved to open the default, offering to pay the accrued costs, and asked leave to demur and answer instanter. This motion and request the court refused. The defendant excepted pendente lite to each of the several rulings mentioned. The case went to trial, and resulted in a verdict for the plaintiff. The defendant's motion for a new trial having been overruled, it excepted, assigning error upon the refusal of a new trial and upon its exceptions pendente lite.

According to the original entry of service, only E. T. Moore, as an individual, had been served (Burnett v. Central R. Co., 117 Ga. 521, 43 S. E. 854, 97 Am. St. Rep. 175), and the judgment by default was void, as the court had no jurisdiction to render it, the defendant company not having been served (News Printing Co. v. Brunswick Publishing Co., 113 Ga. 160, 38 S. E. 333). It follows that the motion by the defendant company to dismiss the case should have been sustained (Stuart Lumber Co. v. Perry, 117 Ga. 888, 45 S. E. 251) if the return of the sheriff had not been amended. The return, however, was amendable so as to include all the facts of a good service if such facts existed, such as that Moore was the agent of the defendant company, and that the company had been served by personally serving him as its agent. Western & Atlantic R. Co. v. Pitts, 79 Ga. 532, 4 S. E. 921. It is true that the amendment of the return related back to the making of the original return of service, but its effect was not to render valid a judgment by default, which, as we have seen, was void for want of jurisdiction in the court to render it. The company was first properly in court when the amendment of the original entry of service was made by showing service upon it, and it then had the right to demur and plead instanter to the suit. There was no question as to the form or matter of the demurrer or answer. In Gordon v. Hudson, 120 Ga. 698, 48 S. E. 131, it was held: "Where a plea and a demurrer have been filed after the expiration of the time allowed by law, but the case has never been marked 'in default,' it is error, on the call of the case for a hearing, to dismiss the plea and the demurrer because not filed in time." In that case there had been no entry of default. In the case in hand there had been such an entry, but it was void; so the ruling in the case cited is directly in point. The question here decided was not involved in Southern Bell Telephone Co. v. Parker, 119 Ga. 721, 47 S. E. 194, relied on by counsel for the defendant in error. In that case the court expressly declined to pass on the question, for the reason, as stated, that it did not appear to have been raised in the trial court, and there was no assignment of error bringing it in review.

As the court erred in refusing to allow the defendant to demur and plead, it is unnecessary to pass upon the assignments of error made in the motion for a new trial.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 257)

CHAMBLESS v. LIVINGSTON.

(Supreme Court of Georgia. June 14, 1905.)

1. PLEADING—FILING ANSWER.

When, upon the call of the appearance docket, no entry of default is made, the court may, in its discretion, at a subsequent term permit a plea to be filed at any time before such entry has been made. Davis v. Railroad Co., 33 S. E. 437, 107 Ga. 420 (1); Gordon v. Hudson, 48 S. E. 131, 120 Ga. 698.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 175.]

2. CONVERSION—EVIDENCE.

In an action for damages for a conversion of personalty, proof of title to the property in the plaintiff, possession in the defendant, a de-

mand for possession, and a refusal by the defendant, prior to the filing of the suit to surrender the property to the plaintiff, makes a prima facie case for recovery, although it does not appear that the defendant was in possession at the time the suit was filed.

(Syllabus by the Court.)

Error from City Court of Dawson; A. M. Raines, Judge.

Action by G. W. Chambless against William Livingston, Sr. Judgment for defendant, and plaintiff brings error. Reversed.

W. H. Gurr, for plaintiff in error. J. R. Irwin and J. G. Parks, for defendant in error.

COBB, J. Judgment reversed. All the Justices concur.

(123 Ga. 269)

JESUP v. ATLANTIC & B. RY. CO.

(Supreme Court of Georgia. June 14, 1905.)

NONSUIT.

The plaintiff having proved his case as laid, the trial judge erred in awarding a nonsuit. Kelly v. Strouse, 43 S. E. 280, 116 Ga. 881-883.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 360.]

(Syllabus by the Court.)

Error from City Court of Vienna; C. R. Crisp, Judge.

Action by P. A. Jesup against the Atlantic & Birmingham Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hill & Royal, for plaintiff in error. J. L. Sweat and Crum & Jones, for defendant in error.

EVANS, J. Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 171)

SKRINE v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

CRIMINAL LAW—INSTRUCTIONS.

The evidence warranted the verdict, there was no error in the charges excepted to requiring the grant of a new trial, and the certiorari was properly overruled.

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Pellam Skrine was convicted of pointing a gun at another. From a judgment overruling a certiorari, he brings error. Affirmed.

W. H. Burwell, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

FISH, P. J. Pellam Skrine was convicted in a county court of the offense of intentionally pointing or aiming a gun at another, not in a sham battle by the military, and not in self-defense, etc., as defined in the Penal Code of 1895, § 343. He carried the case, by certiorari, to the superior court. The petition for certiorari alleged: That the verdict was contrary to law and the evidence, and without evidence to support it. (3) That the county judge erred in charging the jury: "The law makes you the exclusive judges of the evidence, and the court has nothing to do with intimating to you, or in your presence, what is or what is not sworn to in this trial." (4) That he erred in charging: "But you are required to take the law expounded to you by this court." (5) That he erred in charging: "It is your duty further to reconcile the testimony which may seem conflicting, without imputing perjury to any witness, but, in any event, to reach a conclusion that leaves no reasonable doubt of guilt." (6) That he erred in charging: "Witnesses are entitled to be believed unless contradicted, discredited, or impeached in some of the ways known to and prescribed by the law." The certiorari was overruled, and the accused excepted, and brought the case here for review.

The judgment of the superior court should be affirmed. The evidence for the state fully authorized the verdict. The instructions given by the county judge to the jury, of which complaint is made, are substantially correct, with the exception of the charge complained of in the fifth ground of the petition for certiorari. While it was evidently the purpose of the trial judge to charge the jury that they should not reach a conclusion that the accused was guilty, unless such conclusion was authorized by the evidence beyond a reasonable doubt, the charge as given was somewhat involved, and, standing alone, might have been misunderstood by the jury; but in view of the entire charge of the county judge, as shown by his answer to the writ of certiorari, we do not see how the jury could have been misled by the language excepted to. Before giving the instruction complained of, he charged, "But before you can convict, the evidence must show you beyond a reasonable doubt that he is guilty;" and after the charge excepted to he instructed the jury, "But if the evidence is insufficient, or you have a reasonable doubt of his guilt, you should acquit." We cannot see, therefore, how the jury could have understood, from the charge in question, that the judge intended to instruct them that they should, in any event, reach a conclusion that the accused was guilty.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 125)

SUTTON v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

RAPE — ASSAULT WITH INTENT — INSTRUCTIONS.

On the trial of an indictment for assault with intent to rape, where there was evidence from which the jury were authorized to find that an assault was committed by the accused with the intention of gaining the woman's consent to have sexual intercourse with him, but without any intent to overpower her will and commit the crime of rape, it was error to fail to give in charge the law of assault and of assault and battery.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

O. N. Sutton was convicted of assault with intent to rape, and brings error. Reversed.

The accused, O. N. Sutton, was tried under an indictment charging him with the offense of assault with intent to rape. The following verdict was rendered: "We, the jury, find the defendant guilty, and recommend him to extreme mercy." The judge disregarded the recommendation, and sentenced the accused to 10 years in the penitentiary. Sutton filed a motion for a new trial, which was overruled, and he excepted.

The girl alleged to have been assaulted testified, in substance, that on the occasion under investigation she was living with a family by whom she had been adopted; that her foster-parents were not at home; that shortly after dark she started to go out in the back yard, when she was startled by hearing a stick crack in the darkness, and turned to return to the house. Before she could do so she was seized by the accused, who took her in his arms, and carried her to a buggy standing near, and placed her inside, getting in also, and driving away. She called to him to turn her loose, but he would not do so. She did not get into the buggy voluntarily. The accused drove through certain described streets of the town of Bainbridge, and past several people. She cried out, but no one came to her relief. The accused kept his arm around her to keep her from getting out of the buggy. After leaving Bainbridge and driving for about an hour through the country, the accused assaulted her. The manner of the assault can best be described by quoting verbatim from the testimony of the injured party: "He did not stop the buggy when he made the assault, but was still driving on. He took off my guard. I was having what is called 'menstrual sickness' at the time. * * * At the time he was doing that he said, 'Give me some.' I asked him, 'What?' He pointed here, and I told him I was not going to do it. Then he said he was going to do it anyhow. When he said this he took me in his lap. He had unbuttoned my union suit and took off my guard at this time. He took me in his lap. I slapped him, and he told me to quit, and I told him I was not going to do it until he quit, and he quit." This happened on a lonely country road at night. The accused then drove on to the home of a Mrs. Russell, several miles distant, where the girl spent the night. The accused admitted driving through the country with the girl at night, but claimed that it was done not only with her consent, but after her earnest entreaties that he take her away from her foster-parents, whom she represented to have been cruel to her. He denied emphatically having proposed to her to have sexual intercourse with him or having assaulted her in any way.

W. D. Sheffield, W. I. Geer, and A. G. Powell, for plaintiff in error. W. E. Wooten, Sol. Gen., and R. R. Arnold, for the State.

CANDLER, J. (after stating the foregoing facts). The first five grounds of the amendment to the motion for a new trial raise practically the same point, and complain of the failure of the court below to give in charge the law relating to the offense of assault or assault and battery. After a very careful reading of the brief of evidence, we have reached the conclusion that these offenses were necessarily involved in the case, and that the court should have elucidated them in charging the jury. The contention of counsel for the state that, as the accused denied making an assault of any character, he was not entitled to a charge on the minor offenses named, is hardly sound. The jury were the sole judges of the facts, and it was their privilege to draw their conclusions from the entire evidence, or from any part of it. They were at liberty to reject the statement of the accused that he made no improper advances to the female alleged to have been assaulted, and at the same time form their own opinion from her testimony as to the gravity of the assault and the intent with which it was committed. Certainly there was, in the testimony of the girl in this case, ample ground for a finding that an assault was made, but with no intention to commit the crime of rape. The statement made by her that the accused did not stop driving during the occurrence about which she testified, that he used no further force than was necessary to remove certain parts of her clothing, that a running conversation was carried on, and that the accused desisted upon being slapped by her, might well be considered by the jury as incompatible with an intention to commit the crime of rape. And yet there was ample warrant for a finding that an assault was committed upon the girl by the accused, and that his intention was to procure her consent to an act of sexual intercourse with him, but not to persist in the assault if that consent was withheld. The case of Tiller v. State, 101 Ga. 782, 29 S. E. 424, is closely in point on this branch of the case, the only material difference being that in that case the

evidence, while sufficient to justify a conviction of assault and battery, did not warrant a verdict of guilty of assault with intent to rape, while in the case at bar there was evidence which would authorize a conviction of the latter offense. The principle involved, however, is the same in both cases. In the case cited it was held that the mere solicitation by a man of a woman to go with him into the woods, though intended as a proposal to her to have sexual intercourse with him, will not warrant a conviction of an assault with intent to rape, when it is manifest that there was no intention at the time to then have carnal knowledge of the woman forcibly and against her will; and that "it was, on the trial of an indictment for this offense, erroneous, upon such a state of facts as that above recited, to restrict the jury to a finding of 'guilty' or 'not guilty,' and thus, in effect, withhold from their consideration any question of returning a verdict finding the accused guilty of an assault and battery." The trial judge should be careful to instruct the jury as to the law of every offense involved in the charge made by the indictment where, under any view of the evidence, the accused might be lawfully convicted of such an offense; and he should be equally careful not to charge as to any offense not involved in the evidence. Jordan v. State, 117 Ga. 405, 43 S. E. 747. In the case at bar, it is true, the court below did not, in so many words, instruct the jury that they must find the accused either guilty or not guilty, but his entire charge was such as to leave them no alternative to find any intermediate verdict. That this was harmful to the accused seems to be evidenced by the verdict actually returned; for the recommendation to "extreme mercy" does not indicate a strong conviction in the minds of the jury that the accused was guilty of the very grave crime of assault with intent to rape. On the contrary, it lends much strength to the contention of counsel for the accused that, had the proper latitude been allowed them, they would have found the accused guilty of a less serious offense than the one with which he was charged.

The motion for a new trial contains several other grounds, but none of them disclose error of sufficient importance to require, of themselves, the grant of a new trial. The requests to charge, so far as legal and pertinent, were covered by the charge as given, and the charges complained of were, in the main, correct statements of the law. The charge that the jury might consider in whose power the woman alleged to have been assaulted was at the time of the occurrence under investigation is subject to the criticism made on it by counsel for the plaintiff in error that it was capable of the construction that the trial judge entertained an opinion that she was in the power of the accused; but it can hardly be held to be argumentative to the extent that it will require a new trial; and doubtless, when the case is heard again, the trial judge will be more guarded in his expressions. The judgment is reversed solely on account of the failure to charge the law of assault and assault and battery.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 253)

McLENDON v. MACON, D. & S. R. CO.

(Supreme Court of Georgia. June 14, 1905.)

WRIT OF ERROR—SECOND TRIAL—LAW OF THE CASE.

When this case was formerly before the Supreme Court (46 S. E. 106, 119 Ga. 297), it held that under the law applicable to the evidence submitted by the plaintiff the court did not err in refusing to grant a nonsuit. A careful comparison of the brief of evidence in the former record with the brief of evidence in the present record shows that the evidence submitted in behalf of the plaintiff on both trials was substantially the same. It follows that under the law of the case as previously announced by the Supreme Court a nonsuit should not have been granted.

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action between Simon McLendon and the Macon, Dublin & Savannah Railroad Company. From a judgment, McLendon brings error. Reversed.

Sanders & Davis and S. W. Sturgis, for plaintiff in error. Jno. M. Stubbs and Akerman & Akerman, for defendant in error.

FISH, P. J. Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 164)

PARK v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

CRIMINAL LAW—APPEAL—REVIEW OF EVIDENCE.

The evidence was altogether circumstantial, and, not being of such a character as to show the guilt of the accused beyond all reasonable doubt, a new trial should have been granted.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3075, 3080.]

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Geems Park was convicted of crime, and brings error. Reversed.

Jas. B. & Noll P. Park, for plaintiff in error. J. E. Pottle, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

COBB, J. Judgment reversed. All the Justices concur, except SIMMONS, C. J., and CANDLER, J., absent.

(123 Ga. 257)

FORD v. FARGUSON.

(Supreme Court of Georgia. June 14, 1905.)

APPEAL—REVIEW.

There being no errors of law complained of, the evidence being sufficient to sustain the verdict, and the presiding judge having refused a new trial, this court will not interfere.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3074, 3075, 3084.]

(Syllabus by the Court.)

Error from City Court of Dawson; A. M. Raines, Judge.

Action between L. C. Ford and M. S. Farguson, administratrix. From the judgment, Ford brings error. Affirmed.

W. H. Gurr and H. A. Wilkinson, for plaintiff in error. R. R. Marlin and John R. Irwin, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 224)

GRAVES v. RIVERS.

(Supreme Court of Georgia. June 14, 1905.)

1. BREACH OF MARRIAGE PROMISE—PETITION.

A petition which alleges the ability of the parties to contract marriage, the mutual promises to marry and their terms, and the defendant's breach, sufficiently states a cause of action for breach of promise of marriage.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Breach of Marriage Promise, §§ 21, 22.]

2. SAME—EVIDENCE—SEDUCTION.

Seduction of the plaintiff by the defendant subsequent to the promise to marry and pending the engagement may be alleged and proved in aggravation of the damages.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Breach of Marriage Promise, § 42.]

3. SAME—DAMAGES.

The damages recoverable in this form of action may include full compensation for the pain, mortification, and wounded feelings of the plaintiff, and in these matters the amount of recovery must be left to the enlightened conscience of impartial jurors.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Breach of Marriage Promise, §§ 38, 40.]

4. WITNESSES—COMPETENCY.

Neither party to an action of breach of promise of marriage is a competent witness.

5. BREACH OF MARRIAGE PROMISE—INSTRUCTION.

A charge to the effect that the plaintiff may recover on proof of the contract of marriage and its breach by the defendant is open to the criticism that it excludes the defense of a justifiable refusal to consummate the promise to marry.

(Syllabus by the Court.)

Error from City Court of Fayetteville; W. B. Hollingsworth, Judge.

Action by Sallie Rivers against J. M. Graves. Judgment for plaintiff, and defendant brings error. Reversed.

Sallie Rivers sued out an attachment against J. M. Graves on the grounds that the defendant "absconds, also that he conceals himself, and also that he is about to remove beyond the limits of the county." The attachment was sued out before the judge of the city court of Fayetteville, and made returnable to the October term, 1903, of that court. The attachment was levied upon certain property of the defendant. Before the return term of the court the plaintiff filed her declaration in attachment, alleging as follows: (1) That the petitioner had endamaged her in the sum of $10,000. (2) That the defendant began visiting petitioner about 6 years ago, petitioner then being a young lady about 18 years of age, and the defendant being a young man about 20 years old. That the defendant continued to visit her from that time "constantly" until about July 15, 1903, "coming to see petitioner quite often, once or twice each month." (3) That the defendant professed to love her, and by his constant visits and attentions and professions of love he led her to believe him, and to love and admire him, and as a result of such courtship they were engaged to be married, which engagement continued until the summer of 1901, when, on account of some trouble that it was alleged the defendant was in, petitioner's father and mother objected to the visits of the defendant, and the engagement was broken. That defendant did not visit petitioner for several months, but after the lapse of this time the defendant, "to ingratiate himself again into the affections of petitioner and her people," protested his innocence of the charges and rumors that had been made against him, and obtained once more the good will of petitioner's parents and of herself, as a result of which they were again engaged to be married, which engagement "has never been broken off by petitioner." (4) That the defendant and petitioner were to have been married "last Christmas, both having agreed to said time," but for some reason the defendant had put the time off for some months, claiming not to be ready; and when the time arrived again he made other excuses, and finally quit visiting petitioner at all, "and has broken his solemn engagement with petitioner." (5) That during the continuance of the engagement, the defendant all the time promising to marry petitioner, he, by persuasions and manifestations of love and affection for her, and by other false and fraudulent means, induced her to have intercourse with him "during the fall and winter of last year, and at Christmas and again in January of this year," as a result of which petitioner became pregnant and gave birth to a child on September 11, 1903, which child is now living, and is the child of the defendant. (6) That up to the time she was seduced by the defendant petitioner had lived a moral and virtuous life, had a happy and good home, and moved in the best society; but through the baseness of defendant's conduct her happiness in life

has been blighted and ruined, her social standing and bright prospects have been totally destroyed, and henceforth she will be a social outcast, because of the illegal and fraudulent representations of the defendant. (7) That she had implicit faith and confidence in the defendant, and believed that he was sincere. That she loved him, and acted in perfect good faith; but that all the promises and representations made by the defendant to her were false and fraudulent, and made to deceive her, and to destroy her chastity and happiness; and that, although she has tried to get him to right the wrong done her, he fails and refuses so to do. (8) This paragraph was stricken on special demurrer. (9) That as a result of the intercourse of the defendant with her she has become unwell and sick in bed a good deal of the time since January "of this year." That about one month before the birth of her child she had to take her bed, and has since, and will be for some time to come, suffering great pain and agony, both in body and in mind. That she now has the child to look after and support without the assistance of the defendant. That she will continue to suffer in body, and especially in mind, all the remainder of her natural life; all on account of the unconscionable conduct of the defendant. (10) That on September 18, 1903, she sued out before W. B. Hollingsworth, judge of the city court of Fayetteville, an attachment against the defendant, returnable to the October term, 1903, of that court, which attachment was levied by the sheriff of Fayette county on property therein described. (11) This paragraph contains a prayer for a judgment of $10,000, and a special judgment upon the property upon which the attachment was levied, and "that she have a general judgment." There was an entry of service of this declaration by leaving a copy at the defendant's most notorious place of abode. At the October term, 1903, of the city court of Fayetteville, the case was called for trial, and the defendant moved to dismiss the suit, first, because no cause of action was set forth, and, secondly, because the petition showed on its face that it was an action for seduction, and that the plaintiff had no right to sue for her own seduction. The court overruled the motion to dismiss, whereupon the plaintiff offered to amend the petition by adding after the word "facts" in the first line of paragraph 11 the following: "and the breach of said contract for marriage for which petitioner sues." Upon the allowance of this amendment the defendant demurred generally, and that there was no cause of action set out in the petition; that the action was barred by the statute of limitations; and demurred specially to all the allegations as to seduction because such allegations were irrelevant, and the seduction was not alleged as being subsequent to the promise of marriage; and that the damages alleged in the ninth paragraph were not recoverable; and that the attachment affidavit and bond were insufficient in law, and because the court issuing the attachment was without authority to do so. The defendant also specially demurred to the eighth paragraph of the petition. The court overruled the demurrers, both general and special, except to the eighth paragraph, and as to this paragraph the demurrer was sustained. The case proceeded to trial, and resulted in a verdict for the plaintiff in the sum of $10,000. The defendant made a motion for a new trial, which was overruled. The defendant assigned error upon the judgment overruling his motion to dismiss and the demurrers, general and special, and the refusal to grant a new trial.

A. O. Blalock and J. F. Golightly, for plaintiff in error. J. W. Wise, for defendant in error.

EVANS, J. (after stating the facts). 1–3. An action to recover damages for a breach of promise to marry is predicated on the contract and its breach. All that is necessary to be alleged in the petition is the promises to marry and their terms and the defendant's breach. Where special damages are not claimed, these averments comprise all the issuable facts. 5 Cyc. 1007. The facts related in the petition begin with a courtship six years before the bringing of the suit, and the narrative proceeds with a description of the first engagement, how and why it was broken off, when it was renewed, the time the marriage was to be consummated, the wiles of the defendant to secure postponement of the nuptials, and his refusal to marry the plaintiff. Many of the averments in the petition might be treated as surplusage, but the essential elements of the form of action are alleged. The mutual promises to marry, the final agreement that the marriage contract was to have been on Christmas preceding the filing of the suit, the readiness of the plaintiff to marry at that time, the refusal of the defendant to comply with his contract, and his final abandonment of his attentions, are alleged with sufficient definiteness to set out a cause of action. Defendant demurred to the petition on the ground that the cause of action was barred by the statute of limitations. It is not pointed out what limitation period is applicable. As the suit sounds in contract, and is brought within a year from the alleged breach of the contract, we cannot perceive how the plaintiff can be barred. The special demurrers to the paragraphs of the petition which allege seduction as an aggravating element of damages are without merit. The seduction is alleged to have been subsequent to the promise to marry and pending the engagement to marry. The seduction of the plaintiff under promise of marriage may be alleged and proved in aggravation of damages. 8 Enc. Pl. & Pr

688, and cases cited. Although the form of action is ex contractu, yet the measure of damages, in a case where the plaintiff is entitled to recover, may include full compensation for the pain, mortification, and wounded feelings suffered by her in consequence of the dishonorable conduct of the defendant; and the amount of the recovery must be left to the enlightened conscience of impartial jurors. Parker v. Forehand, 99 Ga. 743, 28 S. E. 400. One of the special demurrers challenged the sufficiency of the attachment affidavit and bond and the authority of the court to issue the attachment. The demurrer did not specify any particular defect, and, as the grounds of the affidavit were statutory, and sufficiently alleged (Kennon v. Evans, 36 Ga. 89), and both affidavit and bond were prepared after the code forms (Civ. Code 1895, § 4529), we cannot see any irregularity in either. The affidavit for attachment was made before the judge of the city court of Fayetteville, and the writ of attachment was issued by him. The attachment was returnable to the city court of Fayetteville, and the judge thereof had jurisdiction to issue it. Acts 1902, p. 126. Hence we conclude that the court did not err in overruling all demurrers, except the special demurrer to the eighth paragraph, which was sustained.

4. Six grounds of the amended motion for new trial complain in various ways that the plaintiff was permitted to testify over the defendant's objection. The plaintiff was an incompetent witness, and the court erred in holding that she was competent. At common law a party to a suit interested in the result of the trial was disqualified from testifying because of his interest. The evidence act of 1866 permitted certain persons to testify notwithstanding their interest, but in express terms the ban of disqualification was left on parties to an action for breach of promise of marriage. Civ. Code 1895, § 5272. The evidence act of 1889 (Civ. Code 1895, § 5269) superseded only one clause of the act of 1866, but there is nothing in that act which removes the incompetency of those persons disqualified by the other clauses of the act of 1866. Section 5272 explicitly and positively declares that nothing contained in section 5269 shall apply to any action for breach of promise of marriage. While in England and many of the states the common-law rule of exclusion in this class of cases has been relaxed so as to allow the parties to testify, with the qualification that their testimony must be corroborated, in this state a party is absolutely excluded as a witness. Where the party is denied the right to testify, resort is usually had to circumstantial evidence to prove or disprove the complaint. Since, commonly, marriage proposals and their acceptance do not transpire in public or in writing, they must be established by the observed conduct of the parties or their admissions. "When marriageable persons conduct toward each other as engaged persons commonly do, and as those who are not engaged do not, the reasonable and fair inference is that they are in fact what they thus hold themselves out to be—engaged; and in a breach of promise suit the jury is justifiable in so finding." Bish. Mar. & Div. § 197. Likewise any other material issue in the case may be supported by proof of various circumstances which point to the existence of the fact sought to be established.

5. Exception is taken to the following charge of the court: "I charge you that if you believe from the evidence that J. M. Graves, the defendant, did contract marriage with the plaintiff, then the breach thereof would make the defendant liable; that is, if he failed to carry out this contract." This charge is open to the objection that under it the plaintiff would be entitled to recover for any breach of the contract, although the defendant may have been legally justifiable in refusing to carry out his promise to marry; and the exception is well taken.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(122 Ga. 208)

CALLAWAY v. MAXWELL.

(Supreme Court of Georgia. June 14, 1905.)

1. GARNISHMENT—BOND TO DISSOLVE—CLAIM OF THIRD PARTY.

Where, in accordance with the provisions of Civ. Code 1895, § 4720, a claim is filed to a fund sought to be reached by summons of garnishment in a suit in attachment, and bond is given to dissolve the garnishment, the claimant becomes, under Civ. Code 1895, § 4723, a party to all subsequent proceedings in garnishment, and may take advantage of any defect in the pleadings of his adversary.

2. ATTACHMENT—DECLARATION—FILING.

In a suit by attachment in the city court of Lexington, it is necessary to file a declaration in attachment at the term to which the suit is returnable, in like manner as if the suit were in the superior court. In the absence of such a declaration, any judgment rendered in the suit is a nullity, and may be attacked anywhere.

(Syllabus by the Court.)

Error from Superior Court, Oglethorpe County; H. M. Holden, Judge.

Action by E. C. Maxwell, administrator, against L. F. Callaway. Judgment for plaintiff, and defendant brings error. Reversed.

Joel & Hawes Cloud, for plaintiff in error. Hamilton McWhorter and Hamilton McWhorter, Jr., for defendant in error.

CANDLER, J. By the terms of the act approved December 13, 1899 (Acts 1899, p. 400, § 19), establishing the city court of Lexington, it was provided that "all laws upon the subjects of attachments and garnishments as to any manner whatever in the superior courts of this state shall apply to the said city court as if named with the superior

court, so far as the nature of the city court will admit." Consequently, in a suit in attachment in that court, it is as necessary to file a declaration in attachment at the first term of the court as if the suit were brought in the superior court. In a proceeding on garnishment in attachment, where a claim to the fund sought to be reached is filed, and bond is given to dissolve the garnishment, in accordance with Civ. Code 1895, § 4720, the claimant becomes "a party to all further proceedings upon said garnishment." Civ. Code 1895, § 4723. As a party to the garnishment proceedings, whose interests are adverse to those of the plaintiff, he may, of course, take advantage of any defect in the pleadings. The failure of the plaintiff to file his declaration in attachment at the first term is a very serious defect—so serious, indeed, as to make it impossible to render any valid judgment in the case. The words of the statute are mandatory—"the plaintiff shall file his declaration at the first term." Civ. Code 1895, § 4556. As was said by Mr. Justice Hall in Banks v. Hunt, 70 Ga. 743: "An attachment can no more proceed to judgment without a declaration filed on it at the term of court to which it is returnable than could an ordinary suit, unless the declaration had been filed twenty days before the term to which the suit was made returnable." See, also, Jaffray v. Purtell, 66 Ga. 226. Nor does it matter that the claimant failed to call the attention of the judge of the city court to the fact that there was no declaration in attachment. A judgment against the fund in which the claimant was interested, in the absence of such a declaration, was an absolute nullity, and he could attack it anywhere. It was error to overrule the certiorari.

Judgment reversed. All the Justices concur except SIMMONS, C. J., absent.

(122 Ga. 242)

ELLIS v. STEWART et al.

(Supreme Court of Georgia. June 14, 1905.)

1. INJUNCTION—PENDING PROCEEDING—FORCIBLE ENTRY.

A forcible entry proceeding, under Civ. Code 1895, § 4823, is, after service of the notice therein required, a "pending proceeding," within the meaning of Civ. Code 1895, § 4950, which will authorize the judge of the superior court of the county in which such proceeding is instituted to entertain an application to enjoin the same at the instance of the defendant, notwithstanding the plaintiff may be a resident of another county. Moore v. Medlock, 28 S. E. 836, 101 Ga. 94; Dawson v. Equitable Mtg. Co., 34 S. E. 668, 109 Ga. 389; Townsend v. Brinson, 43 S. E. 748, 117 Ga. 875.

2. INJUNCTION—CONFLICTING EVIDENCE.

The evidence being conflicting on material issues in the case, the discretion of the judge in refusing to grant an injunction will not be interfered with.

(Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Action by K. C. Ellis against L. B. Stewart and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. F. Golightly, for plaintiff in error. J. W. Wise, for defendants in error.

COBB, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(122 Ga. 278)

STANSELL v. MERCHANTS' & FARMERS' BANK.

(Supreme Court of Georgia. June 14, 1905.)

1. WRIT OF ERROR—DISMISSAL—BRIEF OF EVIDENCE.

Though it does not appear, either from the transcript of the record or by a recital in the bill of exceptions, that a brief of the evidence had been approved by the court, or had been agreed upon by counsel, this court will not dismiss the bill of exceptions; but it cannot pass upon those assignments of error which depend for their determination upon the evidence, and, if all of the assignments of error are of this character, the judgment will be affirmed. Fleming v. Roberts, 40 S. E. 792, 114 Ga. 634; Heard v. State, 39 S. E. 909, 114 Ga. 90.

2. SAME—REVIEW OF INSTRUCTIONS.

"Where there is no assignment of error upon a charge of the court save that the court erred in so charging, and the charge states a proposition of law which is in the abstract correct, this court will not consider whether the charge is applicable or appropriate in the case." Brown v. Latham, 42 S. E. 53, 115 Ga. 666.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action between the Merchants' & Farmers' Bank and R. J. Stansell. From the judgment, Stansell brings error. Affirmed.

L. W. Branch, for plaintiff in error. J. G. McCall and Z. D. Harrison, for defendant in error.

EVANS, J. Judgment affirmed.

SIMMONS, C. J., absent.

(122 Ga. 251)

SAWYER v. GEORGIA R. & BANKING CO.

(Supreme Court of Georgia. June 14, 1905.)

RAILROADS — ACCIDENT AT CROSSING — EVIDENCE—SECOND TRIAL.

Plaintiff brought suit against the defendant for the homicide of her husband, which occurred from his being struck by a freight train of the defendant while crossing the railroad tracks at a public street crossing in the city of Madison. A verdict was rendered in favor of the plaintiff, a motion for a new trial was overruled, and the defendant excepted. This court held, on the evidence as then presented, that it disclosed that the plaintiff's husband, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence, and reversed the judgment. 37 S. E. 380, 112 Ga. 846. On the second trial the evidence for the plaintiff differed in material respects from that on the former trial. It tended to show that the train which caused the injury was not on schedule time, but more than an hour late, so

that there was no reason on the part of the deceased to anticipate its coming; that there were freight cars standing on the side track on the side of the railroad which the deceased approached, and within a few feet of the main line, in such position that, together with the depot building and another building not far away, they would obstruct the view of the railroad track by the deceased until he passed the end of the freight cars on the side track, and was near the main line; that the train was running about 30 miles an hour, in violation of an ordinance of the city limiting the speed of railroad trains crossing the public street where the injury occurred to 6 miles an hour. The jury found a second verdict for the plaintiff. A motion for a new trial was made, and the judge (other than the one who presided at the trial) again set aside the verdict, holding that the evidence was substantially the same as when the case was passed on by the Supreme Court. *Held*, that this was error. The evidence on the second trial was materially different from that on the former trial, and the second verdict should have been allowed to stand.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by Louvinia Sawyer against the Georgia Railroad & Banking Company. Judgment for defendant, and plaintiff brings error. Reversed.

Q. L. Williford and George & George, for plaintiff in error. Jos. B. & Bryan Cumming and Foster & Butler, for defendant in error.

LUMPKIN, J. 1. The headnote will show that on the second trial the case was a proper one for determination by the jury. The judge who presided on the hearing of the motion for a new trial thought that the case was controlled by the ruling made by this court in 112 Ga. 346, 37 S. E. 380. In this we think he erred. We have carefully examined the record of the case as it then appeared and as it is now presented, and we find very material differences. Without setting out the evidence in detail, a few illustrations of the change of status will suffice. On the former trial the principal witness for the plaintiff was one Shields. In his testimony he strongly indicated that the plaintiff's husband could have seen the approaching train, and, while some mention was made of the possibility of there being freight cars on the side track, it was very vague and uncertain as to the number, position, and effect on the view of the plaintiff's husband while approaching the track. Indeed, Shields developed into a most excellent witness for the defense. On the second trial, plaintiff did not introduce him at all, but the defendant did so. The plaintiff introduced as his leading witness one Ike Burton. Among other things, he testified that there were other cars between the crossing and the depot—one standing where it had been unloaded, and two more in front of the depot; that the depot was within three feet of the side track; that the car first mentioned was standing between the main road that crosses the track and the depot; that, "with that car standing there, no one could see down that track until they got on the railroad"; that the train had to pass the depot before it reached the crossing; and that it was running at the rate of about 35 miles an hour. Another witness testified that the train which caused the injury was due, according to schedule, at 2 o'clock and 38 minutes P. M. There was evidence to show that it did not arrive until after 4 o'clock. Some of the other evidence set out in the headnote was before the court on the former trial, but this will suffice to show that there were material differences. We think there was enough to sustain the finding of the jury, and that the second verdict should have been allowed to stand. Richmond & Danville R. Co. v. Howard, 79 Ga. 44 (2), 3 S. E. 426; Broyles, Rec., v. Prisock, 97 Ga. 643 (6), 25 S. E. 389; Hopkins' Per. Inj. §§ 4, 90.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 133)

WILLIAMS v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

1. CRIMINAL LAW—NEW TRIAL—RECEPTION OF EVIDENCE.

If the corpus delicti and the guilt of the defendant are both proved as the law requires, it will not furnish ground for a new trial that the court did not require the evidence to be so introduced as to divide it into two distinct parts; the first referring to the corpus delicti, and the second to the defendant's connection with the crime.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1610.]

2. SAME—STATEMENTS OF ACCUSED.

A letter written by one accused of a crime a day or two after its commission, and containing statements favorable to himself, is not admissible in his behalf.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 928–933.]

3. SAME—ALIBI.

Alibi, as a defense, involves the impossibility of the prisoner's presence at the scene of the offense at the time of its commission.

4. MURDER—EVIDENCE.

Where a defendant was charged with committing murder by administering poison, evidence introduced for the purpose of proving that he was not present at the time and place when the state contended that he bought the poison was proper for consideration under the plea of not guilty, but did not set up a distinct defense of alibi.

5. CRIMINAL LAW — OBJECTIONS TO EVIDENCE.

Where counsel for the defendant began to make objection to certain evidence, but the court interrupted him by saying that he could bring out on cross-examination that the testimony was improper, and it did not appear that the objection was ever completed, or the grounds stated, or any subsequent motion to rule out the evidence made, this furnishes no ground for a motion for a new trial.

6. SAME—INSTRUCTIONS.

Where the court properly charged the jury on the subject of reasonable doubt, a request to charge that a particular fact sought to be shown by the defense could create a reasonable

doubt in the minds of the jury was rightly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1991.]

7. SAME.

After charging that, in order to convict upon circumstantial evidence, the proof must exclude every reasonable hypothesis except that of guilt, there was no error in refusing to give in charge a request which added that this rule should never be relaxed in a case involving life, or imprisonment for life.

8. SAME.

There was no error in refusing to charge that the jury were to consider the evidence of expert witnesses as they did that which fell from the lips of other witnesses, and that the law permitted them to believe it in preference to other evidence, if there was conflict between the two; the request to charge leaving out of view any consideration of the credibility of the witnesses themselves, or their opportunity for knowing the facts to which they testified, or the nature of such facts.

9. MURDER—EVIDENCE.

The verdict was sustained by the evidence, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Neal Williams was convicted of murder, and brings error. Affirmed.

Neal Williams, colored, was indicted for the murder of Mattie Bell Devine. He was convicted, and sentenced to imprisonment for life. He moved for a new trial, which was denied, and he excepted. The evidence on behalf of the state was, in brief, as follows: The defendant and deceased lived together in adultery. They sometimes quarreled, and had mutually cursed each other. About a week before the death of the woman they had a quarrel, and she told him to leave. He said when he left he would leave somebody sick or dead. Several days after this, on Sunday, he went to a drug store and bought a box of poison, known as "Rough on Rats." He inquired if it would dissolve in water or whisky, and aroused the suspicion of the clerk, so that the latter desired to retake the poison, but the druggist told the clerk to let him have it. Defendant, in making the purchase, gave a fictitious name; claiming that his name was Charlie Hill. He left on Monday, going from Augusta to Charleston, S. C. On the day he left he broke up some furniture in the house belonging to the deceased, and cut the mattresses. The woman was taken sick Monday night, and died Tuesday night. She became sick after eating supper. Her brother, who also ate there, became sick shortly afterwards. Both exhibited symptoms of arsenic poisoning. An antidote was administered to the brother, and he recovered. The morning after her death a box partly filled with "Rough on Rats" was found on a sill over the door. A bucket in the house containing flour exhibited signs of having something mixed in it which appeared to be a powder differing in color from the flour. This flour and some biscuits which had been cooked by the deceased were examined by a chemical test, and found to contain arsenic. The witness who so testified stated on cross-examination that the test used would show the presence of arsenic or antimony; that the analysis was not carried further to differentiate between arsenic and antimony, for the reason that both of them are irritant poisons, and antimony is not contained in Rough on Rats, which is mainly composed of arsenic. The stomach of the woman was taken out and afterwards examined, but no arsenic was found in it. It had certain red splotches or spots upon it, which one of the witnesses testified might have been the result of an irritant. A physician testified on this subject as follows: "Upon opening the stomach itself, we found that the mucous membrane was somewhat softened in appearance, and that there were one or two large reddened spots upon the mucous membrane lining. Those reddened spots could have been produced by any irritant, or by some of this powder, Rough on Rats. The effect of an irritant poison is to cause violent vomiting and purging. Arsenic is an irritant poison. It would be absorbed or eliminated by the system after it had remained in the stomach some time. It is not a cumulative poison. It is rapidly eliminated. It may stay sometimes, but it can be and is frequently rapidly eliminated. Where it is eliminated by absorption and by vomiting, there are cases on record where the stomach showed absolutely no signs of it at all. Where signs of it are left, those signs are the reddened spots I have spoken of, and possibly a reddened spot would give the appearance of an actual burn, but certainly the most characteristic finding would be these reddened areas. I wrote on her death certificate, 'Arsenic poison.' It was, in my opinion, the cause of her death." A negro woman testified that the defendant had asked her on Sunday if she had any concentrated lye or any rat poison, saying that he had two old cats that drank out of his water bucket. Another testified that he applied to her for strychnine on Sunday evening. Another testified that on Monday the deceased and herself were walking on the street, when the defendant came up and obtained from the deceased a key to the house where they were living; that when the witness went back to the house the defendant was gone, the door locked, and the key in the door; that the defendant and the deceased had a fuss on the Tuesday preceding; and that he said he was going to kill her before he got off. Another witness testified that the defendant applied to her for some Red Seal lye, saying that he wanted to kill two old black cats, but she fixed the time of the application as being on Monday. The defendant was arrested in Charleston, and brought back to Augusta. There was other evidence, which it is not necessary to set out in detail.

Oswell R. Eve, for plaintiff in error. J. S. Reynolds, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

LUMPKIN, J. (after stating the above facts). 1. Counsel for defendant objected to the introduction of any evidence against the accused until the corpus delicti had first been proved by the state. There was no error in overruling this objection. The order in which evidence is allowed to be introduced must rest to a considerable extent in the sound discretion of the presiding judge. Sometimes the corpus delicti may be proved separately, and evidence tending to connect the accused with the offense produced afterward. In other cases proof of the corpus delicti and of the connection of the defendant with it is so interwoven as to be practically inseparable in the introduction of evidence. Thus, if a defendant were charged with murder by shooting another, it would be difficult to prove the homicide as an independent fact before showing that the defendant was the perpetrator. If the corpus delicti and the guilt of the defendant are both proved as the law requires, it will not furnish him any ground for complaint that the evidence did not separate the case into two distinct parts, and refer to each separately.

2. A letter was offered in evidence which had been written by the defendant from Charleston, a day or two after the woman's death, to a witness sworn in his behalf, who resided at Augusta; telling of his arrival in Charleston, and his compliance with a request previously made by the witness; explaining why he had gone to Charleston on the "former excursion," and requesting the witness to address a reply to him at that point. This was properly rejected by the court. It amounted to offering declarations of the defendant in his own favor, forming no part of the res gestæ, or, as it is sometimes expressed, self-serving declarations. Dixon v. State, 116 Ga. 186, 42 S. E. 357; Boston v. State, 94 Ga. 590, 21 S. E. 603.

3, 4. Complaint is made that the court charged that the defendant set up the plea of alibi, besides that of not guilty, and defined "alibi" to mean absence from the scene of the alleged crime at the time of its commission, thus making it impossible for him to have perpetrated it. The court gave a correct definition of the defense of alibi, and correctly applied it. Pen. Code 1895, § 992. The contention made by counsel for defendant is that the alibi sought to be shown by him was that he was at a different place at the time when the state endeavored to prove that he purchased poison. This would not be a defense of alibi, but merely evidence conflicting with some of that introduced by the state, and would be for the consideration of the jury under the plea of not guilty. The court did not err, therefore, in failing to charge upon this contention of the defendant as if it were a plea of alibi.

5. Objection was made to allowing a witness to testify that he saw the bread, some of which he was told the deceased had eaten. As appears in the motion for new trial, however, the ground of objection was not stated. The court and counsel had a colloquy which resulted in the evidence remaining in, the court saying that counsel could show its impropriety on cross-examination. This court cannot pass upon the alleged error without having before it the ground of objection made to the evidence at the time when it was offered. As to not ruling it out later, see Stone v. State, 118 Ga. 705 (9), 45 S. E. 630, 908 Am. St. Rep. 145; Cawthon v. State, 119 Ga. 396, 46 S. E. 897.

6. It is contended that the court erred in refusing to give the following request to charge: "I charge you that the failure to find arsenic in the stomach of the deceased could create a reasonable doubt in your mind as to the guilt of the accused, and, if that doubt is with you, you cannot convict the accused." This request was properly refused. It singled out a particular piece of evidence, and sought to have the jury instructed, in effect, that it could be sufficient to create a reasonable doubt in their minds. The charge fairly instructed the jury on the subject of reasonable doubt. McDuffie v. State, 90 Ga. 786, 17 S. E. 105; Delk v. State, 92 Ga. 453, 17 S. E. 269.

7. The rule that, in order to convict upon circumstantial evidence, the proof must exclude every reasonable hypothesis except that of guilt, was given in charge by the court. Defendant's counsel made a request to charge which was a substantial repetition of the charge given, with the added clause, "and this rule should never be relaxed in a case involving life, or imprisonment for life." This was a purely argumentative addition to the rule of law, and was rightly refused by the court. The use of language of this character by a justice of the Supreme Court in discussing the facts of a particular case (Martin v. State, 88 Ga. 295) does not necessarily render it proper for use by a judge of a trial court in charging the jury (Atlanta & West Point R. R. v. Hudson [present term] 51 S. E. 29).

8. Error was alleged because the court declined to give the following request to charge: "I charge you that you are to consider the evidence of expert witnesses as you do that which falls from the lips of other witnesses. The law permits you to believe it in preference to the other evidence if there is a conflict between the two." The court left the jury to determine the weight of the evidence, and properly refused this request. In it the credibility of the witnesses themselves was entirely left out of view, as well as their opportunity for knowing the facts to which they testified, and the nature of

such facts. That a witness may be an expert does not furnish ground for disbelieving him, but his evidence is to be weighed by the jury, and the rules applicable to determining the weight to be given other evidence are also applicable as to experts. Merritt v. State, 107 Ga. 676 (4), 34 S. E. 361; Ryder v. State, 100 Ga. 529 (6), 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. Rep. 334.

9. The verdict was sustained by the evidence, and there was no error requiring a new trial.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 263)

HAYSLIP v. GILLIS.

(Supreme Court of Georgia. June 14, 1905.)

GUARDIAN — APPOINTMENT — DOMICILE OF MINOR.

Where one, without legal authority, took a child of tender years from the county of its domicile into another county, where a third person took it into her family and cared for and supported it for a number of years, the ordinary of the latter county, in the absence of any choice by the minor making that county his domicile, has no jurisdiction to appoint a guardian for it.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, § 15.]

Darden v. Wyatt, 15 Ga. 414, distinguished.

(Syllabus by the Court.)

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

On an application of Elizabeth Gillis for sale of lands, as guardian, W. T. Hayslip, claiming to be guardian, interposed to stop the sale. Judgment for Gillis, and Hayslip brings error. Reversed.

Allen Fort & Son, for plaintiff in error. Long & Son, Z. D. Harrison, and Culberson & Johnson, for defendant in error.

FISH, P. J. It appears from the record that Maggie Hayslip's father, Ben Hayslip, at the time of his death was a resident of Lee county, where he owned a parcel of land. She was a child of very tender age when her father died. Her mother's death occurred before her father's. Soon after Ben Hayslip died, his brother, W. T. Hayslip, took the child to his mother's to live. The record does not disclose in what county his mother resided. Maggie lived with her grandmother until the latter died, when her husband (one English) took charge of the child; giving her to one Patterson, who carried her to Worth county, where "she was among several families for a while," until Mrs. Elizabeth Gillis, who resided in Worth, but who was of no kin to Maggie, took her to live with her. At this time Maggie was about three years old. She continued to live with Mrs. Gillis, who cared for, supported, and educated her, for nine years or more. No one else ever contributed anything to the child's support. On September 1, 1902, while she was still living with Mrs. Gillis, the ordinary of Worth county appointed Mrs. Gillis guardian of Maggie's person and property. On May 4, 1903, the ordinary of Lee county appointed W. T. Hayslip guardian of Maggie's person and property. Mrs. Gillis, as guardian, advertised the land in Lee county belonging to the child to be sold on the first Monday in January, 1904, when W. T. Hayslip, as guardian as aforesaid, interposed his claim to stop the sale. On the trial of the claim case the foregoing facts were adduced, and a verdict found against the claim of Hayslip. He moved for a new trial upon the general grounds that the verdict was contrary to law and the evidence, and without evidence to support it, and excepted to the overruling of his motion.

The sole question presented for determination is, who is, under the facts, the legal guardian of Maggie Hayslip? Civ. Code of 1895, § 2516, provides that "the ordinary of the county of the domicile of a minor having no guardian shall have the power of appointing a guardian of the person and property, or either, of such child." The solution of the question therefore depends upon the domicile of Maggie Hayslip, the minor. Where was her domicile—in Worth county or in Lee? At the time of her father's death her domicile was unquestionably in Lee. Has it since been legally changed? We think not. When less than three years old she was carried to Worth county by Patterson, into whose custody her stepgrandfather had placed her, and, after being for a time with several families, she was taken by Mrs. Gillis. None of these people was related to the child, and none of them had any legal right to change her domicile. However generous and commendable their motives may have been cannot affect the question. The domicile of her father at his death continues to be her domicile until it is legally changed. The general rule is that an infant, on account of its presumed want of discretion, is incapable of changing its own domicile. Our Code, however, modifies the rule. It declares: "The domicile of every minor shall be that of his father, if alive, unless such father has voluntarily relinquished his parental authority to some other person. In such event the domicile of the minor shall be that of his master, if an apprentice, or his employer; if neither master nor employer, then the place of his own choice; if the father be dead, then the domicile of the minor shall be that of his guardian, if he has one in this state; if no guardian, then of his mother, if alive; if no mother, then of his employer; if no employer, then of his own choice. The domicile of a bastard shall be that of his mother." Civ. Code 1895, § 1827. The record fails to disclose that the minor in this case has ever exercised the privilege given her under the law

of choosing a domicile for herself. In other words, it does not appear that she has done anything to change the domicile fixed for her by the law at her father's death. As her domicile was never changed from Lee county to the county of Worth, the ordinary of the latter county had no jurisdiction to appoint a guardian, and his action in the matter was void.

Counsel for defendant in error relied on the case of Darden v. Wyatt, 15 Ga. 414, wherein it was held: "A father dies in a county, leaving minor children. Soon afterwards the mother dies, leaving minors in the same county. Then the grandfather of the minors, who resides in another county, carries the minors to his home, in that county, to live with him. Whilst they are thus living with him, an uncle applies in the first county for letters of guardianship of the minors: Held, that the court of ordinary for the first county had no authority to grant the letters, but that the authority to grant them was in the court of ordinary of the second county." That decision was put upon the act of 1838, which declared that "the place where the family of any person shall permanently reside, in this state, and the place where any person having no family, shall generally lodge, shall be held and considered as the most notorious place of abode of such person or persons, respectively." Laws 1838, p. 203. In construing the act the court said: "This act, by its title, preamble, and body, extends to all persons who are citizens or inhabitants of this state. It therefore extends to minors. It makes the test of residence, of those who have no family, the place where they 'shall generally lodge.' That therefore is the test for minors in this case." That case was tried in 1854. Our first Civil Code, which went into effect in 1863, changed the act of 1838 so as to make it apply only to persons of "full age." Code 1863, § 1644, which is section 1824 of our present Civil Code (of 1895). The provisions contained in section 1827 of the present Civil Code (of 1895), which we have quoted, in reference to the domicile of minors, also appears in the Code of 1863 (section 1647). On account of these changes made by the Code of 1863 in the law as it existed in 1854, when Darden v. Wyatt was decided, that case is not controlling. Moreover, in that case the grandfather of the minors took them from the county of the domicile of their deceased father, and carried them to his home, in another county, there to live with him, whereas, as we have shown, the minor in the present case was carried from the county of her deceased father's domicile, and cared for by persons who were not her kin. Therefore, if the court had broadly held in the Darden Case, as perhaps it might properly have done (see Lamar v. Micou, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. Ed. 94), that the grandfather of an infant whose parents are both dead may change the domicile of the infant from one county to another, so as to vest in the ordinary of the latter county jurisdiction to appoint a guardian, such a decision would not have been contrary to the case at bar, for the reason just indicated. Accordingly we hold that, under the facts and the law as we conceive it to be, a verdict was demanded in favor of the claimant, and the court below erred in not granting a new trial.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 133)

TAYLOR v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

1. FORGERY — INDICTMENT — DESCRIPTION OF INSTRUMENT.

While the strict rules of the common law in regard to indictments have been modified in this state, yet, in an indictment for forging or fraudulently altering a teacher's license, it is necessary to set out the material parts thereof; and it is not sufficient to describe the instrument merely by calling it a license, and stating as a legal conclusion that it authorized the holder to teach in the public schools of the state and to receive pay therefor.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forgery, §§ 66–76.]

2. SAME.

None of the grounds of the demurrer, except that which makes the point just referred to, were meritorious, and they were properly overruled.

(Syllabus by the Court.)

Error from Superior Court, Hart County; H. M. Holden, Judge.

A. S. Taylor was convicted of forgery, and brings error. Reversed.

A. S. Taylor was indicted in the superior court of Hart county for the offense of falsely and fraudulently altering a teacher's license. The indictment was demurred to. The demurrer was overruled, and the defendant excepted. On the argument in the Supreme Court it was suggested that the copy of the indictment sent up with the record contained certain errors, and, under order of the court, another copy was certified and filed. The body of the indictment was as follows: "The grand jurors * * * charge and accuse A. S. Taylor with the offense of felony. For that the said A. S. Taylor did on the 1st day of January, 1904, in the county aforesaid, with force and arms, with intent to defraud said county of Hart in said state of Georgia, falsely and fraudulently alter a license issued by E. Benton, county school commissioner of Bryan county, Georgia, to A. S. Taylor, a teacher the same, being what is commonly known as a 'license,' which authorizes a teacher to contract with the proper officers to teach in the public schools of said state, and authorizing the holder of such license to be paid for such teaching out of the public school fund, said license as originally issued being for what is known as 'third grade,' author-

izing the holder thereof, the person to whom issued, to be contracted with to teach in the public schools, in which he may be employed for a term of one year from date of issue, the date appearing on said license in the face thereof as the date of issue being July 1st, 1904; the said alterations so made by said A. S. Taylor being the altering the word 'third,' originally appearing before the word 'grade' in said license, so as to make it read 'first,' and said license at that part thereof to read 'first grade,' and altering the word 'one' before the word 'years' in said license, so as to make it read 'three,' and thus making said license, when so altered, read that part thereof 'three years,' and by altering said date appearing in the face of said license as the date of issue of the same, which was originally July 1st, 1904, so that, after said alteration so then and there made by said A. S. Taylor, said license read in that part of said license, 'July 1st, 1903'; teachers of third-grade license being authorized to teach thereunder only one year from date thereof, so as to receive pay from public school fund received in said county of Hart less pay for time taught than persons holding first-grade license, authorizing them to teach three years from date of said license. Said alterations being so made by said A. S. Taylor with intent to procure more money from the public school fund of the said county of Hart for teaching in the public school therein than said Taylor would have been authorized to receive under said license as the same was originally issued, thus with the intent to so defraud said county of Hart."

A. G. & Julian McCurry, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

LUMPKIN, J. The demurrer in this case contains 12 grounds, but several of them make substantially the same point. It is contended that the indictment states no legal offense; that it does not set out the license alleged to have been fraudulently altered; that it is not shown that the defendant made any attempt to use the license alleged to have been altered to defraud the county, or how it was intended to defraud the county, or to draw public funds thereof; that no authority is shown in the county school commissioner who issued the license to do so; that it does not show clearly that the holder of a first-grade license had any more right than the holder of a third-grade license, or was entitled to receive more pay, or was paid more, in Hart county; that the license was not good in Hart county without being indorsed by the county school commissioner of that county, and it was not shown that there was any intent to induce him to indorse it, or that the defendant altered it with intent to induce the public school authorities of Hart county to contract with him or authorize him to teach school; and that the county of Hart was not alleged to be a corporation.

We do not think there is merit in any of the grounds of the demurrer, except one. The indictment was based on the act of December 18, 1900 (Acts 1900, p. 69; Van Epps' Code Supp. § 6675). Under that act it is criminal to falsely and fraudulently forge or alter "any certificate or license issued by any county school commissioner of this state," with intent to defraud the state or any county thereof. It is not necessary to allege the authority of the commissioner to issue the license, nor the details of the manner in which the defendant intends to defraud the county, nor that he has actually committed a fraud, or attempted to do so, by overt acts. Travis v. State, 83 Ga. 372, 9 S. E. 1063; Shope v. State, 106 Ga. 226, 32 S. E. 140. The courts will take judicial cognizance of the fact that each county is a body corporate. Pol. Code 1895, § 340; Civ. Code 1895, § 5148.

At common law, as a general proposition, when a written instrument formed a part of the gist of the offense charged, it was required to be set out verbatim, unless where a statute declared that it was not necessary. An instrument charged to be forged was not required to be set out verbatim where it was lost or destroyed, or in the defendant's possession, or where access to it could not be had, in which event the disabling fact could be alleged and the substance set out. 2 Bish. Crim. Proc. (3d Ed.) §§ 401, 403, 404, 419; 1 Barb. Crim. L. p. 334; 2 McLain's Crim. L. §§ 794, 796; Whar. Crim. P. & P. (9th Ed.) §§ 167, 180. One of the principal reasons given by the last-named author for the necessity for particularity in criminal pleading is: "To enable the defendant to prepare for his defense in particular cases, and to plead in all; or, if he prefer it, to submit to the court by demurrer whether the facts alleged (supposing them to be true) so support the conclusion in law as to render it necessary for him to make an answer to the charge." Section 166d.

In England, and in some of the United States, there have been special legislative enactments on the subject. Id. § 412. But, in the absence of statutory enactment, the general rule requires that there should be such a setting out of at least the material parts of the paper alleged to be forged or altered as would put the defendant upon notice of its contents. The exceptions need not be mentioned. In this state the niceties and technicalities required in indictments at common law have been largely swept away. Pen. Code 1895, § 929; Studstill v. State, 7 Ga. 2; Berry v. State, 10 Ga. 517; Stephen v. State, 11 Ga. 240. In Johnson v. State, 90 Ga. 444, 16 S. E. 93, it is said that: "In our judgment, the section of our Code above cited was not intended to dispense with the substance of good pleading. It simply

means that an indictment conforming substantially to its requirements will be sufficient, but it is not designed to deny to one accused of crime the right to know enough of the particular facts constituting the alleged offense to be able to prepare for trial." In Haupt v. State, 108 Ga. 53, 34 S. E. 313, 75 Am. St. Rep. 19, it is said that "while, in an indictment for forgery, only the material parts of the instrument, as a contract, are required to be set out," etc., thus recognizing the necessity for putting the defendant on notice of the material parts of the instrument alleged to have been forged or altered. It is not sufficient for the indictment to state conclusions or inferences in regard to the legal effect of the instrument. The decision in Watson v. State, 78 Ga. 349, was not based on a charge of forging or altering an instrument.

The indictment under consideration describes the instrument alleged to have been altered as being "what is commonly known as a 'license,' which authorizes a teacher to contract with the proper officers to teach in the public schools of said state, and authorizing the holder of such license to be paid for such teaching out of the public school fund." In the latter part of the indictment occur the following words, "teachers of third-grade license being authorized to teach thereunder only one year from date thereof so as to receive pay from public school fund received in said county of Hart less pay for time taught than persons holding first-grade license, authorizing them to teach three years from date of said license." Neither of these expressions contains any sufficient description or setting forth of the instrument, but rather a mere opinion of the grand jury or the Solicitor General as to the result or legal effect of it. In the body of the indictment certain words forming part of the instrument are alleged to have been altered. They do not appear to have been consecutive words, but to have occurred at different places in the license. It is impracticable from an inspection of the indictment to learn what was the contents of the whole paper or of a substantial part thereof.

The ground of the demurrer to the effect that the writing or paper alleged to have been fraudulently altered was not sufficiently set forth in the indictment should have been sustained. The other grounds were properly overruled.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 205)

POOL v. WARREN COUNTY.

(Supreme Court of Georgia. June 14, 1905.)

1. EVIDENCE—DECLARATIONS—RES GESTÆ.

It is incumbent on a party seeking to introduce hearsay evidence as part of the res gestæ to prove that the declarations testified to were so nearly connected with the transaction under investigation, in point of time, as to be free from any suspicion of device or afterthought.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 302, 351-368.]

2. SAME—TIME WHEN MADE.

The word "immediately" is a relative expression; and it is not sufficient, in order to render declarations admissible as part of the res gestæ, to show that they were made "immediately" after the transaction, without showing, at least approximately, how nearly they were connected therewith in point of time.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 302, 351-368.]

3. NEW TRIAL—OBJECTIONS TO EVIDENCE.

A ground of a motion for a new trial complaining of the admission of evidence which does not show that the objections set out in the motion were raised at the time the evidence was offered will not be considered.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 64.]

4. JURORS—DISQUALIFICATION.

In a suit against a county, a brother of one of the county commissioners was not disqualified to act as a juror; it appearing that the commissioner was not pecuniarily interested in the result of the suit, other than as a citizen of the county, and that in defending the action he acted purely in his official capacity.

5. DEFECTIVE BRIDGES — EVIDENCE—LIABILITY OF COUNTY.

The evidence was conflicting, but was sufficient to authorize a finding that the bridge through which the plaintiff claimed to have been precipitated by reason of the defendant's negligence was built prior to the passage of the act approved December 29, 1888 (Acts 1888, p. 39), and that the county was therefore not liable for any injuries arising out of its defective condition.

(Syllabus by the Court.)

Error from Superior Court, Warren County; H. M. Holden, Judge.

Action by Emma Pool against Warren county. Judgment for defendant, and plaintiff brings error. Affirmed.

W. M. Hawes and Evans & Evans, for plaintiff in error. E. P. Davis, for defendant in error.

CANDLER, J. Mrs. Pool sued the county of Warren for damages on account of injuries alleged to have been sustained by her on account of the negligent construction of a bridge in the county, and the negligent failure of the county to keep the bridge in reasonably safe repair; the bridge having given way while she, with others, was crossing it in a surrey, precipitating her to the water below, and causing the injuries of which she complained. The jury found a verdict for the defendant, whereupon the plaintiff made a motion for a new trial, which was overruled, and she excepted.

1, 2. The court excluded the following evidence of the plaintiff's husband, offered in her behalf: "I knew my wife was hurt, because she complained immediately after the accident of being injured in her right side." It is contended that this was error, as the evidence offered was part of the res gestæ, and, as such, should have been admitted. Evidence of declarations of a per-

son other than the witness is, as a general rule, inadmissible, as hearsay. An exception is made to this rule where the declarations accompany an act under investigation, or are "so nearly connected therewith in time as to be free from all suspicion of device or afterthought." Civ. Code 1895, § 5179. It is, of course, incumbent upon a party seeking to introduce hearsay evidence contrary to the general rule to lay the foundation for its introduction by showing that it is within the exception to the rule provided by law. In other words, one who seeks to introduce hearsay evidence as part of the res gestæ of a transaction must show that it is in fact part of the res gestæ. The word "immediately" is a relative term. It may mean a minute, an hour, a day, or a week, according to the circumstances of the case, or other periods of time which the witness has in mind when speaking. In the present case it was incumbent upon the plaintiff to show that the declarations sought to be introduced were so closely connected with the incident of her precipitation through the bridge as to be free from any suspicion of device or afterthought. We cannot say that this was done by the use of the word "immediately." The witness could easily have told approximately, at least, how long after the accident it was that his wife made the complaints as to which he testified. It was not error to exclude the evidence offered.

3. The motion also complains that "the court erred in permitting, over plaintiff's objection, counsel for the defendant to propound to, and [a named witness] to answer, the following hypothetical question." The question and answer are then set out at considerable length, after which the movant proceeds to criticise the ruling of the court admitting the evidence. It nowhere appears, however, that the objections made in the motion were raised on the trial of the case; and, following its oft-repeated decisions, this court will not pass on any question in a motion for a new trial which does not affirmatively appear to have been passed on by the trial judge.

4. The county commissioners were not pecuniarily interested, as such, in the result of the suit. Every citizen of the county had the same interest as they. As officials, it was their duty to defend the suit on behalf of the county, but their official character did not give them any greater interest in the result than if they had been private citizens. Therefore a brother of a county commissioner was no more disqualified to serve as a juror than would have been any citizen of the county. This case differs from Dumas v. State, 62 Ga. 58. There the county commissioner actively furthered the prosecution of the accused, and, in doing so, did acts which were not within the scope of his official duty. His nephew was held to be incompetent as a juror by reason of relationship—not on account of the commissioner's official connection with the prosecution, but because the commissioner acted otherwise than as an official. For, said the court (page 64), the commissioner was to be regarded "as a volunteer prosecutor, and as having committed himself personally and in his private capacity to the side of the prosecution." See, also, Augusta R. Co. v. McDade, 105 Ga. 134, 31 S. E. 420; Smith v. Smith, 119 Ga. 239, 46 S. E. 106.

5. The sole issue of fact involved was whether or not the bridge through which the plaintiff fell was constructed prior to the passage of the act approved December 20, 1888 (Acts 1888, p. 39), providing that a county shall be primarily liable for injuries caused by reason of defective bridges, for it is admitted that, if the bridge was built before that time, no liability attaches to the county for its defective condition. The man who built the bridge testified that the work was done in 1888 or 1889. His belief was that it was in 1889, but he could not swear positively as to which year it was. He also testified that two or three months elapsed after the work was done before he was paid for it. The records of the county commissioners, introduced in evidence, showed that authority to rebuild the bridge was granted on November 6, 1888, and that the work was paid for May 5, 1891. There was evidence for the county that the bridge had been built as early as 1883 or 1884, and that it had never been washed away and rebuilt, as contended by the plaintiff, but had only been repaired from time to time as occasion required. It will thus be seen that there was a square conflict in the evidence. The issue of fact was fairly submitted to the jury, who found for the defendant. The trial judge was satisfied with the verdict, and this court will not disturb it.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent, and EVANS, J., disqualified.

(123 Ga. 256)

JARRETT v. McLAUGHLIN.

(Supreme Court of Georgia. June 14, 1905.)

STIPULATION — CASE TO ABIDE RESULT IN OTHER CASE—PROCEEDING TO SET ASIDE.

To the levy of a mortgage fi. fa. on land, four separate claims by different individuals were interposed. All of the claimants being represented by the same counsel, they agreed with the plaintiff in fi. fa. that one only of the claim cases should be tried, and that the others should abide its result. An order of court to that effect was duly passed, that case was brought to trial, and the plaintiff in fi. fa. prevailed. The case was then taken to the Supreme Court for review, and the judgment of the court below was affirmed. Taylor v. McLaughlin, 48 S. E. 203, 120 Ga. 703. Subsequently, the claimant in one of the other cases sought to prevent judgment against him being entered up in accordance with the above-mentioned agreement, filing a motion (styled an "equitable plea") to set aside that agreement. The sole ground of this motion was that the trial judge, in under-

taking to perfect a brief of the evidence filed in the case which was tried and lost, improperly inserted therein a recital of facts to which no witness testified, and that the changes so made in the brief of the evidence presented a state of facts which constrained the judgment of affirmance rendered by the Supreme Court. This motion was overruled, and judgment against the claimant entered up accordingly, to which action on the part of the trial court exception is taken. *Held*, that there was no merit in the motion to set aside the agreement of the parties, inasmuch as the plaintiff in error voluntarily chose to consent that his case should abide the result of that brought to trial and final judgment, whatever that result might be, or however erroneously or through whatever misfortune it might be reached, and therefore he stands in no better position than does the losing party to that case, as to whom the judgment therein is certainly final.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Stipulations, §§ 46, 67–73.]

(Syllabus by the Court.)

Error from City Court of Columbus; J. L. Willis, Judge.

Application by J. T. Jarrett to set aside a stipulation entered into with L. C. McLaughlin. From an order denying the application, he brings error. Affirmed.

Geo. P. Munro, for plaintiff in error. J. J. Dunham and J. H. Lumpkin, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(128 Ga. 375)

PRIESTER v. MELTON.

(Supreme Court of Georgia. June 16, 1905.)

1. ADVERSE POSSESSION—COLOR OF TITLE.

A writing purporting to contain an agreement to convey land, but which is so indefinite as to the description of the land that the same cannot be thereby identified, is not, in the absence of extrinsic evidence showing the description applicable to a particular parcel of land, admissible in evidence as color of title.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 463, 464.]

2. WITNESS — COMPETENCY — TRANSACTIONS WITH DECEDENT.

In an action of ejectment there were three demises. The lessor in the first demise was dead, and his legal representative was not a party. The lessor in the second demise had conveyed all of his interest to the lessor in the third demise. *Held*, that the lessor in the second demise was a competent witness as to transactions and communications between him and the lessor in the first demise on the trial of an issue between the lessor in the third demise and the tenant in possession.

3. EJECTMENT—EVIDENCE.

When a plaintiff in ejectment seeks to recover on the prior possession of his predecessor in title, a prima facie case is not made out unless the evidence shows prior possession of such predecessor and a deed from him to the plaintiff, or to some one under whom the plaintiff claims, while the grantor therein was in actual possession.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 64.]

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action by Sophia Priester against Thomas Melton. Judgment for defendant, and plaintiff brings error. Affirmed.

This was an action of ejectment in the common-law form. The plaintiff laid three demises, in the names of A. H. Smith, N. J. Priester, and Sophia Priester, respectively. Thomas Melton was the tenant in possession. The case went to trial on the issue made by the plea of not guilty. The plaintiff introduced in evidence a deed from N. J. Priester to Sophia Priester, conveying the premises in dispute. The plaintiff also tendered in evidence a writing, of which the following is a copy: "Georgia, Lowndes County. I have this day bargained to N. J. Priester 15 acres of land adjoining to my Griffin field and Mr. E. L. Moore's land, for which he is to pay $125.00 within 3 years and will receipt him for payments made. Jan. 14th, 1891. A. H. Smith." The court, upon objection, rejected this evidence. The plaintiff then tendered in evidence a receipt, signed by A. H. Smith, reciting the payment of $60 by Nathan Priester. The court, upon objection, rejected this evidence. The plaintiff then introduced N. J. Priester as a witness, and offered to prove by him that "he had been living" on the land in dispute and "had been in the actual possession" for more than seven years, "had built a house and put other improvements" thereon, and "had paid" to A. H. Smith the purchase money for the land. Upon objection to the witness on the ground that A. H. Smith was dead, the court refused to allow the witness to testify. No further evidence being offered, the court awarded a nonsuit, and to this ruling, and the other rulings referred to, the plaintiff excepted.

J. G. Crawford, for plaintiff in error. Denmark, Ashley & Smith, for defendant in error.

COBB, J. 1. The paper signed by A. H. Smith was offered as color of title, but we think it was properly rejected, as the description of the land therein was not, in the absence of extrinsic evidence showing that the description was capable of application to a particular parcel of land, sufficient to identify any particular land. Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691 (1).

2. It appeared that A. H. Smith was dead, that there was no demise in the name of his legal representative, and that N. J. Priester had conveyed all of his interest in the land in controversy to Sophia Priester. Hence there could be no recovery on the demise in the name of A. H. Smith, nor on that in the name of N. J. Priester. The case, therefore, was one in which Sophia Priester was the plaintiff and Melton was the defendant, and, on the trial of the issue thus made, N. J. Priester was not by the death of Smith ren-

dered an incompetent witness under any of the provisions of Civ. Code 1895, § 5269.

3. The testimony of N. J. Priester that he had been in possession of the premises in dispute, claiming them as his own, should have been admitted, but it did not make out a prima facie case in favor of Sophia Priester. The Code declares that "a plaintiff in ejectment may recover the premises in dispute upon his prior possession alone, against one who subsequently acquires possession of the land by mere entry, and without any lawful right whatever." Civ. Code 1895, § 5008. See, also, Parker v. Railroad Co., 81 Ga. 392, 8 S. E. 871; Bleckley v. White, 98 Ga. 597, 25 S. E. 592 (3); Ellis v. Dasher, 101 Ga. 5, 29 S. E. 268; Horton v. Murden, 117 Ga. 73, 43 S. E. 786 (6, 7). While the section of the Code, literally construed, would authorize a recovery only when the plaintiff proves prior possession in himself, the rule is broader than this. An heir or devisee who has never been in possession may recover upon the prior possession under a bona fide claim of ownership of his ancestor or devisor at the time of his death, unless a better adverse title is shown by the defendant. Wolfe v. Baxter, 86 Ga. 705, 13 S. E. 18; Brundage v. Bivens, 105 Ga. 806, 32 S. E. 133; Watkins v. Nugen, 118 Ga. 375, 45 S. E. 260 (1). One who claims under an heir or devisee may recover on proof that the ancestor or devisor died in possession, bona fide claiming ownership, unless the defendant shows a better adverse title by possession or otherwise. Bagley v. Kennedy, 85 Ga. 703, 11 S. E. 1091. One who claims under another, who in turn claims under an executor's deed, may in like manner recover upon proof of possession of the testator at the time of his death. Hadley v. Bean, 53 Ga. 685. In all of the cases cited in which the plaintiff was permitted to recover, not on his own prior possession, but on the prior possession of the person under whom he claimed, such person was either an ancestor or a devisor who died in possession, and therefore whatever title he may have had passed from him at the time he was an actual possessor. It would seem upon principle that one who claims under a deed from a living person who was actually in possession at the time the deed was made should be given the right to recover on the prior possession of his grantor to the same extent that an heir or devisee can recover on the prior possession of his ancestor or devisor. The right in all of such cases is given because the person so claiming the title is supposed to have acquired it by descent, will, or deed, as the case may be, whatever rights would be drawn to the possession, and therefore, for any such right to be acquired by one, it must appear that he acquired it from a possessor. The possessor is allowed to recover upon his bare possession. He may bargain away this right. But one who claims under him, and asserts a right to recover upon his possession, must show that he acquired title, either directly or indirectly, from him while he was in actual possession. See, in this connection, the remarks of Judge Trippe in Hadley v. Bean, supra. If the evidence of N. J. Priester had been admitted, it would have shown possession in him at some time in the past, but it would not have shown that he was in possession at the time he made the deed to Sophia Priester. The plaintiff's case would therefore have failed even if the evidence had been admitted. There was no error in granting a nonsuit.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 332)

SWEAT v. HENDLEY et ux.

(Supreme Court of Georgia. June 15, 1905.)

1. SPECIFIC PERFORMANCE — AMENDMENT OF PETITION.

Where an equitable petition was filed, seeking specific performance of a parol contract to convey a tract of land, alleging possession and improvements made by the plaintiff thereon, an amendment was properly allowed which alleged that the land included in the contract was inadvertently misdescribed in the original petition, and that, instead of being the east half of a certain lot, containing 245 acres, more or less, it included the entire lot, containing 490 acres, more or less.

2. SAME — PERMANENT IMPROVEMENTS — INSTRUCTIONS.

Where a husband and wife alleged that the defendant had contracted with them jointly to convey a certain lot of land, and that they had taken possession of it and placed permanent improvements upon it, and prayed that he be required to execute a deed to them, and the defendant denied the existence of such a contract, it was error for the court to charge that the wife claimed one half of the lot, and the husband the other half, and to submit to the jury separately the rights of the two as to the respective halves.

3. SAME.

This is true although there was some evidence indicating that the wife's claim against the defendant originated on account of services rendered to him, or on account of her interest in other lands, and that in connection with this the defendant agreed that if the husband would buy the tract of land in dispute, and pay the expenses incident to the purchase, he would make them both a deed, and that the purchase was made, possession taken, and improvements made accordingly, and although the defendant testified that the husband had no connection with the purchase of one half of the lot, and only acted for him as a matter of accommodation in making inquiry as to the other, and although the defendant expressed a willingness to make a deed to the wife conveying a life estate on account of her services or interest in the other tract of land.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by J. L. Hendley and Julia Hendley against J. W. Sweat. Judgment for plaintiffs, and defendant brings error. Reversed.

J. L. Hendley and his wife, Mrs. Julia Hendley, brought their equitable action joint-

ly against J. W. Sweat, seeking to compel a specific performance of an alleged contract to make a conveyance of land to them. It was alleged that the wife had worked for Sweat, who was her brother, and that he promised to remunerate her, and asked if she would prefer money or land, to which she replied that she would prefer land; that this conversation occurred in the presence of the husband, and thereupon the defendant told the husband that if he would find a good place, and make the purchase, and pay all the expenses connected therewith, the defendant would take the timber for himself, and make a deed to the land to both the husband and wife; that the purchase of the land involved in the controversy was made accordingly, and the defendant placed the plaintiffs in possession; that they had spent much time, work, and money in improving the land, placing buildings upon it, and clearing up a part of it; that the defendant took the deed to himself in order that he might sell the timber, which he had done; and that the plaintiffs had since occupied the land and paid the taxes, but the defendant refused to make them a conveyance. They prayed that they be decreed to be the lawful owners of the land, and that the defendant be required by decree to make them a warranty deed in fee simple to it. As originally brought the petition described the land involved in regard to which the contract was alleged to have been made as being the east half of lot No. 7 in the Tenth District of Berrien county, containing 245 acres, more or less. The plaintiffs amended their petition "in order to correct a defect inadvertently made therein," by alleging that the land which the defendant agreed to convey included all of lot No. 7, containing 490 acres, more or less, instead of one-half thereof, as originally alleged. This was objected to on the ground that it set up a new and distinct cause of action. The objection was overruled, and an exception pendente lite filed and recorded. In the main bill of exceptions, error is assigned upon it. The defendant denied the contract alleged by the plaintiffs, but alleged that he had bought the land referred to in the petition, and had allowed the plaintiffs to go into possession of it under him, with the expectation that at some future time he would give to Mrs. Hendley, who was his sister, a deed conveying a life estate in it, in order that she might have a good home as long as she lived; that he never contracted to make a warranty deed; that she had lived in the family first with her mother, and after the death of the latter with the defendant, and had worked, and the place had been bought by the joint efforts of all the family; that after her marriage he agreed to pay her $100 for her interest in the place referred to, but it was understood that, if he made her a deed conveying the place where she has since resided for her life, he was not to pay her the $100; that the improvements which the plaintiffs had made were small, if any, and would not amount to the value of the place for rental while they occupied it. The jury found that the defendant should execute to Mrs. Julia Hendley a warranty deed to the west half of the lot of land upon which she resided, and that the defendant should retain the east half of the lot in question. The plaintiffs and the defendant each moved for a new trial. Both motions were overruled. The defendant filed a bill of exceptions, and plaintiffs filed a cross-bill.

Alexander & Gary and W. H. Griffin, for plaintiff in error. R. A. Hendricks, for defendants in error.

LUMPKIN, J. (after stating the above facts). 1. In ejectment or complaint for land mere inaccuracies of description may be corrected by amendment, but the declaration cannot be so amended as to sue for another tract or parcel of land, not included in the original suit. This would be to add a new and distinct cause of action. But the present action is not ejectment or complaint for land. It is an equitable proceeding to compel specific performance of a contract to convey land. It would not be competent to add by amendment another distinct contract to convey other land, and to seek its enforcement in addition to or instead of the contract originally relied on. Milburn v. Davis, 92 Ga. 362, 17 S. E. 286. But if the original contract was misdescribed or erroneously set out, it could be corrected by amendment. The action would still be predicated on the same contract. It would still be an effort to compel specific performance of that contract. Mere correction of a misdescription of the terms of a contract, or of the land covered by it, would not be adding a new and distinct cause of action. The amendment was therefore properly allowed. Civ. Code 1895, §§ 5097, 5098; City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318; McDougall v. Williford, 14 Ga. 665.

2, 3. The presiding judge charged, in effect, that the wife claimed one half of the lot for services rendered the defendant or for her interest in other land, and that if this were true, and she went into possession under a promise of the defendant to make her a deed, and by her labor and expenditure of money had made valuable improvements, the jury should find in her favor as to that part of the property; also that the husband contended that he was entitled to have a deed from the defendant to the other half of the lot, and that, if the contentions of this plaintiff on the subject were correct, the jury should find for him as to that half. From the verdict rendered, it would seem that these charges exercised a strong influence upon the minds of the jury, since they found for the wife as to one half of the lot, and for the defendant as to the other half. All parties to the litigation are dissatisfied with the charge, on the ground that it did

not correctly state the contentions of the parties, and with the verdict of the jury. All contend that the verdict should have been in favor of the plaintiffs jointly, or in favor of the defendant. We think that this combined attack upon the charge and the verdict must prevail. The plaintiffs sought to obtain specific performance of the alleged contract made between the defendant and them jointly. They desired to stand or fall on the right asserted in their pleadings to have the conveyance made to them jointly. The defendant did not set up any ground for separating the parties plaintiff, but denied flatly the contract on which their claim was predicated. His mere expression of willingness to convey a life estate to his sister, not acceded to by the plaintiffs, did not serve as a basis for a verdict in her favor, separately finding that the conveyance in fee simple should be made to her as to one-half of the land. There was nothing in the pleadings authorizing the charge stated above, or the verdict of the jury. See, on this subject, Lake v. Hardee, 57 Ga. 460 (4); Rhodes v. Hart, 51 Ga. 320 (3); 2 Story's Eq. Jur. (13th Ed.) p. 934, § 770a.

4. This covers all the grounds contained in the two motions for new trial which require notice. The cost accruing on each bill of exceptions is adjudged in favor of the plaintiffs in error therein.

Judgment reversed.

SIMMONS, C. J., absent

(123 Ga. 361)

FOKES v. WELLS.

(Supreme Court of Georgia. June 16, 1905.)

APPEAL—REVIEW—NEW TRIAL.

This court will not disturb the first grant of a new trial upon certiorari from a city court unless the verdict is demanded by the evidence. Brantley v. Taylor, 49 S. E. 262, 121 Ga. 475.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 3863.]

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Action between F. Q. Fokes and A. Wells. From an order granting a new trial, Fokes brings error. Affirmed.

Watts Powell, for plaintiff in error. M. P. Hall, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 454)

BENNING v. HORKAN.

(Supreme Court of Georgia. June 17, 1905.)

APPEAL—MOTION FOR NEW TRIAL—AMENDMENT.

After a motion for new trial has been overruled in the superior court, the case brought to this court, and the judgment affirmed, it is too late to amend by adding new grounds to the motion, though the amendment be tendered before the remittitur from this court is made the judgment of the superior court.

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by Mary H. Benning against G. A. Horkan. Judgment for defendant, and plaintiff brings error. Motion to amend motion for new trial denied, and judgment affirmed.

For former opinion, see 48 S. E. 123.

W. C. McCall, for plaintiff in error. Shipp & Kline and Arnold & Arnold, for defendant in error.

LUMPKIN, J. This is the fourth appearance of this case in the Supreme Court. See 105 Ga. 493, 30 S. E. 748; 111 Ga. 126, 36 S. E. 432; 120 Ga. 734, 48 S. E. 123. The plaintiff having lost her case in the superior court, a motion for new trial made by her having been overruled, and that judgment having been affirmed by this court, the case was at an end, and a proposition to amend the motion for new trial came too late.

Our law is quite liberal on the subject of amendment, but it contemplates that there shall be an end of litigation. Southern Mutual Ins. Co. v. Turnley, 100 Ga. 296, (7), 302, 27 S. E. 975; The Central Railroad & Banking Co. v. Paterson, 87 Ga. 646, 13 S. E. 525. This presents a different case from one where the judgment of the trial court has been reversed and the case sent back to that court for further action. Savannah, etc., Ry. Co. v. Chaney, 102 Ga. 814, 30 S. E. 437; Daniel v. Foster, 49 Ga. 303.

Judgment affirmed.

(123 Ga. 304)

ATLANTIC & B. RY. CO. v. ROBERTS.

(Supreme Court of Georgia. June 15, 1905.)

PLEADING — SPECIAL CONTRACT — QUANTUM MERUIT.

The petition, as amended, authorized a recovery either upon proof of a special contract or upon a quantum meruit. The evidence authorized a recovery upon either theory, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from City Court of Vienna; O. R. Crisp, Judge.

Action by E. A. Roberts against the Atlantic & Birmingham Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Sweat and Crum & Jones, for plaintiff in error. M. P. Hall and W. F. George, for defendant in error.

COBB, J. The plaintiff sued the railway company upon an account for goods sold and delivered, and by an amendment, which was allowed without objection, set up an ex-

press contract to pay for the goods at the sum named in the account. Such amendment also contained allegations which, as against a general demurrer, would be sufficient to authorize a recovery upon a quantum meruit. The defendant, in its answer, denied the special contract, and also the other material allegations in the amendment which were relied on for a recovery. The judge submitted both issues to the jury, who returned a verdict in favor of the plaintiff. The defendant made a motion for a new trial, assigning error upon the admission of certain evidence, and also upon an extract from the charge of the court. The motion was overruled, and the defendant excepted. The evidence rejected was a voucher or receipt signed by a person not a party to the case, from whom the railway company claimed to have purchased the goods described in the petition. There being nothing to connect this evidence with the transaction under investigation, it was not erroneous to reject the evidence. The charge complained of was simply an instruction that, under the allegations of the amendment, a recovery upon a quantum meruit was authorized. The evidence was sufficient to support the verdict, and we find no reason for reversing the judgment.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 478)

MARTIN v. STATE.

(Supreme Court of Georgia. June 17, 1905.)

LARCENY—EVIDENCE.

If a person, fraudulently intending to get possession of the money of another and appropriate the same to his own use, by false representations induces the owner to deliver the money to him for the purpose of being applied for the owner's use or benefit, and then appropriates it in pursuance of the original intent, he is guilty of both larceny after trust delegated and simple larceny, and may be prosecuted for, and convicted of, either offense.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, §§ 32, 39.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

T. D. Martin was convicted of larceny, and brings error. Affirmed.

M. G. Bayne, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

FISH, P. J. Martin was tried in the city court of Macon under an accusation charging him with simple larceny, in that he wrongfully and fraudulently took and carried away $25 in money, of the lawful currency of the United States, of the personal goods of Sam Lewis, with intent to steal the same. Lewis testified that, anticipating that a case would be made against him in the recorder's court of the city of Macon for striking a woman named Lethia, he called on Martin for advice, and the latter informed him that he (Martin) would see the recorder and settle the matter. A few days later Martin told Lewis he had seen the recorder, who said the case could be settled for $23. Lewis thereupon gave Martin $25 in lawful currency of the United States; telling him to settle the case, and with the balance of the money procure a license for Lewis to marry Lethia. Martin was to get the papers settling the case, and deliver them to Lewis. Some three weeks later Lewis made inquiries of Martin as to the matter, and Martin informed him that he (Martin) had paid the money to the recorder and settled the case, and, upon Lewis asking him for the papers, stated that he had not procured them. Lewis never got the money back from Martin, nor did Martin procure the marriage license for him. The state also introduced evidence to the effect that no case had been made against Lewis in the recorder's court; that neither the recorder, nor any officer of the city, had ever agreed to settle any case or charge against Lewis, and that Martin had never paid the recorder or any other official of the city any money in settlement of any case or charge against Lewis; and that Martin had never paid the recorder or any other official of the city any money in settlement of any case or charge against Lewis. The accused introduced no evidence, but made a statement in which he said that Lewis gave him $25 to keep for him, and to pay his fine when the case should be made against him; that Lewis had never asked him for the money, and that he still had it, and was keeping it to pay the fine; that he had not seen Lewis since he gave him the money, until he was arrested; and that he never had intended to use the money for his own benefit. The accused was found guilty of the offense charged, moved for a new trial, which was refused, and he excepted.

If a person obtains possession of goods or money by trick or fraud, or under false pretense of a bailment, with intent to appropriate the thing to his own use, and the owner intends to part with the possession only, and not with the property, the possession is obtained unlawfully, and the subsequent appropriation in pursuance of the original intent is larceny. Clark's Crim. Law, 262; 1 Bish. Crim. Law, § 583; Harris v. State, 81 Ga. 758, 7 S. E. 689, 12 Am. St. Rep. 355; Cunnegin v. State, 118 Ga. 125, 44 S. E. 846; Johnson v. State, 119 Ga. 563, 46 S. E. 839. The charge excepted to, being in accordance with this principle, was not erroneous; and, applying the charge to the evidence, the jury were fully authorized in finding the accused guilty of simple larceny. It is true that the evidence also made out a case of larceny after trust (Walker v. State, 117 Ga. 260, 43 S. E. 701), but as the accused, in the same transaction, committed both simple larceny and larceny after trust, there is no legal reason why the state

could not prosecute and convict of the lesser offense—simple larceny—as the common-law rule of merger of crimes, where one is a misdemeanor and the other a felony, does not prevail in this state. Watson v. State, 116 Ga. 607, 43 S. E. 32. We are not unmindful of the fact that in Mobley v. State, 114 Ga. 544, 40 S. E. 728, it was held that, where the evidence showed that the accused was guilty of larceny after trust, he could not legally be convicted of simple larceny; but in that case there was no evidence that the accused had committed simple larceny, as well as larceny after trust. There the accused was voluntarily intrusted with the money which he subsequently appropriated to his own use. He did not obtain possession of the money by any trick, fraud, or false pretense, with intent to steal it. So, while the ruling announced was too broad, the case was correctly decided on its facts. Every case of larceny after trust does not include simple larceny, but both offenses may be committed in the same transaction.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 400)

WOLFF et al. v. SAMPSON.

(Supreme Court of Georgia. June 16, 1905.)

1. FIXTURES — CONVEYANCE OF FREEHOLD — EFFECT.

As between grantor and grantee, the strict rule of the common law prevails, that, in the absence of an agreement to the contrary, all fixtures, whether actually or constructively annexed to the realty, pass by a conveyance of the freehold.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, §§ 47–55.]

2. SAME—LANDLORD AND TENANT.

The evidence authorized a finding that all of the articles which were removed except the gas fixtures were upon the premises at the time the plaintiff's vendor acquired title from the defendants, and that there was no agreement reserving title to such articles. The defendants, therefore, had no right, as tenants under the plaintiff, to remove those articles, but did have the right to remove the gas fixtures, as they were placed in the building during their tenancy under the plaintiff's vendor.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, §§ 22–31.]

3. SAME—JUDGMENT.

The judgment will be affirmed upon condition that the plaintiff write off from the verdict the value of the gas fixtures as indicated in the opinion.

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Action by S. Sampson against C. & S. M. Wolff. Judgment for plaintiff, and defendants bring error. Affirmed on condition.

Sampson brought an action against Charles and S. M. Wolff to recover possession of eight pine store counters, "one low-down siphon water-closet," and fixtures consisting of water pipe, lead, and screws, seven gas fixtures and chandeliers, one lot of pine partitions, and pine office railings and posts, all alleged to be of the value of $318.50. The defendants answered, denying title in the plaintiff, and setting up title in themselves. The trial resulted in a verdict in favor of the plaintiff for the sum of $225. The defendants made a motion for a new trial, which being overruled, they excepted.

J. H. Merrill, for plaintiffs in error. J. F. Mitchell and Theo. Titus, for defendant in error.

COBB, J. The motion for a new trial consisted of the general grounds and mere amplifications of the same. There is no assignment of error on any ruling of the judge during the progress of the case. Under such circumstances, if there was evidence to support any theory which would justify a finding in favor of the plaintiff, this court will not interfere with the discretion of the judge in refusing to grant a new trial. The defendants were the owners of a storehouse, which they sold to Rachel Wolff, who in turn sold to the plaintiff. There is no abstract of the deeds in the brief of evidence, but it is to be inferred from what appears therein that the deeds contained nothing more than the usual covenants in deeds of bargain and sale. After the sale to Rachel Wolff the defendants became her tenants, and continued as tenants of Sampson after his purchase. It distinctly appears that the gas fixtures were placed in the store by the defendants during the tenancy under Rachel Wolff. There is some confusion in the evidence as to the time the other articles were placed in the store, but there is evidence to authorize a finding that they were placed therein by the defendants prior to the sale to Rachel Wolff, one of the defendants testifying: "The partitions, necessary counters and shelving, and water-closet were in there when I sold to Rachel Wolff, and were still there when she sold to the plaintiff." The articles were removed from the store by the defendants before the expiration of their tenancy under the plaintiff. The plaintiff claims that he derived title to the property in controversy under his deed from Rachel Wolff. The defendants claim that these articles were mere trade fixtures, which they had a right to remove during their term. The evidence shows that the partitions, office railing, water-closet, and gas fixtures were attached to the building in the way that such articles are usually attached to buildings in which they are situated. It does not appear that the counters were attached either by nails or screws, but they were of such a character as to be suited to the building and the business that was expected to be carried on therein by any one who occupied the same.

Whether an article of personalty connected with or attached to realty becomes a part of the realty, and therefore such a fixture that it cannot be removed therefrom, de-

pends upon the circumstances under which the article was placed upon the realty, the uses to which it is adapted, and the parties who are at issue as to whether such an article is realty or detachable personalty. The general rule of the common law was that articles attached to the realty become a part thereof; but there was an exception to this rule in the case of trade fixtures. Charleston Ry. Co. v. Hughes, 105 Ga. 1, 23, 30 S. E. 972, 70 Am. St. Rep. 17 (4); Wright v. Du Bignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669 (1). There was also an exception in the case of domestic fixtures which were placed upon the property by a tenant not engaged in any trade, but merely for the more convenient use of the premises during the term, and which were of such a character as to indicate that it was not the intention of the tenant that such articles should become a part of the freehold. Wright v. Du Bignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669 (2).

The rule in reference to trade fixtures is applicable in cases of landlord and tenant, or where the occupant is in for a limited time; but it generally has no application whatever between a grantor and grantee. Mr. Bronson, in his work on Fixtures, says: "As between grantor and grantee, the strict rule of the common law obtains, and the general rule, in the absence of any agreement between the parties to the contrary, undoubtedly is that all fixtures, whether actually or constructively annexed to the realty, pass by a conveyance of the freehold. As between these parties, there is a strict observance of old common-law principles as to fixtures, and the courts have shown an unwillingness to extend the exceptions to the general rule granted to tenants in cases of fixtures between landlord and tenant. In this respect there is an apparently good reason why the courts should maintain that attitude, for the grantor, before the conveyance of his freehold, is the owner of all his fixtures, as well as the realty to which they are attached. He knows what the law is, and it is in his power to make his fixtures personalty before sale of the premises, either by a severance, or by an agreement in the instrument of conveyance duly reserving them to himself." Bronson on Fixtures, § 44. "The fact that articles attached to the premises have been devoted to purposes of trade, domestic convenience, or ornament does not thereby entitle the grantor to remove the same. The exception to the general rule in favor of this class of fixtures is not operative as between grantor and grantee." Bronson on Fixtures, § 47. See, also, 13 Am. & Eng. Enc. Law (2d Ed.) 662 et seq. The grantor might, before surrendering possession, be allowed to remove domestic fixtures which could be detached with little or no injury to the freehold, when he would not be allowed to remove trade fixtures under similar circumstances. The owner of a place of trade is generally not permitted to remove trade fixtures adapted to the purpose for which the building was constructed, in the absence of an agreement to that effect entered into at the time of the sale. In the absence of such an agreement, the fixtures will pass under the instrument which conveys title to the realty. The right to remove annexed articles as personalty may be reserved in the instrument conveying title to the realty, or by an agreement extrinsic and collateral. It has been held, however, that a parol reservation of fixtures, made by the grantor before or at the time of the conveyance, is ineffective, for the reason that parol contemporaneous evidence is inadmissible to vary the terms of a valid written contract. Bronson on Fixtures, p. 266. However, in Richards v. Gilbert, 116 Ga. 382, 42 S. E. 715, a parol agreement seems to have been treated as sufficient. But the question as to whether the agreement should have been in writing was not directly passed upon in that case, the parol evidence having been admitted without objection. The articles in controversy, other than the gas fixtures, being upon the premises at the time of the sale to Rachel Wolff, and being either actually or constructively attached to the building, and all of them being adapted to the use for which the building was constructed, became the property of Rachel Wolff under her deed from the defendants, unless there was an agreement to the contrary between her and them. The burden was upon the defendants to show such an agreement, and, for the purposes of this case, treating a parol agreement as sufficient, the evidence was of such a character as to authorize the jury to find that there was no such agreement. One of the defendants stated in his testimony that he did not sell these fixtures to Rachel Wolff; but taking the evidence as a whole, the jury could properly infer that this was merely a conclusion of his that title to the fixtures did not pass under the deed. If Rachel Wolff became the owner of the fixtures, and her title never became divested prior to the sale to the plaintiff, then, under her deed to him, he acquired title to such of the fixtures as were on the property at the time Rachel Wolff acquired title. We think the jury could find from the evidence in favor of the plaintiff, so far as the articles other than the gas fixtures were concerned. Gas fixtures, being easily removable, and generally without any injury whatever to the freehold, and being merely the substitute for lamps or candle stands, which were always personalty and removable, may be removed by a tenant, in the absence of a stipulation to the contrary. Bronson on Fixtures, § 53, p. 258. See, also, McCall v. Walker, 71 Ga. 290. The defendants had a right to remove the gas fixtures, but the removal of the other articles was unauthorized. The judgment will be affirmed, on condition that the plaintiff will, within 10 days from the time the remittitur is filed in the office of the clerk of the trial

court, write off from the verdict the sum of $21, which being done, the judgment shall stand affirmed. If this be not done, the judgment shall be reversed; the costs of this writ of error in either event to be taxed against the defendant in error.

Judgment affirmed, on condition. All the Justices concur, except SIMMONS, C. J., absent.

(128 Ga. 361)

CHAMBLISS v. HAWKINS.

(Supreme Court of Georgia. June 16, 1905.)

COURTS—JURISDICTION — CITY COURT—FORECLOSING LIEN.

The city court of Americus has jurisdiction to foreclose a lien in favor of the proprietor of a sawmill on the product of the mill for work done on material furnished by another, at least where the principal of the amount claimed does not exceed the jurisdiction of the county court. (Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by B. B. Chambliss against C. A. D. Hawkins. Judgment for defendant, and plaintiff brings error. Reversed.

J. H. Lumpkin, for plaintiff in error. Hall & Wimberly, for defendant in error.

FISH, P. J. Chambliss instituted a proceeding in the city court of Americus against Mrs. Hawkins to foreclose a lien for $453, claimed by him as proprietor of a sawmill on certain lumber sawed by him from timber furnished by the defendant. When the issue made by defendant's counter affidavit came on to be heard, she moved to dismiss plaintiff's case on the ground that the city court of Americus did not have jurisdiction of the subject-matter of the suit, but that the superior court of Sumter county had exclusive jurisdiction thereof. The motion was sustained, the case dismissed, and the plaintiff excepted.

The act creating the city court of Americus (Acts 1900, p. 93, § 2) provides that it "shall have jurisdiction to try and dispose of all civil cases of whatsoever nature, except those cases over which exclusive jurisdiction is vested in the superior courts by the Constitution and laws of the state of Georgia," etc. The proceeding to foreclose the lien of the proprietor of a sawmill is not one of those cases of which the superior court is given exclusive jurisdiction by the Constitution. Civ. Code 1895, § 5842. The question, then, is, do the statutes of the state confer upon the superior court exclusive jurisdiction of a case of the character of the one under consideration? Civ. Code 1895, § 2807, declares: "Proprietors of planing-mills and other similar establishments shall have the same lien as provided in section 2805, for work done on material furnished by others;" and in Murphey v. McGough, 105 Ga. 816, 31 S. E. 757, it was held that a sawmill is a similar establishment to a planing mill, and that therefore "the proprietor of a sawmill has a lien on the product of the mill for work done on material furnished by others." Section 2805 provides: "All mechanics of every sort, for work done and material furnished in manufacturing or repairing personal property, shall have a special lien on the same;" and declares that, when such lien is not asserted by retention of the property, it "shall be enforced in accordance with the provisions of section 2816 of this Code." This last-named section provides: "Liens on personal property, not mortgages, when not otherwise provided, shall be foreclosed in accordance with the following provisions:" (1) There must be a demand on the owner, etc., and a refusal to pay. (2) It must be prosecuted within one year after the debt becomes due. (3) The person prosecuting such lien, or his agent or attorney, must make affidavit showing all the facts necessary to constitute a lien under the Code, and the amount claimed to be due, and, "if the amount claimed is under one hundred dollars, the application may be made to a justice of the peace, who may take all the other steps hereinafter prescribed, as in other cases in his court." (4) "Upon such affidavit being filed with the clerk, it shall be the duty of the clerk of the superior court, or the justice of the peace if in his court, to issue an execution instanter against the person owing the debt, and also against the property on which the lien is claimed, or which is subject to said lien, for the amount sworn to, and the costs, which execution, when issued, shall be levied by any sheriff of this state, or bailiff, if the amount be less than one hundred dollars, on such property subject to said lien, under the same rules and regulations as other levies and sales under execution." (5) "Affidavits may be made before any officer authorized to administer an oath." (6) The defendant, or any creditor of his, may contest the amount or justice of the claim, or existence of the lien, by filing an affidavit of the fact, setting forth the ground of such denial, "which affidavit shall form an issue to be returned to the court and tried as other causes." The other two paragraphs of the section are not material here. According to the provisions of section 2816, considered alone, it would therefore seem that the superior court had exclusive jurisdiction of the foreclosure of sawmill liens on personalty where the amount claimed was not less than $100, but where the amount claimed is under $100 the justice's court has concurrent jurisdiction with the superior court.

On the question whether the superior court has exclusive jurisdiction when the amount claimed is not less than $100, the jurisdiction of the county court must be considered. Section 4208 of the Civil Code of 1895 confers jurisdiction on the judges of the county courts to "foreclose mortgages on personal property and liens." This language means either that the judge of a county court, when the amount

claimed is within the jurisdiction of the county court has jurisdiction to foreclose all liens, except mortgages on realty, or that he has jurisdiction to foreclose liens on personalty only. This being true, in either case he has jurisdiction to foreclose a sawmill lien on personalty. The jurisdiction of the county court extends "into the county town, district or districts, to all civil cases of contract or tort (save where exclusive jurisdiction is vested in the superior court) where the principal sum claimed in cases of tort does not exceed five hundred dollars; and over the remainder of the county, when the principal sum aforesaid does not exceed five hundred dollars nor is less than fifty dollars." Civ. Code 1895, § 4193. The words, "save where exclusive jurisdiction is vested in the superior court," in our opinion, refer to the cases enumerated in the Constitution over which that instrument declares the superior court shall have exclusive jurisdiction. We think this view is supported by the decision in Durden v. Clack, 94 Ga. 278, 21 S. E. 521, wherein it was held: "The county court has jurisdiction to try and determine applications for the eviction of intruders." Code 1882, § 4074 (now Civ. Code 1895, § 4810), declares that, in a proceeding to eject an intruder, "the sheriff shall return both affidavits and deposit them in the office of the clerk of the superior court of the county in which the land lies, upon which an issue shall be made up and tried by a jury, according to the laws of the state." Certainly this language as strongly indicates that the superior court shall have exclusive jurisdiction of proceedings to eject intruders (especially as there can be no trial by jury in civil cases in the county court) as the language, "upon such affidavit being filed with the clerk, it shall be the duty of the clerk of the superior court * * * to issue an execution," indicates that the superior court shall have exclusive jurisdiction of proceedings to foreclose liens, other than mortgages, on personal property. If it should be suggested that the Civil Code of 1895 (section 4208) expressly confers jurisdiction upon judges of county courts to hear and determine applications for the eviction of intruders, it will be noted, as we have already seen, that the same section also expressly confers upon them jurisdiction to "foreclose mortgages on personal property and liens." Again, if it be asked what procedure will be followed if judges of county courts have authority to foreclose liens on personalty, other than mortgages, the reply is that the Civil Code of 1895 (section 4204) provides: "The practice and modes of procedure in the county court * * * shall be the same as in the superior court, unless otherwise provided." And surely there would be no more difficulty as to the procedure in the county court in the foreclosure of liens, not mortgages, on personal property, than in the procedure in such court to evict intruders. Again, "The county court, where the amount sued for is within its jurisdiction, has jurisdiction to render a judgment foreclosing a mechanic's lien on realty." Wheatley v. Blalock, 82 Ga. 406, 9 S. E. 168. Civ. Code 1895, § 2807, provides: "Proprietors of sawmills, when furnishing material for the improvement of real estate, to purchasers from them for that purpose, shall be entitled to the lien provided in section 2801, to be governed, when the same are applicable, by the rules laid down in said section 2801." This last-named section establishes liens on real estate in favor of mechanics and materialmen. In fixing the jurisdiction of county courts, could the Legislature have intended that such courts should have authority to render a judgment foreclosing a lien on realty for $500 in favor of the proprietor of a sawmill for material furnished to improve such realty, but that such courts should not have jurisdiction to foreclose a lien for $5 in favor of the proprietor of a sawmill on lumber he had sawed from timber furnished by his debtor? We cannot believe that the Legislature ever entertained such an irrational intention. If the county court has no jurisdiction of the foreclosure of a sawmill lien on personalty, then, of course, it has no jurisdiction of the foreclosure of liens on personalty in favor of laborers, landlords for necessaries furnished, nor of any other such liens, established by statute, in favor of various classes of persons, as all such liens, when not otherwise provided, must be foreclosed according to the provisions of Civ. Code 1895, § 2816. It has, however, long been the practice, and, so far as we know, without question of the court's jurisdiction, to foreclose all such liens in the county courts when the amount claimed was within the jurisdiction of such courts. This fact may be considered as showing the opinion of the bar as to the jurisdiction of county courts in such cases. For the reasons stated, we are confident that the county court has concurrent jurisdiction with the superior court of the foreclosure of a lien in favor of the proprietor of a sawmill for work done on material furnished by the debtor where the amount claimed is within the jurisdiction of the county court. This being true, the superior court in such a case does not have exclusive jurisdiction under the statute. Therefore, as exclusive jurisdiction is not conferred upon the superior court, either by the Constitution or the statute, of the foreclosure of a sawmill lien on personalty, when the amount claimed is within the jurisdiction of the county court, it necessarily follows that the city court of Americus has jurisdiction to foreclose such a lien, at least when the amount claimed is within the jurisdiction of the county court, and the trial judge erred in holding otherwise and dismissing the case.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 404)

JOHNSON v. ÆTNA INS. CO.

(Supreme Court of Georgia. June 16, 1905.)

1. INSURANCE—CONDITIONS OF POLICY—OWNERSHIP OF LAND.

Where a policy of fire insurance contained a stipulation that it should be void "if the subject of insurance be a building on ground not owned by the insured in fee simple," but, at the time the application for insurance was made, the company, through its agent, knew that the applicant did not own the land on which the building sought to be insured was situated, it will not be heard, in defense to an action on the policy, to set up the noncompliance of the plaintiff with this condition of the contract.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 968, 986.]

2. SAME—WAIVERS.

Limitations in an insurance policy upon the authority of the agent of the company to waive the conditions of the contract of insurance are to be treated as referring to waivers made subsequently to the issuance of the policy. Mechanics' Ins. Co. v. Mutual Bldg. Ass'n, 25 S. E. 457, 98 Ga. 266, approved and reaffirmed.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 955.]

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by W. A. Johnson against the Ætna Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed.

Humphreys & Humphreys, Park & Payton, and Z. D. Harrison, for plaintiff in error. T. H. Parker and Shipp & Kline, for defendant in error.

CANDLER, J. This was an action on a policy of fire insurance. The court below sustained a demurrer to the plaintiff's petition, and he excepted. From the petition as amended it appeared that one of the conditions of the policy was as follows: "This entire policy, unless otherwise provided for by agreement endorsed hereon or added hereto, shall be void if * * * the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." The policy also provided that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto. And as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any provision or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The building insured belonged to the plaintiff, but the land on which it was situated did not. It was alleged, however, that when he made application for insurance he expressly informed the agent of the defendant company as to the character of his ownership of the property sought to be insured; "that when he [plaintiff] signed said application, in answer to the question as to the ownership of the land, neither 'No' nor 'Yes' was written in said application"; and, "if said question was answered in the affirmative, * * * it was inserted after petitioner had signed said application, without his knowledge, consent, or authority"; and that "said application was signed at the request of the agent of defendant company, who filled out the answers to all questions that were filled out."

It will be seen that the controlling question for decision is whether, under the allegations of the petition as amended, the defendant, by reason of the knowledge of its agent as to the real character of the plaintiff's ownership of the property, is estopped to defend on the ground of the plaintiff's noncompliance with the conditions of the contract of insurance, or whether the plaintiff, by accepting the policy on those conditions, and with notice of the limitation on the power of the agent to make a waiver for the company, is precluded from recovering on the policy. There is no principle of law more firmly established than that, in general, the knowledge of an agent as to a material fact bearing upon the validity of a contract made on behalf of his principal is imputable to the principal, and this principle has uniformly been applied by our court in actions on contracts of insurance. Carrugi v. Atlantic Ins. Co., 40 Ga. 135, 2 Am. Rep. 567; City Fire Ins. Co. v. Carrugi, 41 Ga. 660; Greenwich Ins. Co. v. Sabotnick, 91 Ga. 719, 17 S. E. 1026; Swain v. Macon Ins. Co., 102 Ga. 96, 29 S. E. 147. It has also been held that where a policy contained a stipulation identical with the one in the present case, limiting the power of any agent of the company to make a waiver for the company, and providing that any waiver, to be valid, must be indorsed in writing on the policy, the insured cannot, in an action on the policy, excuse his failure to comply with the conditions of the contract. Lippman v. Ætna Ins. Co., 108 Ga. 391, 33 S. E. 897, 75 Am. St. Rep. 62; Id., 120 Ga. 247, 47 S. E. 593; Reese v. Fidelity Life Ass'n, 111 Ga. 482, 36 S. E. 637; Mutual Life Ins. Co. v. Clancy, 111 Ga. 865, 36 S. E. 944; Mutual Reserve Ass'n v. Stephens, 115 Ga. 192, 41 S. E. 679. In the Lippman Case, the policy provided that it should be void "if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy"; and the plaintiff sought to set up a waiver of this condition by showing that, subsequently to the issuance of the policy, an agent of the company had given him oral permission to procure other insurance on the property.

In the Reese, Clancy, and Stephens Cases, which were actions on policies of life insurance, the waiver sought to be set up was as to a provision that the policy should not become binding upon the company until the first premium had been paid during the good health of the insured. Unquestionably, as to a matter concerning the time when the contract is to become of force, or as to the waiver of the conditions of the policy subsequently to its issuance, the insured, by accepting the policy, would be bound by its terms, and could not set up a waiver which he was bound to know the company's agent had no power to make. But that is not this case. Here the insured made written application for a policy of fire insurance. Upon being asked the question as to the character of his ownership of the property, he frankly informed the agent with whom he was dealing that he owned the building, but did not own the land. There is no intimation in the petition that the insured was on notice before receiving the policy that the agent had no power to write the insurance with the title to the property held as it was. There is nothing from which an inference can be drawn that the agent and the insured colluded to defraud the insurance company by concealing the truth as to the ownership of the property. On the contrary, the pleader is emphatic in his declaration of his entire good faith and candor throughout the transaction. The knowledge of the agent being imputable to the company, and the company having, notwithstanding the provision of the policy that it should be void if the building was situated on land not owned by the insured in fee simple, entered into a contract with the plaintiff with its eyes open as to his ownership of the property, should it not be estopped, in a suit on the policy, to take advantage of a fact which it well knew when the contract was executed? To answer this question in the negative, it seems to us, would be to permit one party to a contract to receive all the benefits of the instrument, with full knowledge on his part from the beginning that it could not be enforced against him, and refuse absolutely to perform any of the conditions imposed by the contract upon him. To state such a proposition is to demonstrate its entire lack of equity.

Two cases are relied on by counsel for the insurance company as opposed to the view which is now announced. In Thornton v. Travelers' Ins. Co., 116 Ga. 122, 42 S. E. 287, 94 Am. St. Rep. 99, it was held that "where, in a policy of insurance, there is an express stipulation that 'no agent has power to waive any condition of this policy,' the insured, by an acceptance of the policy, is estopped from relying upon any agreement made with an agent, having the effect of waiving one of the conditions enumerated in the policy." In that case the policy provided that the insurance should not cover injuries or death resulting wholly or in part, directly or indirectly, from hernia; and it appeared that the plaintiff told the agent of the company to whom the application for the policy was made, at the time of making the application, that he had hernia, and that the agent told him that it was not necessary to state that in his application—that the company did not require it. There is possibly a shadowy distinction between that case and the case at bar, on the idea that in the Thornton Case the plaintiff colluded with the agent to defraud the company by concealing from it the fact that he had hernia, while in the present case there was nothing in the petition as amended to indicate that the plaintiff was guilty of either actual or constructive fraud. The writer confesses that he does not derive much comfort from this distinction, and candidly asserts his belief that the Thornton Case is wrong, in that it applies the doctrine of estoppel to the wrong party to the contract. The decision in the case cited is based upon the authority of the case of Porter v. Home Friendly Society, 114 Ga. 937, 41 S. E. 45, which decided, in effect, that where a life insurance policy contained a stipulation that "no agent has authority in any manner * * * to make, alter, or discharge contracts," the beneficiary was not entitled to maintain an action against the company on the theory that one of its agents had made an agreement with the beneficiary to the effect that if the latter would pay the premiums, etc., for a specified number of years, the amount of the policy would then be paid to her. We fail to see how the Porter Case can be deemed authority for the ruling in the Thornton Case, for in the former the plaintiff sought to set up an entirely different contract from the one evidenced by the insurance policy, which, of course, could not be done, while in the latter the plaintiff sued strictly on the contract set out in the policy, but sought to show a waiver by the company of one of its conditions.

The case of Butler v. Standard Guaranty Co., 122 Ga. 371, 50 S. E. 132, is not in point, for in that case the court did not consider the question of the right of the defendant to set up the failure of the plaintiff to comply with the conditions of the contract. The plaintiff there sought to rescind the contract on the ground that she was induced to sign it by reason of representations of the defendant's agent not embodied in the contract, and it appeared that the plaintiff was on notice that no agent had power to bind the company by any statement not contained in the contract.

The case of Thornton v. Travelers' Ins. Co., supra, is, so far as we know, the only Georgia case which goes to the extent of holding that where the insurance company is on notice, at the time of entering into the contract, that the insured has not complied with some of the conditions of the policy, and yet

with that knowledge issues the policy to him, it will be heard to defend on the ground of such noncompliance with the conditions; and it is in direct conflict with the earlier case of Mechanics' Ins. Co. v. Mutual Bldg. Ass'n, 98 Ga. 262, 25 S. E. 457, which, however, together with the cases of Clay v. Phœnix Ins. Co., 97 Ga. 44, 25 S. E. 417, and Phœnix Ins. Co. v. Searles, 100 Ga. 97, 27 S. E. 779, we are asked to review and overrule. So far as appears from the report, the Clay and Searles Cases did not involve any question as to the effect upon the plaintiff's rights of a stipulation in the policy limiting the power of an agent of the company to waive the conditions of the policy; and, as they do not stand in the way of the contentions of counsel, it will be unnecessary to review them. The first case mentioned, however, had to do with a policy containing a stipulation as to waiver almost identical with the one in the present case; and it follows that, if that case is reaffirmed, the Thornton Case must yield to it as authority. In the case in 98 Ga. 262, 25 S. E. 457, the court (Mr. Chief Justice Simmons delivering the opinion) said at page 266 of 98 Ga., page 458 of 25 S. E.: "'Conditions which enter into the validity of a contract of insurance at its inception may be waived by the agent, and are waived if so intended, although they remain in the policy when delivered;' and limitations therein upon the authority of the agent to waive such conditions otherwise than in writing attached to or indorsed upon the policy are treated as referring to waivers made subsequently to the issuance of the policy." Citing 1 May, Ins. § 143, and authorities cited. The language quoted fits the present case like a glove, and upon the soundness of the principle announced must depend the decision of this case. A careful study convinces us that the logic of that case is unanswerable. An insurance company receives an application for a policy. One of the rules of the company is that insurance will not be issued upon a building situated on land not owned by the applicant. But the company, through its agent, knows that the applicant owns the building which he wishes to have insured, but does not own the land on which it is situated, and, with this knowledge, nevertheless issues a policy on the building. Certainly, after leading the applicant to believe that he would be protected, and receiving from him the premiums charged for the insurance, it should not, in good conscience, be heard to set up in defense to an action on the policy that the ownership of the building and of the land was in different persons. True, the policy states on its face that no agent has the power to waive any of the conditions of the policy, and that none of them will be deemed to have been waived unless such waiver is attached to or indorsed upon the policy in writing. But this is not a question of waiver so much as of notice and estoppel. The agent's knowledge, as has been seen, is the company's knowledge. In spite of the assertion in the policy that the contract shall be void if the ownership of the property is of a given character, the policy has been issued with notice to the company that the ownership is of that character. Regardless of any question of waiver, then, the company has placed itself in a position where it would be inequitable to allow it to make the defense which it seeks. "Waiver is sometimes the express abandonment of a right. More frequently it is implied from acts that are inconsistent with its continued assertion. * * * Estoppel is the shield of justice interposed for the protection of those who have not been wise or strong enough to protect themselves. It is the special grace of the court, authorized and permitted to preserve equities that would otherwise be sacrificed to cunning and fraud." Ostrander, Fire Ins. § 366. As to matters arising subsequently to the issuance of the policy the case wears a different aspect. The contract is then made, and both parties are on notice as to its terms. The insured is bound to know what are the rights of the company, and that none of them can be relinquished save in the manner pointed out in the policy; and he, on his part, will not be heard to urge a waiver by the company unless it has been made in the manner required.

Our conclusion is that the ruling in the case of Mechanics' Ins. Co. v. Mutual Bldg. Ass'n, 98 Ga. 262, 25 S. E. 457, is sound; that it is controlling of the case at bar; and that anything to the contrary in the case of Thornton v. Travelers' Ins. Co., 116 Ga. 122, 42 S. E. 287, 94 Am. St. Rep. 99, must yield as authority to the earlier case.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

COBB, J. (concurring). There is an irreconcilable conflict between the case of Mechanics' Ins. Co. v. Mut. Bldg. Assn., 98 Ga. 262, 25 S. E. 457, and Thornton v. Travelers' Ins. Co., 116 Ga. 122, 42 S. E. 287, 94 Am. St. Rep. 99, and therefore the ruling in the former case must control unless it is reviewed and overruled. That case was not called to the attention of the court when the decision in the Thornton Case was rendered. The case in 98 Ga. 262, 25 S. E. 457, was decided upon authority, and it must be conceded that it is abundantly supported. The ruling in the Thornton Case seems, however, to the writer to be the better view, although candor required an admission that there is little authority in support of it. As the other members of the court do not think that the case in 98 Ga. 262, 25 S. E. 457, should be overruled, the writer concurs in the judgment upon the authority of that case, being bound thereby. I am authorized to say that FISH, P. J., also agrees with this view.

(123 Ga. 400)

McMULLEN et al. v. CITIZENS' BANK.

(Supreme Court of Georgia. June 16, 1905.)

1. NEW TRIAL—COPY OF RULE—SERVICE.
"In all applications for a new trial the opposite party shall be served with a copy of the rule nisi, unless such copy is waived." Civ. Code 1895, § 5475; Smedley v. Williams, 37 S. E. 111, 112 Ga. 114.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 276, 279.]

2. SAME—NECESSITY.
Such service is essential, though the application is to be heard during the term at which the trial is had. The intimation to the contrary in Baldwin v. Daniel, 69 Ga. 782, disapproved.

3. SAME—DISMISSAL.
Where a rule nisi was granted on a motion for a new trial and ordered served, and the motion set to be heard at an adjourned term of the court at which it was made, to be held more than 80 days after the date of the rule, the court did not at least abuse its discretion in dismissing the motion for want of service, there being no excuse for failure of service, nor any evidence of waiver.

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by the Citizens' Bank against John McMullen and others. Judgment for plaintiff, and defendants bring error. Affirmed.

E. L. Bryan and W. C. McCall, for plaintiffs in error. Humphreys & Humphreys, for defendant in error.

FISH, P. J. Judgment affirmed.

SIMMONS, C. J., absent.

(123 Ga. 318)

ANDERSON v. ALBANY & N. RY. CO.

(Supreme Court of Georgia. June 15, 1905.)

BILL OF EXCEPTIONS—SERVICE.
The only evidence of service of the bill of exceptions being an entry of an officer to the effect that he had left a copy of the same at the most notorious place of abode of a named officer of the corporation which was the defendant in error, the writ of error must be dismissed for insufficient service of the bill of exceptions.

(Syllabus by the Court.)

Error from Superior Court, Dougherty County; W. N. Spence, Judge.

Action by A. Anderson, by her next friend, against the Albany & Northern Railway Company. From the judgment, both parties bring error. Writ of error dismissed.

Anderson sued the Albany & Northern Railway Company, and the court granted a nonsuit. The plaintiff excepted. A motion to dismiss the writ of error was made upon the ground that the bill of exceptions had not been served in the manner prescribed by law. The only evidence of service was an entry upon the bill of exceptions, of which the following is a copy: "I have this day served the Albany and Northern Railroad Company with a true copy of the within bill of exceptions by leaving such copy at the most notorious place of abode of J. S. Crews, who is the agent, vice-president and general manager of the said Albany and Northern Railroad Company at Albany, Ga. This November 11/1904. Wm. Godwin, Dpt. Shff."

Jesse W. Walters and Walters & Walters, for plaintiff in error. Hooper & Dykes and Pope & Bennet, for defendant in error.

COBB, J. The Code provides that, within 10 days after a bill of exceptions is signed and certified, the party plaintiff therein shall serve a copy thereof upon the opposite party or his attorney. Where the opposite party is the state, or does not reside in the county where the bill of exceptions is sued out, and the same cannot be served personally upon the attorney by reason of his absence from the county of his residence, service may be perfected by leaving a copy of the bill of exceptions at the residence of such defendant. Civ. Code 1895, § 5547. The express provision authorizing service by leaving a copy at the residence of the attorney in two instances only, indicates that the legislative intent was that in other cases the service must be personal. In addition to this, at common law service of writs was required to be personal; and therefore a statute providing for service should be construed to require personal service, unless the contrary intent plainly appears. A corporation may be served with process either by serving an agent personally, or by leaving the process at the public place of transacting the usual and ordinary business of the corporation. Civ. Code 1895, § 1899. Process against a corporation served by leaving the same at the most notorious place of abode of an agent or officer is not good service. Stuart Lumber Co. v. Perry, 117 Ga. 888, 45 S. E. 251. The only service made in the present case being by leaving a copy of the bill of exceptions at the most notorious place of abode of an officer of the company, the writ of error must be dismissed for insufficient service of the bill of exceptions. Bank of Southwestern Georgia v. Tillman, 94 Ga. 731, 20 S. E. 4. The ruling by two judges in Montgomery v. Walker, 41 Ga. 682 (4), in so far as it may conflict with anything now ruled, is disapproved. See, in this connection, Wostenholmes v. State, 71 Ga. 669.

Writ of error dismissed. All the Justices concur.

(123 Ga. 279)

MACON RY. & LIGHT CO. v. STREYER.

(Supreme Court of Georgia. June 15, 1905.)

1. STREET RAILROADS — COLLISION WITH TRAVELERS—NONSUIT.
The plaintiff's evidence as to the negligence of the defendant's employés and the observance of due care by herself and her husband and agent was sufficient to withstand a motion for a nonsuit.

2. NEGLIGENCE—INSTRUCTION.
In a suit for personal injuries, a charge that, "If the evidence shows that [plaintiff's] own negligence caused the injury alleged, she could not recover, though you may believe from the evidence that she was injured, and that the company was likewise negligent, provided you believe that the plaintiff's negligence * * * was greater than the negligence of the defendant company," is erroneous, in that it states in immediate connection with each other, without proper explanation, two distinct rules of law, qualifying the former by the latter.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 564, 565, 569–576.]

3. DAMAGES—PERSONAL INJURIES—EVIDENCE.
The jury were authorized to infer that the plaintiff's injuries would be permanent from the character of her suffering and the length of time that it had continued up to the date of the trial and hence it was not error to charge on the subject of permanent injuries. This is so though there was no direct and positive evidence that her injuries were in fact of a permanent character.

4. SAME—AMOUNT OF VERDICT.
The verdict was not excessive, and the grounds of the motion not expressly dealt with in the foregoing show no cause for granting a new trial.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Mattie Streyer against the Macon Railway & Light Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dessau, Harris & Harris, for plaintiff in error. Jos. H. Hall, for defendant in error.

CANDLER, J. Mrs. Streyer sued the Macon Railway & Light Company for damages on account of personal injuries, and obtained a verdict for $1,000. The company moved for a new trial, which was denied, and it excepted.

1. From the evidence for the plaintiff it appeared that on the occasion under investigation Mrs. Streyer, the plaintiff, together with her husband and two children, were driving in a small delivery wagon on a street in the city of Macon along which a line of the defendant company ran. The plaintiff's husband was driving. The team was on a side of the street, clear of the car tracks. At a designated point the plaintiff's husband, desiring to cross the street, started to drive diagonally across the tracks of the defendant. As he did so, he looked ahead, to see if a car was approaching in an opposite direction to the one in which he was going. Just as he did so, one of the children exclaimed, "Papa, watch out for the car!" He turned his head, and saw a car approaching from behind. The motorman was looking towards the rear, and consequently could not see him. He motioned to the motorman with his hand, and also called him, at the same time endeavoring to drive off the track, so as to avoid a collision with the car. His efforts were futile. The car collided with the wagon, and the plaintiff received the injuries for which she sued. There was also evidence to the effect that at the time the plaintiff's husband attempted to cross the defendant's tracks water was being discharged from a plug in the immediate vicinity, and the defendant contended that this caused the horse to become frightened and unmanageable, rendering it impossible to prevent the collision. The plaintiff's witnesses, however, denied that the gush of the water from the plug frightened the horse. At the conclusion of the evidence for the plaintiff the defendant made a motion for a nonsuit, and it is argued that the plaintiff's own evidence showed that her husband, who was acting as her agent at the time, was guilty of negligence in not looking back to see if a car was approaching from the rear, and that, had he exercised due diligence, he would have seen the car, and not have attempted to cross the track. The refusal of a nonsuit is here assigned as error. Negligence is, except in certain well-defined cases, a question for the jury. Had the court below held as matter of law that the failure of the plaintiff or her husband to look behind them as they attempted to cross the tracks was negligence, it would have been error requiring the grant of a new trial. The facts were in evidence. It was for the jury to say whether or not they constituted negligence. It was not error to refuse to grant a nonsuit.

2. The motion for a new trial complains of the following charge of the court: "Now, the burden of proof is upon the plaintiff to show that she was injured, under the rules I have given you in charge, before any presumption arises; and if the evidence shows that her own negligence caused the injury alleged she could not recover, though you may believe from the evidence that she was injured, and that the company was likewise negligent, provided that you believe that the plaintiff's negligence—from a consideration of the evidence in the case you believe that the plaintiff's negligence—was greater than the negligence of the defendant company, its agents, servants, and employés." It will be seen that this charge states in immediate connection with each other two distinct propositions of law, viz. (1) that the plaintiff cannot recover if her injuries were caused by her own negligence, and (2) the doctrine of comparative negligence. Following the decisions of this court in Americus R. Co. v. Luckie, 87 Ga. 6, 13 S. E. 105, and Columbus R. Co. v. Peddy, 120 Ga. 590, 48 S. E. 149 (4), the charge which we have quoted must be held error, requiring the grant of a new trial.

While we are not compelled to so rule, we feel constrained to say that the charge of the court as a whole placed upon the plaintiff a burden greater than she should have been required to bear. We feel sure that all errors in the charge will be corrected by the trial judge upon the resubmission of this case to a jury.

3. The evidence as to the permanence of the plaintiff's injuries was by no means strong or convincing, but we cannot say that it was erroneous for the trial judge to give to the jury instructions on the subject of damages for permanent injuries. It was in evidence that the plaintiff's injuries were received nearly a year before the case was tried, that she had suffered continuously since that time, and that her suffering had not ceased or abated. We know of no law which confines the jury to medical expert testimony in considering a case of this kind, nor can we conceive of any reason why they may not draw their own inferences as to the permanence of an injury from the length of time and the seriousness with which it has continued. The Carlisle Tables were admitted in evidence without objection by counsel for the defendant, and it was not error, under the circumstances, for the court to charge the jury as to their use.

4. The verdict was for $1,000. In the light of the plaintiff's evidence as to the extent of her injuries, this amount cannot be considered excessive. Of the grounds of the motion for a new trial which were not abandoned, those which have not been considered in the foregoing complain of extracts from the judge's charge, but they do not disclose error of such importance as to require the grant of a new trial. The judgment is reversed for the reasons stated in the second division of this opinion.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 423)

ATLANTIC & B. RY. CO. v. J. B. SMITH & SON.

(Supreme Court of Georgia. June 16, 1905.)

1. RAILROADS — KILLING STOCK — EVIDENCE —NEGLIGENCE.

The evidence for the plaintiffs showed that the animal for the killing of which suit was brought was killed by the running and operation of the defendant's train, and the presumption arose that the defendant was negligent.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1578–1581.]

2. SAME.

Some of the evidence offered by the defendant tended to show that its employés in charge of the train exercised due care to avoid the injury; but the engineer was not produced, and the evidence of the fireman, on account of the length of time intervening between the occurrence and the trial, was very uncertain, there being a failure on his part to recall with any degree of positiveness anything done by any member of the train crew to prevent the killing. From other witnesses there was some slight evidence tending to show that due diligence was not observed. The jury trying the issues of fact took this view of the evidence, the judge of the superior court, upon certiorari, sustained their finding, and this court will not reverse the judgment overruling the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

Action by J. B. Smith & Son against the Atlantic & Birmingham Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Sweat and Haygood & Outts, for plaintiff in error. L. Kennedy, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(123 Ga. 278)

WILLIAMS v. STATE.

(Supreme Court of Georgia. June 15, 1905.)

ARSON—EVIDENCE—SUFFICIENCY—MOTIVE.

The only evidence introduced by the state which tended to show any motive on the part of the accused for the attempted arson was that five days previously he "had some words that were unpleasant" with the wife of the owner of the house set on fire. Tracks, evidently made by a person who was barefooted, were discovered on the premises, and were traced to and from a point near the kitchen to the corner of the garden, some 20 yards away; thence across a public road to the sidewalk on the opposite side; along the sidewalk, which had a sandy surface, to the gate in front of the house of the accused, a distance of between 15 and 30 yards; and from the gate to the steps of his house. The sidewalk led to a nearby village, and was in use by the general public, there being no sidewalk on the other side of the road. There was nothing peculiar about these tracks, though they corresponded with tracks which the accused, on being charged with the crime, voluntarily made beside some of those in the road which were supposed to be his. While the testimony raised a suspicion as to his connection with the offense, it was not, in view of prior decisions by this court, sufficient to authorize his conviction. Ross v. State, 35 S. E. 102, 109 Ga. 516; Cummings v. State, 35 S. E. 117, 110 Ga. 293; Green v. State, 36 S. E. 609, 111 Ga. 139; Patton v. State, 43 S. E. 533, 117 Ga. 235; Gaither v. State, 45 S. E. 973, 119 Ga. 118.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arson, § 71.]

(Syllabus by the Court.)

Error from Superior Court, Taliaferro County; H. M. Holden, Judge.

William Williams was convicted of arson, and brings error. Reversed.

Wm. N. Maltbie, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

EVANS, J. Judgment reversed.

SIMMONS, C. J., and CANDLER, J., absent.

(123 Ga. 467)

PAULK v. ENSIGN-OSKAMP CO. et al.

(Supreme Court of Georgia. June 17, 1905.)

1. CANCELLATION OF DEED—PARTIES.

In an equitable proceeding against a resident defendant and a foreign corporation to cancel a conveyance of timber made by the former to the latter, wherein the title to the timber was warranted, and also to cancel an extension of a timber lease originally executed to the resident defendant by a third person, which extension was made subsequent to the conveyance of

the same timber by the resident defendant to the foreign corporation, the resident defendant was a necessary party.

2. REMOVAL OF CAUSES — NONRESIDENT DEFENDANT.

A suit in a state court is not removable to the United States court on motion of a nonresident defendant on the ground of diverse citizenship, when it appears that the codefendant of the nonresident is an indispensable party against whom substantial relief is prayed.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 90.]

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

Action by T. M. Paulk against the Ensign-Oskamp Company and H. H. Tift. Judgment for defendants, and plaintiff brings error. Reversed.

T. M. Paulk brought an action against the Ensign-Oskamp Company, a nonresident corporation, and H. H. Tift, praying for an injunction to restrain the defendants from cutting and removing the timber upon a certain described tract of land, and for the cancellation of a certain lease from William Paulk to H. H. Tift, and a lease from Tift to the Ensign-Oskamp Company, together with an extension of the original lease from William Paulk to H. H. Tift. The petitioner alleged that he was the true owner of all the timber suitable for sawmill purposes upon the described land: that on March 19, 1900, William Paulk conveyed the said lot of land to petitioner, who recorded his deed on March 14, 1901; that, previously to the execution and delivery of the aforementioned deed, William Paulk, on August 14, 1897, sold and by lease conveyed to H. H. Tift the sawmill timber upon the described lot of land; that said conveyance provided that Tift and his assigns should have the free use and enjoyment of the timber for the purposes therein stated for the full term of six years from the 14th day of August, 1897; that thereafter, on October 28, 1898, Tift signed, sealed, and delivered his conveyance of the timber, together with other timber, to the Ensign-Oskamp Company, in which conveyance Tift warranted to the Ensign-Oskamp Company the timber purchased from William Paulk for the term of six years from the date of the boxing of the timber for turpentine purposes; that in 1899 the Ensign-Oskamp Company procured from William Paulk an instrument in writing purporting to be an extension of the time of the original deed to H. H. Tift, so that the lease would expire six years after the boxing of the timber for turpentine purposes, which extension was without consideration, nor was there any consideration recited therein; that the extension of said lease was a fraud, because it was without consideration, and too indefinite and uncertain to be enforced; that the Ensign-Oskamp Company was threatening to enter upon said land under their pretended claim of right, and to cut and remove the timber therefrom; and that the extension of the lease and conveyance from Tift to the Ensign-Oskamp Company is a cloud upon petitioner's title. At the appearance term the Ensign-Oskamp Company presented their petition for removal of said cause to the Circuit Court of the United States for the Southern District of Georgia, alleging that the amount involved was more than $2,000; that it was a corporation of the state of West Virginia, and that its codefendant was neither a necessary nor indispensable party to said suit; that no substantial relief was prayed against its codefendant, and that the whole controversy could be disposed of by a decree between the plaintiff and the nonresident corporation. The court passed an order directing a removal of the cause to the United States court as prayed, and the plaintiff excepts to the judgment of removal.

Quincey & McDonald and McDonald & Quincey, for plaintiff in error. Ellis, Wimbish & Ellis and Fulwood & Boatwright, for defendants in error.

EVANS, J. (after stating the facts). Only one question is presented by this record, and that is whether, under the allegations of the petition of T. M. Paulk against H. H. Tift and the Ensign-Oskamp Company, the resident defendant, Tift, is a necessary party. The prayer of the petition is for a cancellation of the extension of the lease from William Paulk to H. H. Tift, and so much of the conveyance of Tift to the Ensign-Oskamp Company as purported to convey the sawmill timber upon the land described for a period of six years from the boxing of the timber for turpentine purposes.

It will be observed from the allegations in the petition that Tift warranted to the Oskamp Company the timber included in the conveyance. For the reasons alleged in his petition, the plaintiff prays a cancellation of these two conveyances. Tift was liable upon his warranty to the lumber company, and his conveyance cannot be canceled and declared void in a suit against the lumber company without making him a party. In the cancellation of a deed the grantor is a necessary party. Besides, the allegation is that the extension of the lease alleged to be void for lack of consideration is a lease, not to the lumber company, but to Tift. It is true that the petition alleges that the lumber company procured this extension of the lease after the conveyance of the timber by Tift to it; but while the benefit flowing from the extension of the lease may be to the lumber company, still the person to whom the extension is made is not the lumber company, but the resident defendant. Tift, therefore, was interested not only in the cancellation of the extension of the lease, but also in the vacation of his deed in which he had warranted the title of the timber to the lumber company, and he was, accordingly, a neces-

sary and indispensable party, and the court erred in removing the cause on the ground of diverse citizenship.

Judgment reversed. All the Justices concur.

(128 Ga. 449)

ROUNTREE & CO. v. GAULDEN.

(Supreme Court of Georgia. June 17, 1905.)

1. EXECUTION—LEVY—CLAIM OF THIRD PARTY.
Proof of possession of the land levied on by the defendant in fi. fa. since the judgment casts the onus upon the claimant to prove his title. This onus was successfully carried by the claimant by proof of perfect title from the state to himself.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 572.]

2. SAME—POSSESSION BY DEFENDANT.
In a claim case, whether the possession of the defendant in fi. fa. be relied on simply to cast the burden of proof, or as a basis of prescriptive title in the defendant in fi. fa., the character of the possession is relevant to the issue.

3. APPEAL—ASSIGNMENT OF ERROR.
An assignment of error upon the refusal of the court to allow a witness to answer a specified question propounded by the party calling him is not properly made, unless it states what evidence was thus sought to be elicited, and that the court was informed thereof at the time of the ruling.

4. SAME—NEW TRIAL — EXCLUSION OF EVIDENCE.
A new trial will not be granted solely because the exclusion of evidence which, if it had been allowed, could not have produced a different result.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 40, 69.]

5. TRIAL—INSTRUCTIONS.
The charge of the court covered the substantial issues in the case, and is not open to the criticism made upon it.

(Syllabus by the Court.)

Error from Superior Court, Brooks County: R. G. Mitchell, Judge.

Action by Rountree & Co. against William Jones and another. Judgment for plaintiff on levy of execution, and S. S. Gaulden filed a claim. Judgment for claimant, and Rountree & Co. bring error. Affirmed.

This was a claim case. The issue arose upon the levy of a fi. fa. in favor of Rountree & Co. against William Jones and M. J. Jones on a certain tract of land as the property of William Jones, and the interposition of a claim by S. S. Gaulden.

The plaintiff introduced in evidence the fi. fa., dated June 13, 1891, which was issued on a judgment dated May 7, 1891, and proof that William Jones died upon the land in controversy, having previously lived upon said land for 25 or 30 years. The fi. fa. had indorsed thereon the following entries: "Received from the defendants the cost on this execution, Oct. 1, 1891. J. D. Wade, Jr., Clerk." "Georgia, Brooks County. No property on which to levy this fi. fa. June 4, 1898. A. J. Conoley, Sheriff." "Georgia, Brooks County. I have this day levied the within fi. fa. on the North half of lot 473 in the 12th District of Brooks County Georgia, containing 204½ acres, as the property of W. M. Jones, one of the defendants. This November 14, 1901. A. J. Conoley, Sheriff." "Entered on general execution docket June 13, 1891. J. D. Wade, Jr., Clerk." "Entered on general execution docket Oct. 2, 1900. J. D. Raysor, Clerk."

The claimant, in support of his title, introduced the following documentary evidence: Grant from the state of Georgia to George Bailey; deed from George Bailey to A. C. Omler, dated June 21, 1824; power of attorney from A. C. Omler to P. E. Tebe, authorizing said attorney in fact to sell the premises in dispute; deed from A. C. Omler, by his attorney in fact, to Joseph E. Blantz, dated February 23, 1842; deed from Joseph E. Blantz to Abram Hunter, April 21, 1842; deed from Abram Hunter to Hardy E. Hunter, April 21, 1842; deed from Jesse E. Hunter, Georgia M. Coffee, Martha J. Jones, and W. E. Hunter to Hardy M. Hunter, dated December 31, 1900, the consideration of which was as follows: "The parties to this deed being the heirs at law of Hardy E. Hunter, deceased, and all of the full age of twenty-one years, and the said parties of the first part [grantors] having received their distributive share of the estate of said deceased from the administrator of said estate, and the said party of the second part [grantee] not having been settled with, and a small portion of said estate remaining undisposed of, and the said parties of the first part desiring that said party of the second part should receive what is left of said estate as his portion of the same, as well as in consideration of the sum of Ten Dollars to them in hand paid;" and deed from Hardy M. Hunter to claimant, January 11, 1901. All of these deeds and the grant conveyed the premises in dispute. The claimant also introduced the interrogatories of Mrs. Martha J. Jones, who testified as follows: "I was married in 1843 to Hardy E. Hunter, who died the latter part of 1855. My first husband and I lived in Brooks county. I was married the second time to W. M. Jones in 1856. My second husband and I lived in Brooks county, Georgia, on lot of land 473 in the Twelfth district of Brooks county. Not any one lived on this land before W. M. Jones and myself and my first husband. Never to my knowledge did W. M. Jones claim the north half of lot 473. Hardy E. Hunter claimed said lot before my marriage to W. M. Jones, and Hardy E. Hunter's estate after my marriage to W. M. Jones. W. M. F. Jones, my son, cultivated said land for the last ten years I lived on it." Being cross-examined, she said: "W. M. Jones lived and died upon the piece of land in controversy. W. M. Jones administered on the estate of my first husband, relieving me after my marriage to him. I had commenced to administer. I knew of his administration

from the time it commenced. I think W. M. Jones, as administrator, sold most of the land belonging to said estate."

S. S. Rountree, for the plaintiff in fi. fa., testified that he had known the land in controversy for 25 or 30 years, and that W. M. Jones had lived upon it during all of the time, and was living there at the time of his death, which occurred in 1897; that he knew the heirs of Hardy Hunter, deceased, naming them (they were the persons named in the deed from Jesse E. Hunter et al. to Hardy M. Hunter, introduced by claimant, and Jimpsie Hunter, who died childless and without ever having married); that Jones sold the crops raised on the place up to about 1890, and that plaintiff extended him credit prior to that time. The plaintiff also introduced the following receipts: One dated in 1869, and signed by E. W. Hunter, son of Hardy Hunter, deceased, J. A. Hunter, and J. E. Hunter, as follows: "Received of W. M. Jones, administrator of Hardy Hunter, deceased, late of said county, $2600.-00 in full, entire and complete satisfaction of all rights, claims, interest, property or demand I now have or may have in and upon the estate, real or personal, of the said Hardy Hunter, deceased, my father, and the said W. M. Jones, administrator as aforesaid, is hereby fully and entirely discharged and acquitted of any further claim on my part against said estate." A receipt of like tenor and effect, signed by Georgia M. Coffee, dated 187–.

The jury found in favor of the claimant. The plaintiffs in fi. fa. made a motion for a new trial, which having been overruled, they excepted.

W. H. Griffin and Felder & Rountree, for plaintiff in error. J. G. McCall and S. S. Bennet, for defendant in error.

EVANS, J. (after stating the facts). 1. Upon the trial of a claim case the burden of proof is upon the plaintiff in execution in all cases where the property levied on is, at the time of such levy, not in possession of the defendant in execution. Civ. Code 1895, § 4624. Proof of possession of the land by the defendant in execution since the judgment casts the onus upon the claimant to prove his title. Brown v. Houser, 61 Ga. 629. When the plaintiff in execution introduced in evidence the execution, with the levy indorsed thereon, and proof that W. M. Jones was in possession of the land levied on since the judgment, the burden was on the claimant to show a better title. The claimant assumed this burden by showing a chain of title from the state to himself. The possession of the defendant, although for more than 20 years, was insufficient to establish a prescriptive title. His possession was joint with his wife, who was an heir of Hardy E. Hunter. The defendant was also the administrator of Hardy E. Hunter. Hence Jones' possession was shown to be not in his own right, but in the right of another. It also appears from the evidence that Hardy E. Hunter died in 1855, leaving as his heirs at law a widow and five children. One of the children, Jimpsie, died without having married. After his death the heirs of Hardy E. Hunter were five in number. In 1900 four of these heirs at law, who seem to have received their share of the estate, as evidenced by their receipts to the administrator, conveyed their interest in the unadministered estate of their ancestor to their coheir, who had not received his distributive share. If the heirs who had received their shares of the estate had refused to quitclaim their interest in the unadministered estate of their ancestor to the heir who had not received his portion, the latter could have recovered the unadministered assets of his ancestor, or enough thereof to equalize him with the others, in an appropriate proceeding. By their conveyance the heirs who had been settled with simply accorded to their coheir his right as a distributee in the estate which went into the hands of the administrator. In no event would the administrator have the right to claim any part of the unadministered assets of his intestate as his individual property simply because he had made a settlement with some of the heirs. The claimant's title was perfect, and the court might well have directed a verdict in his favor.

2. The following question was propounded to M. J. Jones, a witness for claimant, who testified by interrogatories: "State, if you know, whether or not W. M. Jones ever claimed the north half of lot of land 473 in the Twelfth District of Brooks county." To which question the witness answered, "Never to my knowledge did he claim it." The plaintiffs filed their written objection to this interrogatory on the ground that it was leading, illegal, incompetent, and irrelevant. The objection was overruled. This evidence was competent. If Jones' possession is relied on to change the onus, it is very pertinent to inquire into the character of the possession. If Jones' possession for 20 years is to form a basis for prescription, it is likewise relevant to ascertain whether his possession was in his own right or in that of another.

3. One complaint of the plaintiffs in the motion for new trial is that the court refused to allow a witness for the plaintiffs to answer a certain question. The answer which the witness would have made is not given. An assignment of error upon the refusal of the court to allow a witness to answer a specified question propounded by the party calling him is not properly made unless it states what evidence was thus sought to be elicited, and that the court was informed thereof at the time of the ruling. Bigby v. Warnock, 115 Ga. 386, 41 S. E. 622 (4), 57 L. R. A. 754.

4. Plaintiff tendered a mortgage made by W. M. Jones and M. J. Jones to A. J. Roun-

tree, dated April 24, 1874, upon 28½ acres of the land levied upon. The court excluded the mortgage. Even if the evidence was admissible to prove the defendant's adverse possession of a portion of the land involved, it could not have authorized a different result, as it was undisputed that at the time the mortgage was executed the property belonged to the estate of Hardy E. Hunter, and that Jones originally went in possession as administrator of Hunter, and had never notified the heirs of Hunter of his adverse claim.

5. The charge of the court covered the substantial issues of the case, and was not open to the criticism made upon it. The verdict was demanded by the evidence, and the denial of a new trial was proper.

Judgment affirmed. All the Justices concur.

(123 Ga. 396)

STRICKLAND v. HUTCHINSON.

(Supreme Court of Georgia. June 16, 1905.)

1. VENDOR AND PURCHASER—SALE BY ACRE—DEFICIENCY IN QUANTITY.

Where the entire description of land sold as contained in a bond for title was "333 acres of land in the southeast corner of lot of land No. 416 in the 11th district of Lowndes county," the number of acres was of the very essence of the description, and if it developed that in fact the land delivered by the obligor to the obligee contained only 225 acres the latter was entitled to a reduction in the price accordingly. This was not such a sale by the tract or entire body as is contemplated in section 3542 of the Civil Code of 1895.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 333–340.]

2. SAME—SUFFICIENCY OF DESCRIPTION.

No point was raised or decided in the trial court as to the sufficiency of the description contained in the bond. Moreover, the plaintiff was suing the defendant upon a note given for the purchase money of the land covered by the bond.

3. NEW TRIAL—GROUNDS.

A party to a suit is not entitled to a new trial because of an error in his favor.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 40.]

4. COSTS IN EQUITY.

In an equitable proceeding the jury may recommend to the court the assessment of costs upon the respective parties, but are not authorized to determine against which party they shall be taxed. The presiding judge is to determine this in the use of a sound discretion.

5. SAME—VERDICT.

Where the verdict of a jury in an equitable action found in favor of one of the parties, and added that each party pay one-half of the costs of suit, and no special exception was made to that part of the verdict, or reference made to it in the brief of counsel, this court will treat it as being a mere recommendation to the presiding judge, which he may or may not follow in his discretion.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action by C. Strickland against A. J. Hutchinson. Judgment for defendant, and plaintiff brings error. Affirmed.

Strickland brought suit against Hutchinson on a promissory note for $261. The defendant pleaded that the note sued on was one of several given for the purchase money of certain land; that he bought the land of the plaintiff for the sum of $1,250 and gave his note therefor, taking a bond for title; that the land which the plaintiff contracted to sell him was 333 acres in the southeast corner of lot of land No. 416 of the Eleventh District of Lowndes county; that he paid all of the notes except the one now sued on; that the plaintiff represented that the tract of land contained 333 acres, and this was of the essence of the contract; that he went into possession and made improvements; that he became doubtful as to the quantity of the land, and approached the plaintiff in reference to it, but the latter assured him that he would warrant every acre that he had represented it to contain, and thereupon the defendant paid the note then due; but upon a survey it was discovered that the land only contained 225 acres. The defendant therefore prayed a finding that he was not liable on the note sued upon, that he should recover the amount already paid in excess of what he should have paid after apportioning the price according to the correct acreage, and that the plaintiff be required to convey the property to him and the purchase price be declared paid. On the trial the jury found "that the land mentioned should be the property of the defendant without further payment, and that each party pay one-half of the costs of suit." The plaintiff moved for a new trial. The motion was overruled, and he excepted.

O. M. Smith and W. H. Griffin, for plaintiff in error. W. E. Thomas and J. M. Johnson, for defendant in error.

LUMPKIN, J. (after stating the above facts). 1, 2. In the view we take of this case it is unnecessary to discuss the various grounds of the motion for a new trial at length. The bond for title which the plaintiff made to the defendant described the land as follows: "333 acres of land in the southeast corner of lot of land No. 416 in the 11th district of Lowndes county." This is the entire description contained in the bond as set out in the record. If a sale of land is by the tract or entire body, in the absence of fraud a deficiency in the quantity sold cannot be apportioned. Civ. Code 1895, § 3542. A sale "by the tract or entire body," as the words are used in this section, means where a tract or body of land is sold as such, and not at so much per acre according to the acres which it may contain. Thus, if a tract of land should be described in a bond for title by metes and bound, or by some descriptive name or designation which would describe it as a whole, and the number of acres should merely be stated as an additional description, this would be a

sale by the tract or entire body. Turner et al. v. Rives, 75 Ga. 606; Walker v. Bryant, 112 Ga. 412, 37 S. E. 749. In the present case, however, the sole description of the land contained in the bond for title is 333 acres in the southeast corner of a named land lot. There is no other description by name, metes and bounds, or otherwise. If the number of acres be stricken from the description, no description whatever is left. The quantity is not only of the essence of the description, but it is the whole description, except being in the southeast corner of a certain land lot. In Gress Lumber Co. v. Coody, 94 Ga. 519, 21 S. E. 217, it was said that a deed which conveyed a specified number of acres on the north side of a lot of land described by its number, district, and county, the lot being by statute a square, is sufficiently certain to embrace such a parallelogram as would result from drawing a line across the lot parallel with its northern boundary, so as to cut off a stated number of acres. This appears to have proceeded on the idea that presumptively the grantor intended to convey land in the shape of a parallelogram. But, if so, the number of acres was of the very essence of the description, since without regard to it no crossline could be located. See, also, Vaughn v. Fitzgerald, 112 Ga. 517, 37 S. E. 752; Huntress v. Portwood, 116 Ga. 351, 42 S. E. 513. It is not sufficient to say that the parol evidence indicated that some tract containing less than the number of acres stated was intended The bond for title was the written contract, and under its terms the obligee was entitled to 333 acres. There is no controversy that he did not receive that much, or that plaintiff was not prepared to convey that much to him. We think, under the facts of this case, that the defendant was entitled to have the deficiency apportioned, and that the verdict in his favor to that effect was demanded by the evidence.

It is suggested that, considering the size of land lots as laid out in accordance with law in the Eleventh District of Lowndes county, it was impossible for 333 acres of land to have been contained in the southeast quarter of land lot No. 416, and that the defendant must have known this. The bond for title does not say that the land was in the southeast quarter or one-fourth of the land lot, but in "the southeast corner" of it. Owing to the fact that in this state there are several different sizes of land lots authorized by different acts of the Legislature, and that on account of differences and inaccuracies in surveys land lots as laid out do not always accurately correspond in the quantity of land contained within their boundaries with that prescribed by law, judicial cognizance in regard to them has its limitations. This court may take judicial notice of the number of acres which a certain statute required to be put into a land lot, but it is not prepared to hold that a "corner" of a land lot necessarily means a quarter of it, or, indeed, how large a corner of a lot is. Besides, if 333 acres could not be contained in the corner of the land lot, neither could 225 acres, considering the size of land lots in that county—490 acres each.

It is argued in the brief of counsel for plaintiff in error that the description contained in the bond for title is so vague and indefinite as to be void. But no such point as this appears to have been made or passed on in the superior court. Nor, indeed, is a plaintiff who brings suit to recover for the purchase money of land in a very good position to contend that the bond for title given by him is void.

3. The plaintiff further asserts that, if the contention of the defendant were true, he would be entitled to a deduction from the purchase money of more than $440, instead of the amount of the note sued on. But it furnishes no ground of complaint on the part of the plaintiff that the jury found too little for the defendant.

4, 5. At law costs are to be taxed against the losing party. In equitable proceedings it is the duty of the presiding judge to determine who shall pay the costs, and in doing so he should use a sound discretion. Guernsey v. Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270. The jury have no power to determine conclusively who shall pay the costs, but in equitable proceedings they may recommend to the court the assessment of costs upon the respective parties. The determination of the matter, however, rests with the judge. Civ. Code 1895, § 4850. Here the defendant, by his plea, asked and obtained equitable relief; and, while the jury had no power to conclusively find that each party should pay half of the costs, yet, as verdicts are to be given a reasonable intendment, and as no special assignment of error was made on this point of the finding, we will construe it as being intended as a recommendation to the presiding judge which did not bind him, but left him free to exercise his discretion in taxing the costs.

Judgment affirmed.

SIMMONS, C. J., absent.

(123 Ga. 282)

JONES et al. v. McCRARY et al.

(Supreme Court of Georgia. June 15, 1905.)

1. WRIT OF ERROR—DISMISSAL—INCOMPETENT DEFENDANTS.

The writ of error will not be dismissed on the ground that it appears from the brief of evidence incorporated in the bill of exceptions that certain of the defendants in error are persons non compos mentis and were not represented by guardian ad litem or next friend, when it does not appear that the persons in question have ever been adjudged lunatics, and when they have appeared in the court below as defendants and secured the benefit of the ruling which it is sought to have this court review.

2. SAME—SERVICE OF BILL OF EXCEPTIONS.
It will be presumed that an officer has not exceeded his authority, unless some showing to the contrary is made; and where the sheriff's return shows that he has personally served one of the defendants in error with a copy of the bill of exceptions, the writ of error will not be dismissed on the ground that the return does not show that the person in question lives in the county over which the sheriff's jurisdiction extends, there being nothing in the record to indicate that she resides elsewhere.
3. SAME—ASSIGNMENTS OF ERROR.
The assignments of error, while not scientifically drawn, are sufficient to withstand a motion to dismiss.
4. HOMESTEAD—DEATH OF APPLICANT.
An applicant took a homestead in 1869 as the "head of a family," consisting of himself and 11 children—4 sons and 7 daughters. The applicant died in 1885, after all of the children had reached majority. Four of the daughters were living on the place with him at the time of his death, and have continued to live on it and support themselves out of its proceeds. *Held*: The only claim of the four daughters as beneficiaries of the homestead was as dependent relatives of the applicant, and, when he died, their dependence ceased, and the homestead estate was at an end.
(Syllabus by the Court.)

Error from Superior Court, Warren County; H. M. Holden, Judge.

Action by Lou Jones and others against Sarah McCrary and others. Judgment for defendants, and plaintiffs brings error. Reversed.

L. D. McGregor and R. H. Lewis, for plaintiffs in error. E. P. Davis, for defendants in error.

CANDLER, J. 1. On the call of this case in this court the defendants in error moved to dismiss the writ of error on the grounds, (1, 2) that there was no proper assignment of error; (3) that it appears from the brief of evidence contained in the bill of exceptions that two of the defendants in error are persons non compos mentis, and are not represented by guardians or next friends, and were not properly served with a copy of the bill of exceptions; (4) that it does not appear from the entry of service that certain of the defendants in error were served with the judge's certificate or the writ of error; and (5) that it nowhere appears that one of the defendants in error resides in Warren county, where the suit was pending, or that the sheriff had authority to serve her officially.

The assignments of error, it must be confessed, are subject to criticism, but, after a careful examination of the entire bill of exceptions, we think they are sufficient to withstand a motion to dismiss. It is true that it appears in the evidence that certain of the defendants in error are imbeciles, but it does not appear that they have ever been adjudged lunatics. Having appeared in the court below without the appointment of a guardian, and received the benefit of a judgment in their favor, they cannot now set up their disability in order to prevent the plaintiffs in error from calling in question the correctness of that judgment. As to the service of the bill of exceptions, counsel for three of the defendants in error acknowledged service, while the sheriff's entry shows personal service on the remaining three. There is nothing on the face of the return to indicate that the service was defective in any way. In the absence of some showing to the contrary, it will be presumed that the sheriff did not exceed his authority by serving a party over whom he had no jurisdiction. The motion to dismiss the writ of error is therefore overruled.

2. In 1869, Ezra McCrary, as the "head of a family," took a homestead in certain real and personal property, the realty consisting of 285 acres of land in Warren county. The record is silent as to whether he had a wife living at the time or not. There were 11 children—4 sons and 7 daughters—most, if not all, of whom were of age when the homestead was set apart. Two of the daughters were, and still are, imbeciles. They, with two other unmarried daughters of Ezra McCrary, live on the land embraced in the homestead, and are dependent upon it for a support. Ezra McCrary died in 1885, intestate, the plaintiffs and the defendants in the present case being his only heirs at law. This suit was a petition by some of the heirs at law to partition the real estate. At the conclusion of the evidence, the material portions of which have been substantially set out in the foregoing, the judge of the superior court directed a verdict for the defendants, "on the ground that the homestead estate has not yet terminated," and the plaintiffs excepted.

The question presented is not without considerable difficulty, for the reason that the decisions of this court construing the homestead law enacted in pursuance of the Constitution of 1868 have been far from harmonious. That act did not provide, as does the present law, in express terms for an exemption for the benefit of dependent females. Its provisions extended only to "each head of a family, or guardian or trustee of a family of minor children." Code 1873, § 2002. But in construing the meaning of the term "head of a family," this court in an early case decided that the word "family" was not to be confined to the wife and immediate descendants of the applicant, but included indigent female relatives who lived with the applicant and were dependent upon him for a support. See Marsh v. Lazenby, 41 Ga. 153, where it was held that an unmarried man whose indigent mother and sisters live with him and are supported by him is the head of a family in the sense in which the term is used by the Constitution of 1868. Grandchildren have also been held to be members of the applicant's family within the meaning of the homestead laws. Hall v. Matthews, 68 Ga. 490; Towns v. Mathews, 91 Ga. 546, 17 S. E. 955. In direct conflict with these cases is the ruling in the case of Dendy v.

Gamble, 64 Ga. 528, where it was held that, to constitute one the head of a family within the meaning of the homestead clause of the Constitution of 1868, there must be some legal obligation on him to support its members; but, of course, this case cannot prevail as authority in the face of the earlier case of Marsh v. Lazenby, supra. Indeed, our court seems to have drawn a distinction, the logic of which is not apparent to the writer, between different sorts of family to which the benefits of a homestead were allowed. Thus, as will have been seen in Marsh v. Lazenby, a family consisting of the applicant's mother and indigent sisters was recognized. In Heard v. Downer, 47 Ga. 629, there is a strong, if not a necessary, inference that adult children, though dependent upon the applicant, are not entitled to the benefits of a homestead; while in Vornberg v. Owens, 88 Ga. 237, 14 S. E. 562, it was held: "That one of the minor beneficiaries of a homestead taken by the head of a family in 1879 is, after arrival at full age, a dependent female, will not extend the duration of the homestead beyond the death of the head of the family and his widow, and beyond the arrival at majority of all the children"—citing Neal v. Brockham, 87 Ga. 130, 13 S. E. 283. And see Sutton v. Rosser, 109 Ga. 207, 34 S. E. 346, 77 Am. St. Rep. 367 (4). On the other hand, in Torrance v. Boyd, 63 Ga. 22, it was held that where a man procured a homestead under the Constitution of 1868 as the head of a family, without stating the nature of his family or restricting his application to any particular members of it, indigent and dependent adult daughters were entitled to its benefits, and that the homestead estate did not expire upon the death of the wife and the arrival of the minors at majority. In this case, however, the head of the family was in life at the time the suit was brought.

To reconcile these cases is by no means an easy task. It can only be done on the hypothesis that, although the Constitution provided merely for a homestead for the benefit of the "head of a family," a homestead could be procured for the benefit of a head of a family of minor children which would endure only while the children were minors, regardless of their dependence; and that another sort of homestead could be procured for the benefit of the head of a family of dependent female relatives, which did not terminate with the arrival at majority of minor children or grandchildren, but lasted during dependence. Giving to the homestead in the present case the most liberal interpretation, viz., that it was procured for the benefit of a family of dependent females, what is the limit of the homestead estate? Homesteads for the benefit of families of minors have uniformly been held to terminate with the arrival at majority of the beneficiaries, and, by parity of reasoning, a homestead for the benefit of a family of dependent females must terminate when dependence terminates. But dependence upon what—the property, or the applicant for the homestead? We confess that it seems more logical and consistent with former rulings of this court to hold that the dependence should be upon the property rather than the applicant. But the question has been positively answered in the case of Towns v. Mathews, 91 Ga. 549, 17 S. E. 955 (4), where it was said: "The general fact of dependency alone would not be sufficient to keep the homestead in existence, because it has to be a dependency upon some person in life entitled, because of such dependency, to take a homestead." Tested by this rule, then, the homestead in the present case expired with the death of Ezra McCrary in 1885, and the court below erred in holding that it was still in existence.

We were asked by counsel for the defendants in error to review the case of Haynes v. Schaefer, 96 Ga. 743, 22 S. E. 327, with a view to overruling that decision in case it should be found to conflict with the view of the law taken by counsel in his brief. That case rests squarely upon the decision in Towns v. Mathews, supra, which we were not asked to review. In Towns v. Mathews, the beneficiaries of the homestead were the wife and the minor granddaughter of the applicant. The granddaughter's claim upon the applicant did not grow out of the fact of her minority, as would have been the case with one of his children, for a man is under no legal obligation to support his grandchildren, though they be minors; but upon the fact that she was a dependent female relative who lived with him and was a part of his household. In Haynes v. Schaefer, the family consisted of the wife of the applicant and several children. Two daughters, one of whom was a minor at the time the homestead was set apart, and the other not, claimed the benefit of the homestead after the death of the applicant and after the youngest had come of age. Their claim was likewise that of dependence rather than minority, and consequently the case came within the rule of Towns v. Mathews. As no request was made to overrule the latter case, it will not be disturbed, and Haynes v. Schaefer, in view of the earlier ruling, could not have been decided otherwise than it was.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 424)

MOORE et al. v. MOBLEY et al.

(Supreme Court of Georgia. June 16, 1905.)

1. FRAUDULENT CONVEYANCE — TITLE ACQUIRED.

A deed to land made in fraud of the rights of creditors is not void ab initio, but is only voidable at the instance of the creditors; and such a deed conveys title as against any one not affected by the fraud.

2. APPEAL — REVIEW — EXCLUSION OF EVIDENCE.

This court will not reverse a judgment overruling a motion for a new trial on the ground

of error in the refusal of the trial court to allow stated questions asked, when it does not appear from the motion that the trial judge was informed what the answer to the questions would be.

3. ADVERSE POSSESSION.

It was not error to charge, in effect, that if a party goes into possession of land under a parol purchase, and afterwards surrenders the land without ever having paid any of the purchase money, his possession will not inure to his benefit as against the one from whom he purchased.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 345.]

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

Action by A. B. Moore and others against Louis Mobley and others. Judgments for defendants, and plaintiffs bring error. Affirmed.

Haygood & Cutts, Hal Lawson, and E. D. Graham, for plaintiffs in error. McDonald & Quincey, for defendants in error.

CANDLER, J. 1. The Civil Code of 1895 (section 3584) provides that "possession to be the foundation of a prescription * * * must not have originated in fraud." The principal question for decision in this case is whether the fraud contemplated by the section quoted is restricted to fraud against the true owner of the land, or extends to any fraudulent scheme which may have been effectuated by the transfer of possession. In the case at bar the question arises in the following manner: The plaintiffs sued the defendants in ejectment, relying on a chain of title originating in a grant from the state. The defendants met the plaintiffs' case by evidence to the effect that they and their predecessors in title had been in possession of the land for more than seven years under color of title. To offset this defense, the plaintiffs sought to prove that the original deed relied upon as color of title was made for the purpose of defrauding the grantor's creditors, the grantee being a party to the fraud. The plaintiffs did not claim under creditors, nor were they affected by the alleged fraud. The court below excluded the evidence offered, and ruled that the deed, if fraudulent for the reasons urged, could only be attacked by creditors of the grantor.

The exact question presented, so far as it relates to the law of ejectment, has never, to our knowledge, been passed upon in this state. Our Reports abound in decisions defining color of title, and laying down rules as to what sort or degree of fraud is necessary to render invalid a paper relied upon as color of title; but we have not been cited to any case in which this court had before it the question whether the fraud contemplated by the Code section is limited to the true owner of the land. A careful study of all the authorities indirectly bearing upon the subject, however, convinces us that the ruling of the trial judge was correct, and that the evidence sought to be introduced was properly excluded. It needs no citation of authority to establish the proposition that in Georgia a deed made in fraud of the rights of creditors is not ab initio void, but is only voidable at the instance of the creditors affected by the conveyance. If the creditors do not interfere to assert their rights, title will pass, and this is true though the grantee have full notice of the fraudulent purpose of the deed and be a party to the furtherance of the scheme. If, therefore, such a deed is good as a conveyance of title as against all the world except those who are affected by the fraud, we are at a loss to see how a plaintiff in ejectment, who was not in any sense affected by the fraud on the creditors, and who does not claim under them, can take advantage of a flaw in the title, which by law is available only to creditors, to defeat the defendants' claim to prescription. In Street v. Collier, 118 Ga. 470, 45 S. E. 294, it was held: "Color of title is anything in writing connected with the title which serves to define the extent of the claim. It matters not how imperfect or defective the writing may be, considered as a conveyance, if there is a writing which defines the extent of the claim." Certainly the paper relied upon by the defendants in the present case comes within the broad definition which we have quoted. It may be conceded that it was made in fraud of creditors, but the fact remains that this fraud was only fraud as to those whom it affected. As to all others the deed, so far as the purposes for which it was made is concerned, was a valid conveyance of title. If this reasoning is correct, it follows that the court below did not err in excluding the evidence offered.

2. The foregoing disposes of those grounds of the motion for a new trial which complain of the exclusion of evidence tending to show that the deed referred to was executed in fraud of creditors, and that the court erred in charging in accordance with the principles which we have mentioned. Certain other grounds of the motion complain of the refusal of the court to allow given questions to be asked, but do not disclose what answer would have been made to the question so propounded. Others still fail to make it appear that the court was informed as to what the witness would answer. Under the ruling of this court in Griffin v. Henderson, 117 Ga. 382, 43 S. E. 712, these grounds cannot be considered by this court.

3. Nor was it error for the court to charge, in effect, that if a party goes into possession under a parol purchase without paying any of the purchase money, and afterwards surrenders the land, his possession will not inure to his benefit as against the one from whom the parol purchase was made. See Brown v. Huey, 103 Ga. 448, 30 S. E. 429.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(104 Va. 308)

KANE v. QUILLIN et al.

(Supreme Court of Appeals of Virginia. June 28, 1905.)

DEED OF TRUST—UNDUE INFLUENCE — EVIDENCE—SUFFICIENCY.

Evidence in a suit to set aside a deed of trust examined, and *held* to warrant a finding that it was procured by undue influence exercised by the beneficiary therein.

Appeal from Circuit Court, Scott County.

Suit by H. H. Quillin and another against Henry S. Kane. From a decree for plaintiffs, defendant appeals. Affirmed.

Bullitt & Kelly and Roberts & Roberts, for appellant. Jackson & Coleman, for appellees.

KEITH, P. William B. Quillin purchased a lot of ground in Gate City in 1874 from H. W. Holdway, and in 1887 caused a deed for it to be made to his wife as her separate estate. Shortly thereafter Edmonds, a judgment creditor, filed a bill in Scott county to subject this lot to the payment of judgments against him, alleging that the purchase price had been paid by Quillin, and that the deed to his wife was in fraud of his rights. A decree was entered maintaining the claims of the creditor, but an arrangement was made by which the debts were otherwise provided for, and the property was not sold.

After Edmonds had obtained a decree for sale, H. S. Kane also a judgment creditor of Quillin, filed his petition in that suit, but no action was taken upon it, and the suit was afterwards dropped from the docket with the assent of Kane, who also expected to be paid the amount due him from another source.

In 1899 Quillin died, and in February, 1901, H. S. Kane procured a deed of trust from Mrs. Quillin, by which she conveyed the lot in Gate City to R. F. McConnell, as trustee, to secure two judgments which Kane had obtained against her husband in his lifetime.

In May, 1901, Mrs. Quillin filed her bill in chancery against Kane and R. F. McConnell, trustee, in which she states the circumstances connected with the deed executed by her in February, 1901. Her account of the transaction is that Kane, in company with G. W. Mann, a justice of the peace, came to her house and informed her that he had a judgment, and could sell her house and lot to satisfy the same, but that he did not desire to put her to any costs, and that he had come to see her to get her to rent the house to satisfy his judgment, as well as other debts he had against her late husband; that he read a paper to her, which he said was an agreement to that effect, and requested her to sign it, which she did, and that he then read to her another paper, which she has since learned was a trust deed securing the payment to Kane of a large sum of money, and she avers that she was so overcome at the time, believing the statements made by Kane were true, that her home was about to be sold from her, that she did not fully comprehend the facts, nor realize the result of her acts, and in her excitement she was induced to sign the two papers; that she believed from the statements made by Kane that he did have judgments against her husband, by force of which he could and would sell her house and lot, and that, acting upon this belief, and in order to save her home from sale, she signed the trust deed and other writing in question. She then charges that the statements made by Kane were false, and that he knew them to be false when he made them; that he had no judgment or any other debt against her husband, to satisfy which he could sell her property, or which was a lien upon it; that it was true that in the year 1892 he had obtained a judgment against her husband for $24.60, and that he had recovered against her husband another judgment long before that time, both of which were, at the time she executed the deed, barred by the statute of limitations.

Kane answered this bill, denying all fraud and misrepresentation. He says that he explained to the complainant the whole transaction; that a suit was instituted by Edmonds against Quillin, herself, and others in 1887, in which the deed from Holdway to her was declared void as to the debts of Edmonds and others, and that respondent had filed his petition in said suit for the purpose of having his judgment for $152.27 paid out of the house and lot, and could have had the same subjected, but for an arrangement he had made by which he expected to receive the money due him. He alleges that complainant signed the deed of trust and rental agreement after full explanation, and without undue influence, and he denies that the judgments or either of them, are barred by the statute of limitations, or that they have been in any way paid or satisfied.

Mrs. Quillin's deposition was taken, in which she reiterates and amplifies all the facts charged in her bill. The deposition of Kane, the defendant, was also taken. He admits that he went to the house of the plaintiff in company with a justice of the peace, with an agreement providing for the rental of the property and the payment of the rent to him, and with the deed of trust ready to be executed; and to that extent his testimony is not in conflict with that of complainant.

G. W. Mann, the justice of the peace, also testified. He describes the visit made by him in company with Mr. Kane to the house of Mrs. Quillin, and states that the interview between them seemed to be friendly and pleasant; that he observed no unusual excitement upon the part of the plaintiff; and that Mr. Kane explained to her the origin of the debt—the moral obligation which, from his point of view, rested upon

her to pay it; requested her to sign the trust deed which had been prepared, and suggested that she pay the debt out of the rent of the property at Gate City, and thereby save the sale of the property under the trust deed, and to this she agreed, and signed the papers which were offered to her for signature. This witness was asked at the close of his examination: "Did Mr. Kane tell Mrs. Quillin that he could enforce his judgments against the house and lot which was conveyed by the trust deed, but he did not wish to put her to such costs and trouble, and would not do so if she would sign the trust deed, and that he thought it would be best for her to sign the trust deed? A. I don't think he said he could enforce them, but he told her that he thought he would come and see her before he took any steps to enforce them, and see if he could not adjust the matter agreeably. Q. Was or not the effect of his conversation calculated to lead Mrs. Quillin to believe that he could sell her house and lot for the satisfaction of his judgments, and that he would do so if she did not adjust the matter? A. The conversation had in connection with the papers would lead a person of ordinary prudence to so think."

Upon the evidence the circuit court was of opinion that the plaintiff was entitled to the relief prayed for in her bill, and decreed that the deed and contract in the pleadings mentioned be set aside and vacated, and the case is before us upon the appeal taken by H. S. Kane, one of the defendants.

We consider the following facts proved by the evidence: H. S. Kane, in company with a justice of the peace, called upon Mrs. Quillin, a widow woman living in the country, taking with him copies of certain judgments which he had obtained against her husband, with a contract providing for the renting of her house and lot and a deed of trust upon it to secure his debts, and accompanied by a justice of the peace, and by his representations and the exhibition of the copies of the judgments and papers, their effect doubtless strengthened by the presence of the justice of the peace, whether intentionally or not, created upon her mind the impression that he had it in his power to sell her property for the satisfaction of his demands, and that the only mode of postponing this disaster was by signing the rental agreement, which placed the rents of the house and lot at his disposition, and the deed of trust as ultimate security for the satisfaction of the judgments. It further appears that the principal judgment, having been obtained more than 10 years prior to the death of Quillin, the judgment debtor, and no execution having been issued upon it, was barred by the statute of limitations. Without considering whether or not the judgment for $24.60, obtained in 1892, was or was not barred at the date of the execution of the deed of trust, we are of opinion that appellant obtained the deed of trust and the rental contract from Mrs. Quillin by the exercise of undue influence, and that there is no error in the decree of the circuit court, which is affirmed.

We are of opinion, however, that the affirmance should be without prejudice to the right of the appellant to subject the house and lot in Gate City to the payment of the last-mentioned judgment, provided he is able to aver and prove actual fraud on the part of W. B. Quillin and his wife, Martha Quillin, in the deed of Hardway and wife, executed in 1887.

MICKENS v. PHILLIPS.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

MARRIAGE — BREACH OF PROMISE—CONDONATION.

A statement in a letter written by a woman to a man who had broken his promise to marry her, repeating his statement that they would never get married, and stating that she hoped that he might marry some day, because he knew she would give him lots of trouble and would not be affectionate towards him, does not, when considered with other parts of the letter, which convey a distinct protest against his refusal to observe his promise to marry the writer, constitute a condonation of the breach, or release the man from his engagement.

Error to Circuit Court, Hanover County.

Action by Nannie Mickens against Charles H. Phillips. There was a judgment for defendant, and plaintiff brings error. Reversed.

The letter referred to in the opinion is as follows:

"Your very painful letter reached me just few minutes ago. I was very glad to hear from you indeed and to know you was well But sorry to hear that you was so much displeased with the letter that I wrote you. Now darling I am sorry and I am very sorry and I hope you will forgive me for what I say to you that you did not like I was looking for a letter from you because last night I didn't sleep any for thinking about you I was thinking you must was sick. Now your letter made me so nervess untill I had to go to bed it made me real sick. I did not think that I wrote you a mean letter I thought that I just wrote a plain and a friendly letter if I said anything that you dislike I ask you to forgive me I love you and it seem like my love increase more and more for you every day now I think you won't be so underkind not to forgive me. I didn't think you would ever treat me like you have write and say that was your last letter I told you that I was afraid that you and I would never marry and you said that I would not be disappointed by you. I don't know why that you should think that I am joulious I don't think I have any right to be because you don't belong to me and for what you say to-day I don't think you will never be. O! that is

so hard it make my very heart acke to think about it. I have been thinking about you ever since I written to you and I was expecting you would be up here this week well you said you don't know when you will come over here again very well it seem like nothing but trouble here on earth for me I have cryed over your letter ever since I receive it untill I am sick I never did think I would be treated so by you I have never say once that you has not been kind to me you have been kind as you could be to me and I thank you for your kindness, you seem to think that I just love you for your kindness, you know that I love you darling and if you go back on me I am sure that I cannot stand it. Now write again want you dear just as soon as you receive this letter becuse I am worried almost out. But at the same time you have said that we will never get married it is too bad you just know that nevertheless I hope you may marry alright some day and get some one to be kind to you because you know that I will give you lots of trouble and would not be affectionate towards you and you have tld me that I am too jelious for you. I wish you could run up here one day because I want see so bad I want to talk with you I guess you will be at Mt. Carmel to-morrow I have lots to write but I can write to-night because almost kill me to think about your letter That you written me to-day now I will pray and ask the Lord to help me in my troubles. bey bey

"I remain as ever your well wisher.

"Nannie Mickens."

Rosewell Page, for appellant. Leake & Carter, for appellee.

WHITTLE, J. This writ of error is to a judgment for the defendant in an action to recover damages for a breach of promise of marriage.

The declaration is in the usual form, where the defendant, subsequently to the breach, has married another person. 4 Rob. Pr. 247.

At the trial, exception was taken to the following instruction given on behalf of the defendant:

"The court instructs the jury that even though they believe from the evidence that the defendant had become engaged to be married to the plaintiff, and has since then married another woman, still if they further believe that before he married the said other woman the plaintiff informed him, after repeating his statement that 'we will never get married,' that she hoped he might marry all right some day, and get some one to be kind to him, because he knew she would give him lots of trouble and would not be affectionate toward him, and there was no renewal of the engagement after that, they should find for the defendant."

An inspection of the letter from which the foregoing excerpt was taken shows that its meaning has been misinterpreted. It was not intended to condone the defendant's conceded breach of promise, nor to release him from his engagement, but, taken in its entirety, conveys a distinct protest against his refusal to observe his promise to marry the plaintiff. The court erred, therefore, in giving the above instruction, for which error its judgment must be reversed, and the case remanded for a new trial.

(104 Va. 361)

BIG STONE GAP IRON CO. v. OLINGER.

(Supreme Court of Appeals of Virginia. June 28, 1905.)

1. MINES AND MINERALS—CONTRACTS—BREACH—BURDEN OF PROOF.

In an action for breach of a mining lease, requiring the lessee to mine not less than 1,000 tons of ore a month, provided that there was and continued to be that much merchantable ore on the land, capable of being mined at a reasonable cost, the burden was on the lessee to show that there was not on the land merchantable ore capable of being mined at a reasonable cost, in order to excuse his default.

2. SAME—INSTRUCTIONS—EVIDENCE.

Where, in an action for breach of a mining lease, the whole evidence showed that the contract was abandoned because the land did not contain ore in sufficient quantity to be mined at a reasonable cost, and the sole question for the jury was whether defendant made a bona fide effort to discover and mine the ore, it was error for the court to instruct the jury to consider whether defendant rescinded the lease under a clause authorizing rescission on payment of a year's royalty from the date the contract was rescinded.

3. SAME.

Where defendant canceled a mining lease because it alleged the land did not contain sufficient merchantable ore, and not under a provision in the contract authorizing cancellation on payment of a year's royalty, it was error to modify an instruction that defendant company was not bound to make extraordinary tests to ascertain the presence of merchantable ore in the land, and, if it made ordinary tests, and did not find ore in sufficient quantity, and the land did not carry such ore in a sufficient quantity, then the jury should find for defendant, by adding the clause, "unless they further believed from the evidence that defendant canceled the contract" as authorized thereby.

4. SAME—COST OF MINING.

In an action for breach of a mining lease, a requested instruction that, if the cost of mining ore on plaintiff's land exceeded the cost at other mines in operation, the jury might find from such fact that the cost was not a reasonable cost, as provided in the contract, eliminated from consideration the conditions that might exist in known conditions at the other mines, and therefore was properly refused.

5. SAME—MERCHANTABLE COMMODITY.

In an action for breach of a mining lease, requiring certain mining operations, if merchantable ore capable of being mined at a reasonable cost could be found on the land, an instruction limiting the jury to a consideration of the testimony of expert witnesses as to the merchantableness of the ore was properly refused.

Error to Circuit Court, Lee County.

Action by John C. Olinger against the Big Stone Gap Iron Company. From a judgment

in favor of plaintiff, defendant brings error. Reversed.

The instruction referred to in the opinion as set forth in bill of exceptions No. 6, as modified by the court, is as follows: "'The court further tells the jury that while the burden of proof is on the defendant to prove that the land of the plaintiff leased by it did not carry the requisite amount of iron ore that was merchantable and capable of being mined at a reasonable cost, yet, in sustaining this burden, it is not necessary for the defendant to show that it made any extraordinary or unusual tests to ascertain the fact; and if the jury believe from the evidence that the defendant made or caused to be made the tests ordinarily used by men skilled in such matters, to determine such a question, and did not find said ore in sufficient quantity, and further believe from a preponderance of all the evidence in the case that said land does not carry said ore in sufficient quantity, then they will find for the defendant.' But the court refused to give the said instructions as aforesaid, and added thereto the following: 'Unless they further believe from the evidence that the defendant canceled the contract in the manner referred to in plaintiff's first instruction.'"

Irvine & Slemp and Ayers & Fulton, for plaintiff in error. Bullitt & Kelly, for defendant in error.

HARRISON, J. On the 23d of August, 1899, John C. Olinger, the defendant in error, entered into a mining lease with R. A. Ayers. On the 20th of October, 1899, Ayers transferred said lease to the plaintiff in error. The lessor had notice of this transfer, and agreed in writing to accept the plaintiff in error as lessee under the contract, in the place of Ayers. This action was brought by the defendant in error to recover from the plaintiff in error certain royalties claimed to be due him under this mining lease, and a judgment was obtained against the plaintiff in error for $1,501.50, and thereupon a writ of error was awarded by this court.

The lease contract which was the basis of the suit gave to the plaintiff in error the exclusive privilege of mining iron ore upon certain land of the defendant in error for a term of five years from the date of the lease.

The terms of the lease, so far as necessary to be stated, were as follows: That the lessee should pay to the lessor a royalty of 10 cents per ton for every ton of 2,240 pounds taken from the land, payable on the 20th day of the month following the month during which the ore was taken out. That the lessee was to mine not less than 1,000 tons of ore per month from the date of the lease, provided there was and continued to be that much merchantable ore on the land capable of being mined at a reasonable cost. That the lessee was to pay the royalty on the minimum amount each month, whether he mined the same or not, provided that, if he failed to mine such minimum during any one month, he might mine the deficit during the next month, or at any time during the lease, without again paying therefor. And that the lessee might at any time rescind and cancel the lease by paying to the lessor the amount of one year's royalty.

It is manifest that both parties were in doubt as to whether the development of this property would disclose iron ore in sufficient quantity and quality to justify a continuation of the contemplated enterprise.

Three propositions are made very clear by the contract: (1) That it was the duty of the lessee to proceed with his mining operations as promptly as possible, for he had to pay the minimum royalty from the date of the lease, whether he prosecuted his mining operations or not; (2) that the lessee was only bound to mine the minimum of 1,000 tons per month, provided there was and continued to be that much merchantable ore on the land capable of being mined at a reasonable cost; and (3) that although iron ore might exist upon the leased premises, of such quantity and quality that it could be mined at a reasonable cost, still the lessee would have the right to cancel the lease at any time by paying for such privilege the minimum royalty for one year from the day the contract was rescinded. These provisions are not only clear from the language of the contract, but they seem to be reasonable, for a lessee could hardly be expected to continue the expenditure of large sums in a vain pursuit for iron ore; nor would it be desirable for him to continue running operations if the ore had no market, or for any other reason could not be made profitable.

It is not pretended that the plaintiff in error failed to proceed with mining operations upon the leased premises, and therefore the case here does not arise under the first proposition where the plaintiff in error would be required to pay the minimum royalty whether mining operations were conducted or not. Nor does the case before us arise under the third proposition, where the lessee has availed himself of the privilege of rescinding the contract, for there is no evidence to support such a view.

On the 25th of March, 1900, the general manager of the defendant company had served upon the lessor the following notice:

"Mr. J. C. Olinger—Dear Sir: I have been instructed by Mr. Pettit to inform you that all work on your property will be abandoned by the 1st of April, 1900. Yours truly, R. F. Body, Supt."

The evidence shows that from the date of the contract of lease to the date of this notice, about seven months, the plaintiff in error was engaged in prospecting upon the leased premises, opening mines and mining ore, and that three or four thousand dollars was expended upon such work. In pursuance

of the above-mentioned notice, the enterprise was abandoned, upon the ground, as claimed, that merchantable ore could not be found on the land, capable of being mined at a reasonable cost. On the other hand, the defendant in error contended that the ore was there, and that sufficient development to disclose that fact had not been made.

All of the evidence in the case was directed to this inquiry. So that the sole question of fact to be submitted to the jury was, did the plaintiff in error make a bona fide effort to discover and mine the ore, or did it act in bad faith, and abandon the enterprise without having made proper and sufficient effort to discover and mine the ore?

The first question to be considered is raised by the third instruction given for the defendant in error, which places upon the plaintiff in error the burden of showing that there was not on the land merchantable iron ore capable of being mined at a reasonable cost. There was no error in this instruction.

The lessor could not show that the land did contain ore of the requisite quantity and quality without the expenditure of a large sum of money. The record of this case shows that it is a costly matter to determine whether land contains iron ore of the quantity and quality here contemplated. It is very clear that one of the chief inducements influencing the lessor to make the contract under consideration was to have the ore developed if it existed. This duty the lessee contracted to perform. It therefore is the proper party to find and ascertain the quantity and quality of the ore. Under such circumstances, the plaintiff in error must assume the burden of showing that there was not on the land merchantable iron ore capable of being mined at a reasonable cost. Jouett v. Spencer, 1 Exch. 647; Muhlenberg v. Henning, etc. (Pa.) 9 Atl. 144.

This view also disposes of instruction No. 4 asked for by the defendant company, and shows that it was properly rejected.

Objection is made to the action of the court in giving for the plaintiff below the following instructions:

"No. 1. The court instructs the jury that, if they believe from the evidence that the defendant intended to, and did, rescind and cancel the contract sued on under and pursuant to clause 'e' of said contract, they will find for the plaintiff the sum of twelve hundred dollars, with interest from April 1, 1900; and they will also find for the plaintiff, if they believe from the evidence that the defendant intended to, and did, cancel the said contract as aforesaid, the additional sum of one hundred dollars, with interest from April 20, 1900, unless they further believe from the evidence that there was not in the month of March, 1900, on the land in controversy, as much as one thousand tons of merchantable iron ore, capable of being mined at a reasonable cost."

"No. 2. On the other hand, if they believe from the evidence that the defendant did not cancel the contract sued on under and pursuant to clause 'e' thereof, then they will find for the plaintiff the sum of one hundred dollars per month from and including March, 1900, to and including May, 1901, with interest on each one hundred dollars from the 20th of the month following the month it became due, or, in other words, they will find for the plaintiff thirteen hundred dollars principal, and $201.50 interest, unless they believe from the evidence that there was not on the land in controversy as much as 13,000 tons of merchantable iron ore, capable of being mined at a reasonable cost."

It was error to give these instructions. They are misleading and confusing. They invite the jury to consider and determine whether or not the defendant company rescinded and canceled the lease under and pursuant to clause "e" of the contract, when there is no evidence in the record tending to show that the defendant rescinded the contract in pursuance of its privilege to do so under clause "e." On the contrary, the whole evidence shows that the contract was abandoned because, as claimed, the ore was not there in sufficient quantity and quality to be mined at a reasonable cost. As already stated, the sole question of fact to be submitted to the jury was, did the plaintiff in error make a bona fide effort to discover and mine the ore? If such reasonable and proper effort was made, then the jury should find for the defendant. On the other hand, if the jury believed from the evidence that the defendant company acted in bad faith, and abandoned the enterprise without having made proper and sufficient effort to find and mine the ore, they should find for the plaintiff the minimum royalties due him under the contract.

For the same reason, it was also error to add to the instruction asked for by the defendant company, which is set forth in bill of exceptions No. 6, the words, "unless they further believe from the evidence that the defendant canceled the contract in the manner referred to in plaintiff's first instruction." The instruction as asked for was proper, and should have been given without addition thereto.

Instruction No. 5 asked for by the defendant company tells the jury that, if they find from the evidence that the cost of mining ore on the Olinger land exceeds the cost at other mines in operation, they may find from this fact that such cost was not a reasonable cost.

This instruction was properly refused. It leaves out of consideration the difference that might exist in the known conditions at the other mines, as to which the comparison was to be instituted. For such a comparison to be proper in determining what was a reasonable cost, the conditions at the several mines compared should be the same.

Instruction No. 6 asked for by the defend-

ant company tells the jury that the question of whether or not a commodity is merchantable is to be determined by expert witnesses, and that, if they believe the defendant has shown by a preponderance of the evidence of such expert witnesses that the ore in question was not merchantable, they must find for the defendant.

There was no error in rejecting this instruction. It limited the jury to the consideration of the testimony of expert witnesses on the subject of inquiry, whereas the jury were entitled to consider all the evidence which the court had admitted bearing on that subject. This subject was sufficiently covered by instruction No. 4 for the plaintiff, which was properly given.

For these reasons, the judgment must be reversed, the verdict set aside, and the case remanded for a new trial, to be had in accordance with the views expressed in this opinion.

(104 Va. 306)

N. FRANK & SONS v. GUMP.

(Supreme Court of Appeals of Virginia. June 28, 1905.)

1. ACCORD AND SATISFACTION — CONSIDERATION.

At common law the acceptance by a creditor of the debtor's unsecured notes for a less sum than the original debt does not extinguish the debt.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Accord and Satisfaction, §§ 46-91.]

2. JUDGMENT NON OBSTANTE VEREDICTO.

In an action on a bond, a plea of accord and satisfaction, which shows on its face want of consideration, is bad after verdict; entitling plaintiff to judgment notwithstanding a verdict for defendant.

3. EVIDENCE—JUDICIAL NOTICE.

The court will take judicial notice that Maryland embraces part of the territory of the original English colonies of America.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 15.]

4. SAME — LAWS OF OTHER STATES—COMMON LAW—PRESUMPTIONS.

In the absence of evidence to the contrary, it will be presumed that the common law obtains in Maryland.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Common Law, § 14.]

Error to Corporation Court of City of Bristol.

Action by N. Frank & Sons against A. S. Gump. From a judgment in favor of defendant, plaintiffs bring error. Reversed.

Roberts & Roberts, for plaintiffs in error. Peters & Lavinder, for defendant in error.

WHITTLE, J. This case is brought here by a writ of error and supersedeas to a judgment of the corporation court of the city of Bristol, rendered in behalf of the defendant in error, who was the defendant in the court below, in an action of debt.

The action is founded upon a bond executed by the defendant at the city of Baltimore, in the state of Maryland, and made payable to the plaintiffs, in that city. The declaration alleges that the bond is a Maryland contract, and governed by the common law of that state.

The defendant filed a plea of accord and satisfaction, in which he avers the making and delivery by him of two promissory notes to the plaintiffs, amounting in the aggregate to the principal sum of the original bond, which notes, it is said, the plaintiffs then and there accepted and received in full satisfaction and discharge of the bond described in the declaration.

The plaintiffs replied generally to that plea, and proved that by the law of Maryland, where the common law on that subject prevails, the acceptance by the creditor of the debtor's unsecured notes for a less sum does not operate to extinguish the original cause of action or release the original debt.

There was a verdict for the defendant, and thereupon the plaintiffs moved the court for judgment non obstante veredicto, which motion the court overruled, and rendered judgment for the defendant.

With respect to the doctrine invoked, Prof. Minor observes: "A motion for a judgment non obstante veredicto—that is, that judgment be given in the mover's favor, without regard to the verdict obtained by his adversary—is made in cases where, after a pleading by the adversary in confession and avoidance, and issue joined thereon, and verdict for the adversary, the unsuccessful party, in retrospective examination of the record, conceives that such pleading was bad in substance, and might have been made the subject of demurrer on that ground. * * * In such a case, therefore, the court will give judgment for such opposite party without regard to the verdict." 4 Min. Inst. (3d Ed.) pt. 1, p. 946.

"The plea must show some consideration moving toward plaintiff, or, in other words, that plaintiff obtained something of value by the new agreement. A plea which on its face shows want of consideration is bad after verdict, and plaintiff is entitled to judgment non obstante veredicto." 1 Cyc. p. 343.

The courts will take judicial notice of the fact that Maryland embraces a part of the territory of the original English colonies of America, and, in the absence of evidence to the contrary, it will be presumed that the common law obtains there. Nelson v. C. & O. Ry. Co., 88 Va. 976, 14 S. E. 838, 15 L. R. A. 583; Stewart v. Conrad's Adm'r, 100 Va. 128, 40 S. E. 624; Bowers v. Bristol Gas Co., 100 Va. 533, 42 S. E. 296.

But as remarked, the plaintiffs proved affirmatively that by the law of Maryland the new notes did not operate as an accord and satisfaction of the original debt.

For these reasons, the trial court erred in overruling the motion of the plaintiffs for judgment without regard to the verdict, and

for that error its judgment must be reversed, and judgment rendered here for the plaintiffs in error.

(104 Va. 269)

WATTS v. WATTS' EX'X.

(Supreme Court of Appeals of Virginia. June 28, 1905.)

1. USE AND OCCUPATION—PERSONS LIABLE.
Where, in a suit to recover rents and profits of land occupied by defendant after a conveyance of a portion thereof by plaintiff's father, it appeared that defendant's sons only assisted her in running the farm, their occupation being subservient to hers, they were not liable to plaintiff for use and occupation.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Use and Occupation, §§ 17, 18.]

2. SAME—DE FACTO GUARDIAN.
After the death of plaintiff's mother, seised of an undivided interest in a farm, leaving plaintiff, and his brother who died soon after, her sole heirs, plaintiff's father married defendant, and thereafter conveyed the land to her, and she occupied and used the same after such conveyance as her own until the death of plaintiff's father. *Held*, that plaintiff's father and defendant, from the death of his mother and from the date of the conveyance by the father to defendant, respectively, were plaintiff's de facto guardians, and, having received the rents and profits from plaintiff's share of the land, were liable to account therefor, with compound interest thereon during the period each enjoyed the whole estate.

3. SAME—TENANTS IN COMMON.
Plaintiff's father and stepmother were not plaintiff's tenants in common only liable to account in accordance with Code 1887, § 3294 [Va. Code 1904, p. 1735], providing that an action of account may be maintained against the personal representative of any guardian, and also by one tenant in common or his personal representative against the other as bailee, for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common.

4. SAME—PARTITION.
Where plaintiff was entitled to an undivided interest in a certain farm as heir of his deceased mother, it was not material to the liability of the estate of his father and of his stepmother for rents and profits of plaintiff's interest during the time they occupied the same that such interest was not ascertained nor partitioned.

5. SAME—DIVISION.
Where, in partition of a certain farm containing 494 acres, plaintiff was awarded 284 acres with the improvements, plaintiff, in a suit against his de facto guardians for an accounting of rents and profits, was entitled to the annual rental value of the part set off to him, and not to $^{284}/_{494}$ of the annual rental value of the whole farm.

6. GIFTS—PRESUMPTIONS.
Where plaintiff's father was indebted to him at the time he placed a certain sum of money in a bank to plaintiff's credit, it will be presumed, in the absence of clear and convincing evidence, that the deposit was intended as a payment on the debt, and not as a gift.

7. USE AND OCCUPATION—CREDITS—SUPPORT.
Where plaintiff's father had possession and used an entire farm after the death of his wife, from whom plaintiff inherited an interest therein, the father's estate was not entitled to credit for support and maintenance rendered to plaintiff, as against his father's liability to account for rents and profits derived from plaintiff's interest in the farm.

8. SAME.
Where, after the death of plaintiff's mother, from whom plaintiff acquired an interest in a farm, his father conveyed his remaining interest to plaintiff's stepmother, who thereafter had possession of the entire farm and supported the family, the father being insolvent, she was entitled to credit for support and maintenance afforded to plaintiff, as against her liability to account for rents and profits of plaintiff's interest in the farm.

Appeal from Circuit Court, Tazewell County.

Suit by R. B. Watts against John G. Watts' executrix. From a decree in favor of plaintiff, defendant appeals. Reversed.

Henry & Graham, for appellant. William H. Werth, for appellee.

HARRISON, J. For some time prior to the year 1890, John G. Watts and Hattie B. Watts, his wife, owned and lived upon a very valuable farm, containing, as shown by recent survey, 494 acres, situated about three miles east of Tazewell Courthouse.

In 1890 Mrs. Watts departed this life, leaving surviving her two infant sons, one of whom died soon after his mother, leaving surviving him his brother, R. Bowen Watts, the complainant in this cause. In 1892 John G. Watts was married again to a widow with four sons, all of whom came to live with him upon the farm mentioned.

On the 28th day of March, 1895, John G. Watts conveyed all of his interest in the farm to his second wife, Mrs. F. G. S. Watts, except 101 acres, known as the "Dill's Meadow Tract," conveyed by him on the same day to A. P. Gillespie, trustee, for the benefit of his creditors. From the death of the first wife to the date of the deed conveying his interest in the farm to the second wife, the entire property was in the exclusive possession and control of John G. Watts, he enjoying and appropriating to himself the entire rents and profits. From the time that the second wife acquired the interest of her husband in the farm, she used and managed the whole tract and received the entire rents and profits.

This suit was instituted by R. Bowen Watts, suing by his next friend and guardian, for a partition of the land, and to recover his share of the rents and profits due him since the death of his mother, to whose interest in the farm he had fallen heir.

By decree of August 31, 1901, the court settled the respective rights of the parties in the land, and appointed commissioners to partition the farm in accordance with the directions of the decree. The commissioners made a report, from which it appears that they laid off by metes and bounds to the complainant 284 acres of land, with the residence and other buildings thereon, as that portion of the farm to which he was entitled as the heir of his mother; that they laid off by metes and bounds the Dill's Meadow

tract, containing 101 acres, to the estate of John G. Watts, who had died before the partition was completed, subject to the deed of trust in favor of A. P. Gillespie for the benefit of creditors; and that they laid off to Mrs. F. G. S. Watts, by metes and bounds, 109 acres, that being the residue of the interest of John G. Watts which had been conveyed to her by him.

To this report no exception was taken by any party, and it was confirmed by decree of December, 1901, and the several parties put into immediate possession of their respective interests; R. Bowen Watts having attained his majority on the 13th day of the preceding March.

The cause having been revived in the name of Mrs. F. G. S. Watts, executrix of John G. Watts, deceased, it was by decree of August, 1902, referred to a commissioner to ascertain and report how much was due to the complainant on account of rents and profits from the estate of his father, and the credits, if any, to which the estate was entitled, and also to ascertain and report how much rent was due complainant, on account of rents and profits, from the defendants, Mrs. F. G. S. Watts and her two sons, D. H. Smith and J. T. Smith, for their alleged use and occupation of the land of complainant, together with any credits to which they were entitled.

The present controversy arises entirely upon the report made in response to this last-mentioned decree, and the action of the lower court with respect thereto. These several contentions will now be considered.

We are of opinion that it was not error to dismiss complainant's bill as to the defendants D. H. and J. T. Smith. As already seen, in 1895 John G. Watts conveyed the residue of his interest in the farm to Mrs. F. G. S. Watts, and after that time, and up to 1900, the evidence shows that she controlled and managed the entire property and received the rents and profits of the whole place. It further appears that her sons, the defendants D. H. and J. T. Smith, by her permission and consent, assisted in running the farm, but this was not a sufficient ground for holding them responsible for the use and occupation of the land of complainant by their mother.

We are further of opinion that from the date of the death of Mrs. Hattie B. Watts to the date of the deed conveying the residue of his interest in the farm to the second wife, during which time he received the entire proceeds, John G. Watts occupied the relation of de facto guardian to his infant son, and, as such, became liable to account for the rents arising from that portion of the land belonging to his son, in accordance with the established rule for the settlement of the accounts of de jure guardians; and from the date that she received a deed to the residue of her husband's interest, and took possession of the whole farm, and received the entire proceeds thereof, Mrs. F. G. S. Watts became the de facto guardian of the complainant with respect to that portion of the rents and profits arising from his land, and became liable to a like accounting. These de facto guardians must, therefore, account for compound interest upon the complainant's share of the rents and profits received by them, respectively, during the period that each enjoyed the whole estate, for one who makes himself guardian de facto is certainly not entitled to be treated with more favor than if he had been legally appointed. Evans v. Pearce, 15 Grat. 513, 78 Am. Dec. 635; Martin's Adm'r v. Fielder, etc., 82 Va. 455, 4 S. E. 602; Garrett v. Carr, 1 Rob. 208; Peale's Adm'r v. Thurmond, 77 Va. 753; Anderson's Adm'r v. Smith, 102 Va. 697, 48 S. E. 29.

The general rule established by this line of authorities is conceded, but it is contended that they do not apply in this case because the father and his infant son were tenants in common, and that a like relation existed between the complainant and Mrs. F. G. S. Watts; that, if liable at all, appellees can only be held to account as tenants in common, in accordance with section 3294 of the Code of 1887 [Va. Code 1904, p. 1735]. This position is not, in our view, tenable. Evans v. Pearce, supra; Martin's Adm'r v. Fielder, supra. In each of these cases the party held liable was tenant in common with infant defendants, and was required to account as de facto guardian for the rents and profits arising from the common property which belonged to the infant co-tenants. It is true, the subject was not discussed in the opinions delivered in these cases, but they were argued by able counsel, and the relation of the parties too plainly appears to admit of the suggestion that such relation was overlooked by the counsel and court.

At common law a tenant in common could not have an accounting from the occupying tenant, in the absence of an express contract, even though excluded from the common property. The statute (section 3294) was passed at an early day to change this harsh rule, and to require the occupying tenant to account to his co-tenant for the profits received by him in excess of his just share or proportion. Under this statute an infant tenant in common has the same right that an adult tenant in common has to require the occupying tenant to account; but, when he does account, his liability is fixed by the same method of calculation with respect to interest that other people are held to who have received and retained the property of an infant. The Legislature manifestly did not intend to abrogate the established rights of infants in this regard. The view of this statute here contended for would make the Legislature, while curing a palpable injustice imposed by the common law upon tenants in common, destroy the humane and meritorious rights of infants, by putting it in

the power of an adult tenant in common to take possession of land in which his interest was small, receive and appropriate for years to his own use rents which belonged almost entirely to an infant co-tenant, and then escape the just liability attaching to a guardian de facto upon the ground that he was a tenant in common. No reason is perceived why a father who occupies land as tenant in common with his infant child should not be at the same time the de facto guardian of the child with respect to its interest in the revenues arising from the common property. It is the child's money that he is putting year by year into his pocket, that he is chargeable with as de facto guardian. He would have to account for that money each year to an adult co-tenant. If he chooses to keep the infant's money, and not pay it into the hands of some authorized person, who would be responsible as guardian, then, in fairness to the helpless child, he must be himself treated as guardian.

It must be conceded that if the whole of the common property was rented to a third person, and the entire rent was paid to the father, he would be chargeable as de facto guardian with the child's share. Why should he not be alike chargeable when, instead of renting out the property, he solely occupies and uses it, and thus receives more than his share?

It is suggested that the interest of the complainant in the land was not accurately ascertained, and for that reason the appellees should not be held to account as guardians de facto.

The public records showed with sufficient certainty the number of acres of this farm belonging to the complainant, and the father knew with reasonable certainty where the most valuable portion of such interest was located. But that is certain which is capable of being made certain, and, if there was any such difficulty as suggested, it could have been easily removed by having the boundary of the child's land ascertained and settled. The child was under the control and management of the father, and could do nothing. It was the duty of the father to ascertain the child's interest, and have a guardian appointed to receive his share of the rents and profits. Having failed to do this, he must account as de facto guardian for the time he received the entire revenues, and Mrs. F. G. S. Watts must account in the same capacity for the time during which she received the entire revenues.

We are further of opinion that, in ascertaining the amount for which appellees are respectively liable, the annual rental value of the 284 acres with the improvements should be taken, and not $^{284}/_{494}$ of the annual rental value of the whole farm. The decree of the court under which the commissioners acted settled this to have been the land to which complainant's mother was entitled, and the report of the commissioners, which was confirmed without objection, defines it by metes and bounds. This could have been as easily done when Mrs. Hattie B. Watts died as now. That it was not done was the fault of those who were using and occupying the land, and they cannot take advantage of this dereliction of duty to the prejudice of the infant heir.

We are further of opinion that the lower court erred in reducing the annual rental value of the 284 acres of land belonging to the complainant from $1,400, as shown by the report of the commissioner, to $852, per annum. The decided preponderance of evidence on this subject supports the finding of the commissioner. Inasmuch, however, as it is necessary to recommit this cause to the commissioner for other purposes, and in order to avoid any possible injustice, the amount due from the appellees on this account will be left open, so that the commissioner may again consider the subject in the light of any additional evidence that may be introduced by either side.

We are further of opinion that in stating the account with John G. Watts, as de facto guardian he should be credited with $2,886.53, as of October 16, 1901. It is contended that this was a gift, and not a payment on account. John G. Watts being indebted to his son at the time, the presumption is that the money, when placed to his credit in bank, was intended as a payment on account. To overcome this presumption the evidence must be clear and convincing, and this it is not.

We are further of opinion that it was proper to refuse credit to John G. Watts for the support and maintenance of complainant from 1890 to 1895, during which time he was in possession of the entire farm. It is the common-law duty of the father to support his infant child, if able to do so. In the application of this rule the court looks at the circumstances of the particular case, and determines according to the right and justice thereof, having in view the position and wealth of the parties. Evans v. Pearce, supra; Hauser v. King, 76 Va. 731–736; National Valley Bank v. Hancock, 100 Va. 101, 40 S. E. 611, 57 L. R. A. 728, 93 Am. St. Rep. 933. Applying these principles to the case at bar, there was no error in holding that nothing should be allowed the father on this account.

Nor was there error in the ruling of the lower court that Mrs. F. G. S. Watts should be allowed compensation for the support and maintenance of complainant, and the keep of his horse, from 1895 to 1900, during which time she had possession of the entire farm. During that time the father is shown to have been insolvent, and the support of the family appears to have devolved upon Mrs. Watts. Under these circumstances it would be inequitable to require her to pay the complainant rents and profits, and not allow her credit for the compensation mentioned.

It is assigned, under Rule 9 (45 S. E. vi), that the court erred in fixing the amount of this credit at $150 per annum, it being con-

tended that the amount allowed is inadequate. As the cause must go back to the commissioner, this item of credit to Mrs. Watts will be left open for further inquiry.

The decree of the lower court properly disallowed any credit for improvements and repairs, and no cross-error has been assigned calling in question this ruling.

We are further of opinion that it is necessary to a proper final decree that this cause be recommitted to the commissioner, who will change his findings upon the two subjects of further inquiry mentioned herein to such extent as he may consider justified by any additional evidence that may be offered with respect thereto, and will further reform his report in the particulars pointed out in this opinion, showing the amount due the complainant from the estate of John G. Watts, deceased, and from Mrs. F. G. S. Watts in her own right, respectively, after the changes indicated have been made.

For these reasons the decree appealed from must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

(104 Va. 249)

VIRGINIA IRON, COAL & COKE CO. v. TOMLINSON.

(Supreme Court of Appeals of Virginia. June 28, 1905.)

1. EXPERT EVIDENCE—MATTERS OF COMMON KNOWLEDGE.

Upon the question as to whether it was dangerous for a boy 12 years old to attempt to start a belt operating machinery by swinging over a sill above the belt by his hands, and tramping upon the belt with his feet, the jurors were as competent to form an opinion as the witnesses, and hence expert testimony that such method of starting the belt was dangerous was inadmissible.

2. EXPERT WITNESSES—COMPETENCY.

The decision of the trial court as to the qualification of an expert witness will not be reviewed unless it clearly appears that the witness was not qualified.

3. MASTER AND SERVANT—FAILURE TO WARN INFANT SERVANT—EVIDENCE.

In an action for the death of an infant servant injured while working about certain machinery, evidence that children were permitted by defendant to go about the place where deceased was killed was admissible; but evidence that children were permitted to go in other dangerous places was not competent to show that defendant had failed to instruct children as to the dangers attending their employment, or had given general permission for them to go into dangerous places.

4. SAME.

In an action for the death of an infant servant, in which it was charged that the master had not given warning of danger, evidence by other employés that they had never heard the foreman give any instruction to any one as to the danger was not admissible.

5. SAME—CONTRIBUTORY NEGLIGENCE.

In an action for the death of a servant less than 12 years of age, an instruction that if deceased, without being ordered to do so, left the place at which he was assigned to work, and went in proximity to the cogwheels where it was alleged he was injured, for any purpose not connected with the performance of his duty, defendant was not liable, was properly refused; it being presumed that deceased was not guilty of contributory negligence.

6. SAME—CONTRIBUTORY NEGLIGENCE OF PARENT—CONSENT TO EMPLOYMENT.

Where the death of an infant was caused by the negligence of his employer, the fact that the infant's father consented to the employment did not defeat his right to recover.

7. SAME—PRECISE CAUSE OF INJURY—NECESSITY OF PROOF.

Where, in an action for the death of an infant, there was direct evidence tending to show that defendant was negligent in failing to properly warn decedent of the danger, and in requiring him to perform dangerous work not within the scope of his employment, it was proper to instruct that plaintiff might recover, if the jury believed that the death was caused by defendant's negligence, although plaintiff had not proven the exact way in which deceased was killed.

8. SAME—PLEADING.

Where, in an action for the death of a servant, the declaration alleged that defendant negligently employed deceased in a dangerous place and in a dangerous occupation, in that it required him to start certain machinery when it stopped, in discharging which duty deceased necessarily came into proximity with the cogwheels which caused his death, plaintiff was entitled to prove that the work of starting the machinery was beyond the scope of decedent's employment.

9. SAME—EVIDENCE—QUESTION FOR JURY.

In an action for the death of a servant killed by being caught in the cogwheels in a buddle, evidence *held* sufficient to justify submission to the jury of the issue of defendant's negligence.

10. SAME—AMOUNT OF CARE REQUIRED.

A master is required to exercise only ordinary care for the safety of his servants, although the amount of care necessary to constitute ordinary care may vary with circumstances, and it is error to instruct that the law requires of a master the highest degree of responsibility for the care and protection of an infant employé.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 139, 141.]

Appeal from Circuit Court, Wythe County.

Action by the administrator of Vivian P. Tomlinson, against the Virginia Iron, Coal & Coke Company. From a judgment for plaintiff, defendant appeals. Reversed.

P. H. C. Cabell and Fulton & Fulton, for appellant. A. A. Campbell and Robt. Sayers, Jr., for appellee.

BUCHANAN, J. Vivian P. Tomlinson, an infant aged 11 years and 6 months, lost his life whilst in the service of the Virginia Iron, Coal & Coke Company, and this action was instituted by his personal representative (his father) to recover damages on the ground that his decedent's death was caused by the negligence of the defendant company.

Upon a trial of the cause there was a verdict and judgment against the defendant company, and to that judgment this writ of error was awarded.

It appears that the defendant company was the owner and operator of machinery called a "buddle," used for the purpose of separating iron ore from the dirt and other impurities found with it. The buddle is located on the side of a hill, and is a structure

in which there are three stories or levels. The ore is brought on small cars from the mine to the upper story or level of the buddle, where it is dumped into washers. The washers consist of logs with paddles attached, incased in closed boxes into which water flows. The logs are made to revolve by means of a gearing consisting of pinions, cogwheels, and belts driven by a steam engine. The paddles upon the revolving logs keep the ore pushed toward one end of the washer, and the mud and water pass out at the other end.

The washers are covered over, and their covering makes, or aids in making, the second level of the buddle. From the washers the ore passes into a screen through which water also passes, and from the screen the ore is carried through a chute into cars underneath the first or ground level. Steps lead from one level of the buddle to another.

The plaintiff's intestate was employed, with the consent of his father, to work at the chute on the bottom floor or level; his duty being to pick mud balls and other substances from the iron ore as it passed through the chute. Near the decedent's place of work was the gearing of the sand washer, with its cogwheels, pinions, pulleys, and belt, but not sufficiently close to endanger his safety whilst engaged in the work he was employed to do. He had been at work at this place for about six weeks prior to his death, which occurred on the 10th day of December, 1908, a few days before the wise and humane statute went into effect which makes it a misdemeanor to employ children under 14 years of age in such work. Va. Code 1904, § 3657bb.

On that day, a few minutes before the buddle was stopped for the employés to get their dinner, he was found crushed to death between the cogwheels (one of which is 34 inches in diameter) of the sand washer. There is no direct evidence as to the manner in which he came in contact with the cogwheels and lost his life.

One of the theories of the plaintiff as to the manner in which the accident occurred, and the one principally insisted upon, is that the belt on the sand washer was slipping, as it sometimes did, and that the decedent, who had been directed by the foreman of the buddle to start the belt when it stopped, was attempting to start it by catching hold of the sill to which the roof was fastened, swinging over and tramping upon the belt with his feet, and that while engaged in this effort to start the belt he fell or was thrown between the cogs below, and very near where he was killed, and that such mode of starting the belt was not only dangerous, but beyond the scope of the decedent's duty, and that the decedent was not warned of the danger.

To show that such a method of starting the belt was dangerous, several witnesses were permitted to give opinion evidence to that effect over the defendant company's objection. This action of the court is assigned as error.

The facts disclosed by the record show that such a mode of starting the belt, especially by a child 11½ years of age, was manifestly dangerous. At least, the facts were of such character that jurors and men of ordinary intelligence generally would be just as competent to form an opinion and determine whether or not that mode of starting the belt was dangerous as the witnesses. This being so, opinion or expert evidence was not admissible. Such evidence, as a rule, is not admissible where the facts already before the jury, or which may be sufficiently brought before it, furnish all the materials necessary for its judgment. Southern Ry. Co. v. Mauzy, 98 Va. 692, 37 S. E. 285; 1 Wigmore on Ev. § 557. But while the evidence under consideration was not admissible, it was harmless error. Lane Bros. v. Bauserman, 103 Va. 146, 48 S. E. 857.

The trial court, over the defendant company's objection, permitted the plaintiff to testify that, when the buddle is overloaded and the belt is properly laced, the belt will not stop, but the overloading will either break the belt or some other part of the machinery. One objection made to this evidence was that it was not shown that the witness was an expert.

The qualification of a witness to testify as an expert being largely in the discretion of the trial court, its admission of such testimony will not be reviewed unless it clearly appears (as it does not in this case) that the witness was not qualified. Lane Bros. v. Bauserman, supra; Richmond Locomotive Wks. v. Ford, 94 Va. 627, 27 S. E. 509.

The other objection was that, even if the witness were an expert, the questions asked called for his opinion upon a hypothetical condition of facts which were not proved in the case.

There was evidence tending to prove the facts hypothetically stated, and the questions were not, therefore, objectionable on that ground.

The court permitted the plaintiff to prove that boys working about the buddle rode back and forth on the cars upon which the ore was hauled from the mine, with the knowledge of, and without objection by, the defendant company. This evidence was objected to by the defendant company because, even if riding on the cars was dangerous, and it were negligent in permitting it, there was no such charge of negligence in the declaration, and the evidence did not in the remotest degree have any connection with the decedent's death. The object of this evidence was to show that the defendant company had failed to instruct such children as to the dangers attending their employment, and general permission and custom for them to go into dangerous places about its works.

Evidence that children were permitted by the defendant company to go, or that they went with its knowledge and without objec-

tion, into or about the place where the deceased lost his life, was, in our opinion, admissible; but evidence that it had permitted other children to ride upon its cars which brought ore from the mine, or to go in or near other dangerous places upon the top of the buddle, in order to establish the negligence charged in the declaration, was not admissible. Wharton on Ev. § 40.

Employés of the defendant company were permitted to testify that they had never heard the foreman, Vaughan, or any other boss of the defendant company, give any instruction to boys working where decedent worked as to the dangers of the machinery where he was killed, and that they were in a position where they would have been likely to have heard any such instruction, if given. This action of the court is assigned as error.

While it was the duty of the defendant company to instruct the decedent and the boys working with him as to the dangers of the machinery by which they were surrounded, yet such instructions were not required to be given at any particular time and place. That being the case, the fact that the witnesses whose evidence is under consideration did not hear such instructions given does not tend to prove with any degree of probability that no such instructions were given. The evidence was therefore inadmissible.

The defendant company asked for 20 instructions. Of these, the court gave 14 as offered, modified instructions numbered 2, 4, 10, and 13, and gave them as amended, and refused to give instructions Nos. 15 and 20. The action of the court in modifying and refusing the instructions mentioned is assigned as error.

We do not think that the court erred in making the additions it did to instructions numbered 2, 4, 10, and 13; nor did it err to the prejudice of the defendant company in giving them as amended.

Instruction No. 15 told the jury that if they believed from the evidence that the plaintiff's intestate, without any requirement from the defendant company, left the place at which he was assigned to work, and went in such close proximity to the cogwheels, either for the purpose of getting grease from the post or cogs, or for any other purpose unconnected with the performance of his duty, then the defendant company was not responsible for the decedent's act in voluntarily exposing himself to such danger, and the jury should find for the defendant.

This instruction states a correct proposition of law as applied to an adult, but, without qualification, is an erroneous statement of the law as applied to an infant under 14 years of age, as to whom there is a prima facie presumption that he cannot be guilty of contributory negligence. Lynchburg, etc., Mills v. Stanley, 102 Va. 590, 46 S. E. 908. See 1 Shear. & Red. on Neg. § 73a; 1 Labatt on Neg. § 348. The court therefore properly refused to give that instruction.

Instruction No. 20 told the jury that, if they believed from the evidence that the plaintiff contributed to the death of his son, he could not recover. There is no evidence tending to prove that the father in any wise proximately contributed to the death of his son. It is true that he consented that his son might enter the employment of the defendant company, but, if that company by its negligence caused the son's death, it clearly cannot defeat the father's right to recover therefor by showing that he consented to the employment. The court was plainly right in refusing to give that instruction.

The court gave six instructions for the plaintiff. The giving of each of these instructions, except No. 5, is assigned as error.

The first instruction is as follows: "The court instructs the jury that it is not necessary for the plaintiff to prove the exact way in which Vivian P. Tomlinson met his death, if they believe that he was killed; but if they believe that the plaintiff has shown by evidence, either direct, or by facts and circumstances, that Vivian P. Tomlinson was killed, and that his death was caused by the negligence of the Virginia Iron, Coal & Coke Company, as set forth in any of the several counts of the declaration, though they are not certain in which way he was killed, they must find for the plaintiff."

The objections made to that instruction are that it is contrary to the well-established principle that the plaintiff must establish the fact that the proximate cause of the decedent's death was the negligence of the defendant, and this he must do by affirmative evidence, and that the evidence did not warrant its being given.

There is direct evidence tending to show that the defendant company was guilty of negligence in failing to properly warn the decedent of the dangers which surrounded him, and in requiring him to perform dangerous work not within the scope of his employment; and, while there is no direct evidence as to the manner in which he came to his death, there is evidence tending to show that it probably resulted from one or the other acts of negligence of which the evidence tended to show the defendant company was guilty. While the plaintiff must introduce evidence from which the jury may properly infer that the accident was caused by the defendant's negligence, he is not required to point out the particular act or omission which caused the accident. 2 Labatt on Neg. §§ 835, 836; 1 Shear. & Red. on Neg. § 58.

Instruction No. 2 given for the plaintiff is as follows: "The court instructs the jury that if they believe from the evidence that Vivian P. Tomlinson was an infant under fourteen years of age, and that he was employed by the Virginia Iron, Coal & Coke Company, and was required or permitted

to start the machinery by pulling or tramping the belt, and was not instructed as to his danger, as set out in instruction No. —; and if they further believe that this was outside the regular duty for which he was employed, and not within the compass of his age and experience, and was an hazardous employment, involving greater danger than the work for which he was originally employed, for an infant of his age and capacity, and that he was caught by the machinery as charged, and killed in so doing—then they are instructed that said infant did not assume the risk of the same, and they must find for the plaintiff."

The objection made to this instruction is that there was no allegation in the declaration that the decedent was put to work outside of the scope of his employment, and that there was no evidence upon which to base it.

There is evidence tending to prove that the decedent was directed to start the belt when it slipped, and that one of the ways of starting it was more dangerous than the work he was employed to do. The second count of the declaration, after setting out the dangerous character of the place where the decedent was employed to work, alleges, among other things, that the defendant company negligently and wrongfully employed the decedent in a dangerous place and in a dangerous occupation for an infant under 14 years of age, in this: that it required him to start said machinery when it stopped by starting a belt connected with the machinery, and in discharging that duty the decedent necessarily came into close and dangerous proximity to the revolving cogwheels which caused his death. Under the allegations of that count, we think the plaintiff had the right to show that such work was beyond the scope of the decedent's employment, in order to prove the negligence charged, and to have the jury instructed upon that subject.

The plaintiff's instruction No. 3, which is upon the question of contributory negligence, is objected to because the evidence fails to show that the proximate cause of the decedent's death was the negligence of the defendant company.

There was, as before stated, direct evidence tending to show that the defendant company was guilty of negligence, and the circumstantial evidence tended to show that such negligence was the proximate cause of the decedent's death.

The same evidence justified the court in giving instruction No. 4 over the defendant's objection that there was no evidence upon which to base it.

The objection made to the sixth instruction is that it imposed a higher degree of care upon the defendant company for the protection of the decedent than is imposed by law. That instruction told the jury that the law required of the master the highest degree of responsibility for the care and protection of an infant employé.

The settled law of this state, by a long line of decisions, is that it is the duty of the master to exercise ordinary care for the safety of his servant in the course of his employment, but he is not bound to use any higher degree of care. See Parlett v. Dunn, 102 Va. 459, 46 S. E. 467, and the numerous cases cited.

What is ordinary care depends upon the facts and circumstances of the particular case. What would be ordinary care in one case might be gross negligence in another. The degree of care due by the master to an infant employé of tender years is much greater than is due to an adult. Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 594, 46 S. E. 908. But whatever be that degree of care, it is ordinary care under all the facts and circumstances of the case. There is language in the opinion of the court in the case last cited, standing alone, and not considered in connection with other parts of the opinion and the authorities cited, which might warrant the language used in the instruction under consideration. But that case was not intended to change the rule that ordinary care, under all the facts and circumstances of the case, was the measure of the master's duty to his servant in the case of infants as well as in the case of adults. This is apparent from the authorities quoted and relied on in that case for the conclusion reached.

Shear. & Red. on Neg. § 219, is quoted with approval in that case (page 594, 102 Va., and page 909, 46 S. E.), in which the law is laid down as follows: "It is the duty of one who employs young persons in his service to take notice of their apparent age and ability, and to use ordinary care to protect them from the risks which they cannot properly appreciate, and to which they ought not to be exposed."

Thompson on Negligence, which is also cited and quoted in that case, in section 3767 of his work, in discussing this question, says: "But in all these and in other risks the limit of his [the master's] duty and obligation is the exercise of reasonable or ordinary care."

And Bailey on Personal Injuries, who is also cited and quoted in the Stanley Case, declares that the measure of the master's liability to his servant is reasonable or ordinary care. Volume 1, §§ 963–966.

The instruction did not state the law correctly as to the measure of the master's duty to the servant, and the court erred in giving it.

It will be unnecessary to consider the remaining assignment of error, viz., as to the refusal of the court to set aside the verdict of the jury and grant a new trial, since the judgment will have to be reversed, the verdict set aside, and a new trial granted, for the errors heretofore pointed out.

(104 Va. 290)

DUNN et al. v. STOWERS et al.

(Supreme Court of Appeals of Virginia. June 28, 1905.)

1. MARRIED WOMEN — PROPERTY RIGHTS—CONTRACT TO SELL LAND—ENFORCEABILITY.

A contract made by a married woman for the sale of her separate estate may be enforced against her in equity.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 722–724; vol. 44, Cent. Dig. Specific Performance, §§ 103, 104.]

2. SAME—EFFECT OF STATUTE.

Code 1887, § 2502 [Va. Code 1904, p. 1272], providing that when a husband and wife have signed a writing purporting or contracting to convey any estate, real or personal, such writing may be admitted to record, when it shall operate to convey from the wife her right of dower, and all interest which at the date of the writing she may have in the estate conveyed, but shall not operate any further upon the wife by means of any warranty contained therein which is not made with reference to her separate estate, as a source of credit, etc., does not prohibit a married woman from carrying out an executory contract for the sale of land, or prevent a court of equity from enforcing such contract against her.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 722–724; vol. 44, Cent. Dig. Specific Performance, §§ 103, 104.]

3. PARTIES — CONTRACTS BY HUSBAND AND WIFE—SUIT AFTER WIFE'S DEATH.

A husband and wife contracted for the sale of land, a part of which belonged to the wife's separate estate, and which provided that the price should be paid in installments to the husband. Several installments were so paid after the death of the wife, after which the husband brought suit for the remaining installments. The purchaser commenced a suit in equity to restrain the prosecution of the action at law, and to compel defendants to exhibit their title to the land, that its marketability might be passed upon. The husband and all the distributees of the wife were made parties, and none of them contested the right of the husband to receive the purchase money. *Held*, that the personal representative of the deceased wife was not a necessary party.

4. REFERENCE—SCOPE OF REPORT.

The vendor in a contract for the sale of real estate sued to recover an unpaid portion of the price, and the vendee sued to enjoin the prosecution of this action, and to compel the vendor to exhibit his title, that its validity might be passed upon. The suit in equity was referred to a commissioner to report all facts connected with the title, and anything else deemed pertinent by himself, or required by any party in interest. *Held*, that the commissioner was justified in reporting what portion of the price was still due, where there was no objection to the correctness of his calculations.

5. DEEDS—PRESUMPTIONS.

Where, in a suit to enjoin the prosecution of an action at law on a contract for the sale of land, it appeared that the vendor and vendee under the contract had been in undisputed possession for over 30 years since the making of certain deeds to the person from whom the vendor purchased, it was presumable that such remote grantors, who were women, were unmarried, and hence that the title was not clouded with outstanding rights of curtesy.

6. VENDOR AND PURCHASER — ACTION FOR PRICE—SUIT TO ENJOIN—AFFIRMATIVE RELIEF—NECESSITY FOR CROSS-BILL.

A contract by a husband and wife for the sale of land, part of which was the property of the wife, provided that the price should be paid to the husband. After the wife's death the husband sued for an unpaid portion of the price, and the purchaser sued in equity to enjoin the action; praying that the husband and the heirs of the wife be required to exhibit their title, so that, if it was good, proper conveyances might be executed, and, if not, the contract rescinded. *Held*, that it was proper, on finding the title valid, to render a decree against complainants in the injunction suit for the balance of the purchase money, though there was no cross-bill seeking such recovery, and the personal representative of the deceased wife was not a party.

7. SAME—FORM OF CONVEYANCE—WAIVER.

A husband and wife contracted to convey lands by deeds containing certain warranties. Part of the price was paid, and all was due, and the vendor was ready to convey before the wife died. Thereafter the purchaser made various payments to the husband. *Held*, that any objection which might otherwise have been made by the purchaser to a conveyance by the husband and the heirs of the wife had been waived.

Appeal from Circuit Court, Bland County.

Suit by D. W. Dunn and others against James M. Stowers and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Fulton Kegley and R. W. Williams, for appellants. Henry & Graham, for appellees.

CARDWELL, J. James M. Stowers, the principal appellee here, and Mary U. Stowers, his wife, spoken of in this record as Polly M. Stowers, owned and occupied three contiguous tracts of land situated in the county of Bland—one containing 202 acres, another 39¾ acres, and the other 93 acres—and they had been in the possession of these lands for years prior to the contract for their sale hereinafter mentioned. Mrs. Stowers acquired nine-fourteenths of these lands as the sole heir at law of her father, Joseph Lambert, who died in March, 1880; and James M. Stowers acquired title to the balance of the lands by conveyances to him from parties who acquired title from Elijah Lambert, who owned jointly with his brother Joseph the said lands, and died prior to the death of Joseph Lambert.

On the 5th of September, 1890, James M. Stowers and wife entered into a written contract, commonly known as a "title bond," with appellants, whereby they agreed and bound themselves to sell to Dunn and his associates the said tracts of land for a consideration of $4,000, which was to be paid to James M. Stowers alone, and for which sum, divided into three equal payments, bonds were executed by Dunn and his associates to James M. Stowers, payable respectively on May 1, 1891, November 1, 1891, and May 1, 1892. The contract or title bond stipulated that the two first-named tracts, of 202 acres and 39¾ acres, were to be conveyed to the vendees with covenants of general warranty, and the other tract, of 93 acres, to be conveyed with special warranty; that is, of such right, title, and interest therein as Stowers and wife had.

In May, 1891, Stowers and wife surrender

ed the land to appellants, who have been in possession thereof continuously from that time.

A number of payments were made upon the several bonds between May 1, 1891, and July 2, 1895, but none of them paid in full, all of which payments were made to James M. Stowers, and several of them made after the death of Mrs. Stowers, which occurred on January 5, 1893. Although repeatedly and earnestly importuned by James M. Stowers to pay the balance due on these notes, appellants paid nothing thereon after the last payment above mentioned, in July, 1895; and on the 29th day of September, 1896, another contract was entered into between the appellants, as parties of the first part, and James M. Stowers, of the second part, which recites that the parties of the first part had purchased the lands, as hereinbefore stated, since which time Stowers' wife had died, leaving the title in doubt; and it was agreed that Stowers should bring a suit in the circuit court of Bland county for the collection of the purchase money still due him. "Said suit is not to be defended by said purchasers, except to present the law of the case based upon the exact facts as to the status of said title, and shall abide by said decision of said court, and are to pay the costs of said suit; and, should said court decide that said Stowers cannot make a good title to said land, then the said parties hereto are still to try all honorable and fair means to adjust the said questions in the premises, and, if they cannot agree on a basis of settlement, then they are to leave the matter to arbitration upon the terms as follows: * * *"

Stowers then brought his suit at law on the purchase-money bonds, and thereupon appellants, without making any appearance in that suit as stipulated for in the contract just referred to, filed this bill in equity against James M. Stowers and the children of himself and his wife, Polly M. Stowers, deceased, praying an injunction to supersede the action at law; that the defendants might produce before the court the title of James M. Stowers and wife to the lands, "that the same might be inspected by the court; and that all questions concerning the title to the lands might be adjudicated, so that, if good, your orators might have proper conveyances executed, and, if not good, the said contract [of September 5, 1890] be rescinded."

Polly M. Stowers left five children, two of whom were under the age of 21 years at the time of her death. James M. Stowers and his three adult children filed an answer to said bill, setting out all of the facts hereinbefore mentioned and others, denying all allegations of the bill not specifically admitted to be true, and claiming that the title to the lands in question was entirely good, exhibiting with the answer the title deeds therefor, and also a deed duly executed and acknowledged by James M. Stowers and four of his children, three of whom were then adults, and tendered the deed for delivery to appellants upon the purchase money for the lands being paid in full by them, which deed conformed to the provisions of the contract of sale as to covenants of title, to which answer appellants filed a general replication. A guardian ad litem was duly appointed for the two infant defendants, and they and the guardian ad litem filed their answer to the bill. Upon these pleadings the circuit court made its decree of January 29, 1900, referring the cause to W. D. Kegley, who was appointed special commissioner for the purpose, to inquire into and report fully all the facts connected with the title to the lands in question, necessary or material to enable the court to pass upon the question of the validity thereof, whether said title was good or bad, and, if defective, in what respect, and to report anything else deemed pertinent by himself or required by any party in interest.

The cause dragged along before Commissioner Kegley until October 7, 1903, when he filed a very full and satisfactory report in response to the decree of reference; taking the ground that the title to the lands in James M. Stowers and his children was good, unless the following matters suggested by him impair its validity, viz.:

(1) Mary Kensil, one of the heirs of Elijah Lambert, sold her one-seventh interest in the land to James M. Stowers, and, having died before making a deed thereto, her interest was afterwards conveyed by John Kensil, her husband, A. W. Shewey and Anna, his wife, James Crabtree and Agnes, his wife, and Barbara Scott, the deed bearing date October 14, 1868; and the defect suggested by the commissioner is: "It does not appear on the face of this deed that the grantors are all the heirs at law of Mary Kensil. Neither does it so appear from the evidence in the case, unless the statement of Mr. Stowers that this interest was conveyed to him by the heirs of Mary Kensil is sufficient on this point. It would seem that Barbara Scott, one of the grantors, was or had been married; but it does not appear whether her husband, if she had been married, was living or not at the time of the execution of the deed. There is no evidence, so far as I can find, in the record on this point."

(2) James M. Stowers acquired a two-sevenths interest in the lands in question from one James R. Bales, and the deed therefor was all-sufficient and duly recorded. One of these one-seventh interests was acquired by Bales from Margaret Perkey, a sister of Elijah Lambert, deceased, by deed of release and quitclaim dated October 7, 1869, duly executed and recorded. The suggestion of defect made by the commissioner is: "It appears in the evidence that Margaret Perkey was married, but it does not appear whether her husband was living at the time of the execution of this deed. If he was living, then he should have united in the deed."

In the first suggestion is involved the pos-

sible right of curtesy in the husband of Barbara Scott in one-fourth of one-seventh of one-half of the land; and in the second is involved the possible right of curtesy in the husband of Margaret Perkey in one-seventh of one-half of the land.

Commissioner Kegley, as he was authorized by the general clause of reference in the decree, at the request of counsel for James M. Stowers and children, made and filed as a part of his report a statement showing the balance due to James M. Stowers on the said bonds of appellants to be $1,258.79, with interest on $785.62 from October 7, 1903.

The cause coming on to be heard upon the pleadings and exhibits therewith and theretofore considered, and the report of Commissioner Kegley, and the depositions and exhibits therewith, the circuit court made its decree of December 7, 1903, appealed from, which holds "that the contract for the sale of the lands in the bill and proceedings mentioned, and executed between the complainants and James M. Stowers and wife, dated the 5th day of September, 1890, is valid and enforceable, notwithstanding the death of Mrs. Stowers; that any question of the loss of the general warranty of the wife, if ordinarily sufficient to bar specific performance, was waived by complainants, who, after her death, recognized the contract as subsisting by retaining the possession of the land and making payments thereon." And the court, being of opinion that it should settle the entire controversy in the cause, and not remit either party to any remedy at law, proceeded to decree further as follows: That said report of Commissioner Kegley be confirmed. That the title of the said land is good and marketable, and that the contract for the sale of said land be specifically enforced, and, to that end, that James M. Stowers recover of appellants (complainants below) the sum of $1,258.79, with interest on $785.62 from October 7, 1903, and the costs of this suit, for which said James M. Stowers might have execution when the deed thereinafter referred to are executed and filed with the papers in the cause; said sum decreed being the balance of the purchase money due for the land, as shown by Commissioner Kegley's report. And further, that James M. Stowers and his children, heirs at law of Mary U. Stowers (Polly M. Stowers), having executed and filed with their answer a deed to said land, conveying the same to said purchasers, the clerk of the court is directed to deliver same when the purchasers pay the decree thereinbefore rendered against them for purchase money; but as two of said grantors, viz., Rufus M. Stowers and Samuel C. Stowers, were infants at the time of the execution of said deed, W. J. Henson was appointed a special commissioner, who, as such, should execute a deed conveying the interest of the said Rufus M. and Samuel C. Stowers in said lands to said purchasers, and, if either of them should have attained the age of 21 years, such one should join in the deed conveying with general warranty the tracts of land mentioned in said contract, which provided for conveyance with general warranty, and with special warranty the tract for which the contract provided for conveyance with special warranty.

Pursuant to the decree, and Rufus M. Stowers having attained full age, he and W. J. Henson, commissioner, duly executed and filed with the clerk of the court, March 17, 1904, a deed, as required by the decree.

As we have seen, Polly M. Stowers acquired title to nine-fourteenths of the lands which are the subject of this suit by descent from her father, who died in March, 1880, the title to which came to her, as Commissioner Kegley reports, "perfect and free from question"; and counsel for appellants now concede in their reply brief that under the law as it stood at the date of the contract of September 5, 1890, a married woman could make a valid sale of her statutory separate estate. This being conceded, it is settled that a contract made by a married woman for the sale of her separate estate may be enforced in a court of equity in suits for or against her. This was done in Gentry v. Gentry, 87 Va. 478, 12 S. E. 966, where the contract was entered into between the parties on the 3d day of July, 1888, and whether the estate the married woman contracted to sell was an equitable or a statutory separate estate does not appear from the reported case, but it does appear that it was her separate and sole property; and this court affirmed the decree of the circuit court enforcing specific execution of the contract.

In Va. Coal & Iron Co. v. Roberson, 88 Va. 116, 13 S. E. 350, the land in controversy was the separate estate of the wife, acquired under the statute enacted April 4, 1877, known as the "Married Woman's Act," and there was a deed made by Roberson and wife to Chas. W. Kilgore, dated the 1st day of March, 1880. The acknowledgment of the parties thereto being found defective, Roberson and wife refused to perfect it. Suit was brought against them by the owners of the land to compel a perfection of the deed, which suit was resisted by Roberson and wife, who made the contention that the wife could not be made to execute a deed. The court held that the certificate was imperfect, but that the imperfect deed constituted a contract, under the married woman's act, and specific performance could be enforced. It therefore reversed the lower court, and decreed that the married woman should be compelled to make a proper deed, and, upon her failure or refusal to do so, the court could have a commissioner execute a deed so as to conclude her rights.

And in the case of Clinch River Veneer Co. v. Kurth, 90 Va. 737, 19 S. E. 878, it was also held that the married woman's deed therein involved was defective, but was enforceable in equity as an executory contract.

This case came under review in Geil v. Geil, 101 Va. 773, 45 S. E. 325, where the court declared that the opinion in the case of Clinch River Veneer Co. v. Kurth was not sound, so far as it held the certificate of the deed therein involved to be defective, and held a certificate with a similar omission to be good; but no disapproval was announced as to the fact that such a deed, if defective, might be treated as an executory contract, upon which a suit might be prosecuted for specific performance of the contract.

Wood v. Walker, 92 Va. 27, 22 S. E. 523, is cited as authority for the proposition that a good title must be shown, and a valid deed tendered, in order to authorize the specific enforcement of a contract for the sale of land, but that case has no bearing upon the case in hand. In a case where the rule in Wood v. Walker applies, the court will not execute a contract at the instance of a vendor unless the deed is made; and where the vendor has the initiative, as in that case, he should do all the court could require him to do by his pleadings in the beginning. As remarked by counsel for appellees, there are many cases where specific performance may be sought, where it would be impossible to file and perfect a deed until the court had passed upon the rights of the parties, and declared the kind of deed necessary to be made, or where the court, through a commissioner, could carry out its decree.

In this case appellants called upon appellees to exhibit their title to the court, in order that it might be inspected by the court, and all questions concerning the title might be adjudicated, so that, if good, appellants might have proper conveyances executed, and, if not good, that the contract by which Stowers and wife agreed to sell to them the lands be rescinded, and the purchase money theretofore paid refunded. With their answer, as we have seen, appellees tendered a properly executed deed for the land, to the extent of the interest of Stowers and all of the children and heirs of Polly M. Stowers, his wife, with the exception of two, who were then under age; and the decree of the court provided for a proper conveyance from these two of their interests in the lands to the appellants, thus vesting in them a good and marketable title to the lands if the defects in the title suggested by Commissioner Kegley did not exist, as to which we will have more to say later.

Counsel for appellants seem to think that they could not acquire title to the lands without a deed executed by Stowers and his wife, as required by section 2502 of the Code of 1887 [Va. Code 1904, p. 1272], since married women can only convey title to their estates according to statutory requirements; and Augusta National Bank v. Beard, 100 Va. 687, 42 S. E. 694, is cited as authority for the proposition. It is true, it was held in that case that the married woman's law does not by implication repeal section 2502, but all that was decided is that section 2502 could have no other interpretation given to it than that it frees a wife from liability on a covenant of warranty contained in the conveyance as completely as did the prior statute, except when made with reference to her separate estate as a source of credit; and, no reference being made in the deed to the wife's separate estate, it was as if there were no covenant of warranty therein contained, so far as the wife was concerned. It cannot be maintained that this statute would prohibit a married woman from carrying out her executory contracts, or inhibit or interfere with a court of equity in enforcing against her her contracts with reference to her separate estate, for, if such was the case, the greater portion of the married woman's acts would be absolutely nugatory.

Polly M. Stowers was bound by her contract, enforceable in a court of equity, to convey her interest in the lands to appellants; and all that a deed from her husband and herself, executed as provided by section 2502, would have availed the appellants, and which they lost by her death, was her contingent right of dower in that portion of the lands which belonged to her husband, and this is obviated by the fact that she was dead when title to the lands was tendered to appellants by the deed from Stowers and the adult children, and that of the guardian ad litem for the infant.

By appellants' second assignment of error they assert that the personal representative of Polly M. Stowers should have been before the court when the decree was rendered, and that such personal representative has a substantial interest in the case.

The bill was filed by appellants for the purpose primarily of enjoining an action at law which had been instituted against them on the purchase-money bonds executed by them to James M. Stowers for the land in controversy, with the further prayer that the defendants exhibit title to the lands, etc.; and they seem not then to have regarded the personal representative of Polly M. Stowers as a necessary party to this suit, as he was not made a party. Nowhere and at no time throughout the proceedings in this suit have appellants questioned the right of James M. Stowers to receive the purchase money. Polly M. Stowers, in signing the contract, stipulated that the money should be paid to him; and by it she and those claiming under her as her heirs and distributees were bound, so far as appellants were concerned. Why this was done, we know not, nor need it be known, as she had a perfect right to give the money to her husband if she so desired, and she had the right to contract with them so as to bind them to pay it to her husband, as she did. Her children and her distributees were before the court, and none of them disputed the right of their father to receive the money.

In Strother v. Hull, 23 Grat. 652, which

was a suit for a settlement of an administration account and the distribution of the estate, it was contended that as one of the legatees died a minor, and the personal representative was not before the court, it was certainly irregular to proceed to a distribution of the estate of the deceased minor, although she died a minor, intestate, and unmarried, without bringing her personal representative before the court; but the court held that to have brought the personal representative of the deceased party before the court would have been the merest matter of form, as all the parties beneficially interested in the estate were before the court, and it was not pretended that there were outstanding debts to collect or to pay, other than the estate in the hands of appellant, and no one could be injured by the absence of the personal representative of the deceased party interested.

In the case at bar it has not been suggested that there were outstanding debts due to Polly M. Stowers to be collected, or debts against her to be paid, and we can see no reason whatever why her personal representative should have been made a party.

Under the third assignment of error it is urged that the circuit court erred in sustaining so much of Commissioner Kegley's report as reported a balance due on the purchase-money bonds, because no such question had been raised in the pleadings in the cause, and this question had not been submitted to the commissioner.

There was no exception taken to Commissioner Kegley's report, and the general clause of reference in the decree was ample to authorize the statement in his report, made at the instance of a party to the cause, showing a balance due on the bonds payable to James M. Stowers.

The rule in such cases as this, laid down in Walters v. Bank, 76 Va. 12, and sanctioned in numerous cases following, is that, when a court of equity has once acquired jurisdiction of a cause on equitable grounds, it may go on to a complete adjudication, even to establish legal rights which would be otherwise beyond the scope of its authority.

As was said in the opinion in Parker v. Dee, 2 Chy. Cas. 200, "When this court can determine the matter, it shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere."

In this case the jurisdiction of the court was invoked by appellants, and in it the court took jurisdiction of all the parties interested and the subject-matter of litigation, and the appellants cannot be heard to deny the jurisdiction of the court to settle all matters in controversy between the parties in accordance with the well-established rule which we have just quoted. Especially are they not to be heard to question in this court the authority of the circuit court to ascertain and determine the amount due from them on their purchase-money bonds for the subject-matter of the litigation, when there is no suggestion of error in the calculation made and reported by the commissioner, whose report was confirmed without exception.

The fourth assignment of error relates to the suggestions made by the commissioner as to the deeds from John Kensil and others to James M. Stowers, and from Margaret Perkey to James Bales.

Through all the delay in the payment of the purchase money for the lands in question, and the many interviews between appellants and James M. Stowers, they made no suggestion whatever that they objected to the title to the lands, until threatened with a suit on their bonds by James M. Stowers; and, in addition to this, they nowhere during the taking of depositions, and when they were afforded an opportunity to do so, made inquiry as to whether Barbara Scott or Margaret Perkey was married at the date of the deeds in question. The conveyance of the Kensil interest was made to James M. Stowers on the 14th of October, 1868, which was about 30 years before the institution of this suit, and more than 35 years before the final decree rendered therein; and, from the testimony of James M. Stowers, which is not contradicted, he had been in possession of this land ever since he bought it. The conveyance of Margaret Perkey to James Bales bears date the 17th day of September, 1869, about 34 years before the final decree in this cause. So that James M. Stowers and the appellants together had continuous, actual, open, and exclusive possession of the lands conveyed by Barbara Scott and Margaret Perkey for more than 30 years before this suit was brought. These facts and circumstances, together with the further fact that the deeds executed by Barbara Scott and Margaret Perkey are perfect upon their face, raise, we think, a presumption that neither of them had a husband living to join in the deeds.

Maupin, in his work on Marketable Title to Real Estate, § 292, says: "A purchaser may be compelled to take a title resting upon a hostile, adverse, and uninterrupted possession under color of title which has continued a sufficient length of time to bar the rights of any possible adverse claimant."

The same author, at page 703, discussing title dependent upon adverse possession, where a vendor relies on the statute of limitations to cure a defect in his title which is contested by his vendee, says: "There must be some present ground to apprehend that the title will be disputed, and the means of sustaining it unavailing to the purchaser."

A similar question was raised in Gibson v. Brown (Ill.) 73 N. E. 578, in which it was said that, while a court of equity will never force upon a vendee a doubtful title, immaterial defects and technical objections, where a purchaser gets substantially what he con-

tracts for, will not be permitted to be set up to defeat a decree of specific performance.

Under the fifth assignment of error, appellants contend that there could be no proper decree in this case against them for the balance due on the purchase money without filing a cross-bill, to which the personal representative of Polly M. Stowers would be a necessary party.

It is true that an answer to a bill often asks that the answer be treated as a cross-bill, if the respondent wishes affirmative relief which would be antagonistic to the relief sought in the bill, with the right of complainant to respond thereto by answer; but whether a cross-bill be resorted to, or not, depends upon the attitude the complainant assumes.

James M. Stowers had sued to recover of appellants the amount due on the purchase-money bonds he held, which were long past due, and the bill in this cause was filed by appellants, making James M. Stowers and the heirs at law of Polly M. Stowers (naming them) parties defendant thereto; the prayer of the bill being "that they be required to produce before this court the title of said James M. Stowers and said Polly Stowers, or either of them, to said land, in order that the same may be seen and inspected by the court, and all questions concerning said title may be adjudicated, so that, if good, your orators may have proper conveyances executed, and, if not good, that said contract be rescinded, and the purchase money so paid by them be refunded by the said James M. Stowers for the loss of the land."

This was plainly a bill for specific performance of the contract, if the title which they sought to bring out proved to be good; and with the alternative prayer that, if it was not good, the contract be rescinded. The decree in the cause, which is the result of the pleadings and proof, demonstrates the fact that there was no need of the personal representative of Polly M. Stowers to be made a party thereto, as the decree simply carried out the contract, in requiring the appellants to pay the money directly to James M. Stowers, to whom they agreed by their contract to pay it.

Under the sixth assignment of error, complaint is made of the action of the court below in requiring appellants to accept the deed executed by its commissioner on behalf of the infant defendants; and this assignment rests upon the theory that appellants after the death of Polly M. Stowers could not be compelled to accept the warranty of the heirs, and especially to accept the commissioner's deed on behalf of the infants.

We are wholly unable to see any merit in this assignment. As we have seen, the court, after declaring that the contract of September 5, 1890, is valid and enforceable, notwithstanding the death of Mrs. Stowers, declares that any question of loss of the general warranty of the wife, if ordinarily sufficient to bar specific performance, was waived by appellants, who after her death recognized the contract as subsisting by retaining the possession of the lands and making payments thereon. This declaration is sustained by the facts already stated, and, if necessary, other equally cogent reasons for it might have been given—among them, that appellants desired and obtained possession of the lands "for prospecting for minerals or mining for same," and, having ascertained that the purposes for which they desired the lands had failed, without paying the purchase money, they retained possession of the lands down to the time of the institution of this suit, and to the present day; and the lands, profitable to James M. Stowers for farming purposes when he surrendered the possession thereof, and long prior thereto, have become greatly deteriorated, if not entirely worthless for those purposes. James M. Stowers was asked why he and his wife did not convey the lands to complainants before his wife's death, to which he made reply: "Because we had not received our money. We were ready to do it." The money was due, as we have already said, when Mrs. Stowers died, and James Stowers further testified that he had made every exertion possible to collect it, except to sue upon the bonds; so that, if the warranty of Mrs. Stowers was necessary or even desirable to appellants, they have no one to blame for their failure to get it, except themselves.

The seventh and last assignment of error refers again to the refusal of the court to rescind the contract, and we do not deem it necessary to discuss this question further than has already been done.

Upon the whole case, we are of opinion that the decree of the circuit court should be affirmed.

(104 Va. 217)

VIRGINIA IRON, COAL & COKE CO. v. LORE.

(Supreme Court of Appeals of Virginia. June 22, 1905.)

1. MASTER AND SERVANT—DEATH OF SERVANT—RULES—FAILURE TO PROMULGATE—FAILURE TO WARN — NEGLIGENCE — EVIDENCE.

In an action for death to a servant, evidence *held* to sustain a finding that defendant was guilty of negligence in failing to promulgate rules for the protection of decedent, and, in the absence of rules, in not warning him of the danger attending his work from the use of defendant company's yard by the railroad company.

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where, in an action for death of a servant in collision between a railroad train operating in defendant's yard and defendant's dinkey en-

gine and slag pot, defendant's engineman testified that it was his habit to leave a switch open when he went out with slag, and to close it when he returned to the main track, whether the leaving of such switch open, in the absence of any rule on the subject, was contributory negligence, was for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089–1132.]

Error to Corporation Court of Bristol.

Action by one Lore against the Virginia Iron, Coal & Coke Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Cabell & Cabell, for appellants. A. H. Blanchard, H. W. Sutherland, and Jno. E. Burson, for appellee.

BUCHANAN, J. H. C. Massie, whilst in the service of the Virginia Iron, Coal & Coke Company, lost his life, and this action was brought by his personal representative to recover damages therefor, upon the ground that his decedent's death was caused by the negligence of that company.

Upon the trial of the cause the defendant company demurred to the evidence, which demurrer was overruled by the court, and a judgment rendered in favor of the plaintiff for $3,000. To that judgment this writ of error was awarded.

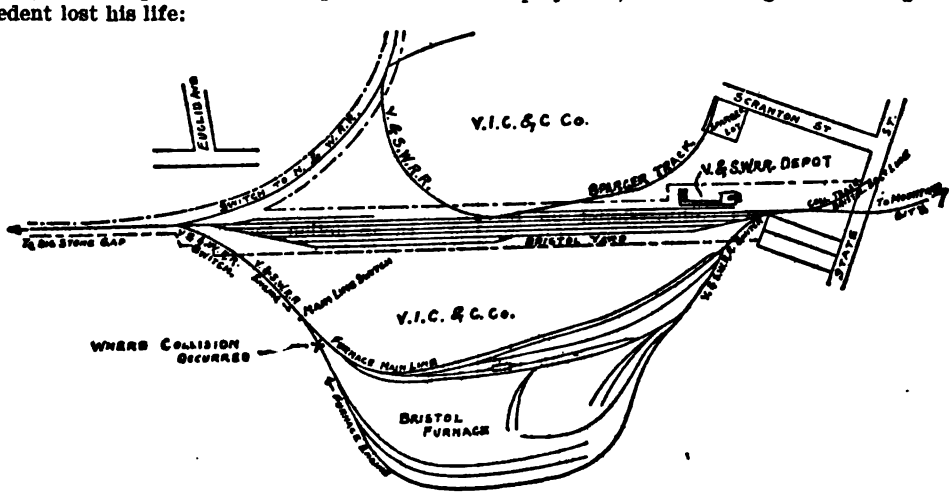
It appears that the defendant company was the owner of a large furnace for the manufacture of iron, located in the city of Bristol. Attached to the furnace was a large yard, in which are tracks and switches belonging to and used by the company in hauling material and refuse from one part of the yard to another. By some arrangement with the furnace company, the nature of which is not shown by the record, the Virginia & Southwestern Railway Company, with its own locomotives, cars, and employés, delivered materials and supplies upon the defendant company's yard for use at its furnace. The map or diagram below shows generally the location of the furnace, its yard, tracks, and switches, the point where the railway company entered the yard, and the point where the plaintiff's decedent lost his life:

On the evening before the accident, which occurred just before day the next morning, the defendant company employed the plaintiff's decedent to aid in hauling slag from the furnace to the dumping ground in its yard. The machinery used for that purpose was a slag pot or ladle on wheels, and a small steam engine called a "dinkey." The engineman and his helper, the plaintiff's intestate, known as the "potman," had been operating this machine the night preceding the accident, and were returning from the tipple track toward the main furnace track, slag pot in front, when they were, without warning, run into by the cars of the Virginia & Southwestern Railway Company, which were being pushed into the yard, and the plaintiff's intestate killed.

The grounds of negligence upon which the plaintiff bases his right to recover are that the defendant company failed to warn his decedent of the dangers attending his employment, and had no rules defining the manner in which its work was to be done, for the purpose of protecting its employés.

It appears that no warning or instruction was given the decedent, and that the defendant had promulgated no rules. The contention of the defendant company is that the decedent needed no warning, because when employed he represented that he had worked before in this same capacity, and that, although the defendant company had promulgated no rules, the rules of the railway company governing its employés in running its locomotives and cars upon the furnace yard were sufficient for the protection of the employés of the defendant company. It appears that the furnace had been in operation for four or five years, and that the decedent had worked at or about the furnace, "off and on," ever since it was built, and that, when employed the evening before his death, he was asked if he had ever worked in that capacity before, and his reply was that he had.

If he had worked as "potman" at the defendant company's furnace before his last employment, and the dangers attending that



work were no greater than when he had formerly worked there, no further instruction or warning was necessary. The decedent's mother, who lived near the furnace, testified positively that her son had never worked in that capacity at that furnace. It further appears that the decedent had been absent from Bristol, and had only returned the day before his death. Prior to that time—how long does not appear—the rules of the railway company made it the duty of its employés, and the practice was, before running its locomotives and cars into the yard of the defendant company, to sound certain blasts of the whistle, and to get reply blasts from the "dinkey" engine of the defendant company. At the time the accident occurred the city of Bristol was enforcing its ordinance prohibiting whistling in the yard, and the rule referred to above was no longer in force. It appears that the decedent knew that the railroad company's locomotive and cars might be sent into the defendant company's yard at any time during the day or night, but the record does not show that he knew that the rule or practice referred to was no longer in force, or that they could be brought into the furnace yard without sounding whistle or bell.

After the abrogation of that rule of the railway company, if not before, it was clearly the duty of the defendant company to promulgate rules for the protection of its employés upon its yard, used as it was by the railway company. Two companies operating steam engines and cars upon the same tracks in the same yard, running backyards as well as forwards, at all hours of the day and night, were engaged in such a complex business that in the exercise of reasonable care they should have foreseen and anticipated that, unless they promulgated rules for the protection of their employés in the discharge of their duties, a collision like that which did occur was not only probable, but inevitable. Failure to promulgate rules under such circumstances is such negligence as renders them responsible for injuries resulting therefrom. Richmond Granite Co. v. Bailey, 92 Va. 554, 24 S. E. 232; Moore Lime Co. v. Richardson's Adm'r, 95 Va. 326, 335, 28 S. E. 334, 64 Am. St. Rep. 785; N. & W. Ry. Co. v. Graham, 96 Va. 430, 434, 31 S. E. 604; 1 Labatt on Master & Servant, §§ 210, 211.

The railway company recognized its duty in this respect, and until the abrogation of the rule requiring its employés to give notice when they were going to enter the defendant company's yard with engines and cars, and to get a reply from the dinkey engine, its rules seem to have been sufficient; but upon the abrogation of that rule its only rules were the general railway rules which govern when entering its own yards, viz., not to use excessive speed in the yard, to keep the switches properly set, and to have on the front end of the train in the daytime a man stationed, and at night a lantern.

It does not appear that the decedent had ever been a railway employé, or knew anything about the rules or practices which governed the railway company's employés at the time of the accident.

Under the facts and circumstances of the case, we are of opinion that the defendant was guilty of negligence in not promulgating rules for the protection of its employés, and, since it had no such rules, in not warning the decedent of the dangers attending his work as "potman" from the use of the defendant company's yard by the railway company.

The defendant company insists that, even if it were guilty of negligence, the proximate cause of the accident was the negligence of the decedent and his fellow servant, the engineman, in leaving the switch open when they went upon the tipple track with the dinkey engine and slag pot.

The evidence of the engineman proves that it was the habit or custom to leave the switch open when they went out with slag, and to close it when they returned to the main track. Whether or not leaving the switch open in accordance with that custom, in the absence of any rule on the subject, was contributory negligence, was, under all the facts and circumstances of the case, a question for the jury, and, as they might have found that it was not, the circuit court did not err in so holding.

We are of opinion that upon the whole case there was no error in the judgment complained of, and that it should be affirmed.

(123 Ga. 295)

GRAY v. WRIGHT.

(Supreme Court of Georgia. June 15, 1905.)

1. CONSENT DECREE—SETTING ASIDE.

A consent decree will not be set aside because, "through accident and mistake," one of the consenting parties failed to introduce evidence which was in his possession, and which might, if submitted on a trial, have resulted in the rendition of a decree different from the one which was taken by consent.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 945, 1039.]

2. INJUNCTION—CUTTING TIMBER.

It is not error to refuse to entertain a petition to enjoin the cutting of timber on land which, by a decree to which the plaintiff consented, has been legally adjudged to be the property of the defendant.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 105.]

(Syllabus by the Court.)

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by Thomas Gray against T. M. Wright. Judgment for defendant, and plaintiff brings error. Affirmed.

H. G. Langston and G. G. Glenn, for plaintiff in error.

CANDLER, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 146)

ROBERTS v. STATE.

(Supreme Court of Georgia. June 13, 1905.)

1. HOMICIDE—EVIDENCE.
The evidence fully authorized the jury to find that the deceased was murdered, that the accused was the murderer, and that the defense of insanity was not sustained.

2. SAME—INSTRUMENT CAUSING DEATH.
The circumstances tending to show that the deceased was killed with the instrument named in the indictment were sufficient to warrant the jury in finding that this charge was sustained.

3. SAME.
When the body of a woman alleged to have been murdered was found upon a bed in a room of the house which she occupied as a dwelling, with the head crushed in two places, in such a manner as to indicate that the fatal wounds were inflicted with some blunt, smooth, and round instrument, which crushed the skull without breaking the skin, such as a pole or piece of iron piping, and, shortly after the discovery of the body, bloody bedclothes were found behind a cot in the same room, and a curtain pole, fractured about the middle—the breaks appearing to be fresh—was found behind a trunk in an adjoining room, such pole, upon being identified by witnesses who so found it, was admissible in evidence upon the trial of the person charged with the murder.

4. CRIMINAL LAW—ARGUMENT.
When the facts above indicated were shown by the evidence, and the pole was introduced, the solicitor general had the right, in his argument to the jury, to contend that this pole was the weapon used by the murderer.

5. MURDER—EVIDENCE.
When a husband is on trial for the alleged murder of his wife, evidence tending to show a long course of ill treatment and cruelty on his part toward her, continuing until shortly before the homicide, is admissible. Such evidence tends to show malice and motive, and to rebut the presumed improbability of a husband murdering his wife.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 289, 298, 322.]

6. CRIMINAL LAW—OBJECTIONS TO EVIDENCE.
The testimony of a witness that on a given occasion a particular person appeared to be excited, or did not so appear, is not subject to objection upon the ground that it is a mere opinion or conclusion of the witness, and therefore inadmissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1037.]

7. SAME—INSTRUCTIONS.
Upon the trial of a criminal case, it is not error for the judge to shape his general charge to the jury upon the evidence alone, but he should at some stage of the charge appropriately instruct the jury with reference to the prisoner's statement.

8. HOMICIDE—INSANITY.
The trial judge fully instructed the jury in reference to the law applicable to the defense of insanity, and the amount of mental capacity necessary to commit the crime charged, and did not err in failing to repeat the charge upon the subject of such mental capacity, in immediate connection with his instruction that if the jury should find that the accused took the life of the deceased as charged, and was at the time of such mental unsoundness as to be incapable of committing a crime, they should acquit him.

9. SAME.
There was no error in refusing to charge that the defendant had introduced evidence of his insanity at the time the alleged offense was committed, and that, if the jury believed from a preponderance of the evidence that at the time of the alleged offense the accused was insane, they should acquit him.

10. CRIMINAL LAW—STATEMENT OF SOLICITOR GENERAL.
The fact that the solicitor general, after asking a witness for the accused if he had not, during the course of his examination, made a certain statement, and eliciting from the witness the reply that he had not said to the witness, in the hearing of the jury, "I say that you did," is not cause for a new trial, although the statement of the prosecuting officer was objected to at the time, and the court failed to rebuke his improper conduct, as the jury, having heard all of the testimony of the witness, were not at all likely to be misled by such statement, and the particular question about which the dispute arose was immaterial.

(Syllabus by the Court.)

Error from Superior Court, Walker County; W. M. Henry, Judge.

J. B. Roberts was convicted of murder, and brings error. Affirmed.

Roberts was indicted for the murder of his wife, and upon his trial, in February of the present year, he was convicted upon evidence which was wholly circumstantial. He made a motion for a new trial, which was overruled, and he excepted. The grounds of the motion were: (1) That the verdict was contrary to law. (2) That it was contrary to the evidence. (3) That it was contrary to the law and the evidence, and without evidence to support it. (4) Because the indictment charged that the offense was committed by striking the deceased with a curtain pole, and the evidence wholly failed to show that it was committed in this way. (5) Because the verdict was strongly against the weight of the evidence introduced to show the insanity of the accused at the time the alleged crime was committed. (6) Because the evidence clearly showed that at the time of the homicide the accused was of such unsoundness of mind as to be incapable of forming a criminal intent. (7) Because J. S. Wilson was permitted, over the objection of the defendant, to testify as follows: "On New Year's morning I passed Mr. Robert's home. He was in the house, and seemed to be going from one part of the house to the other. He was saying 'God damn' something or other. I didn't understand what names he used. I didn't understand very much. He was talking to his wife. I heard her say 'Papa' a time or two. That was all I heard her say." (8) Because this witness was allowed to testify: "He (defendant) did not appear to be excited when he came to me in the woods. After I got back from Chattanooga he appeared to be excited. That was both before and after his children came." (9) Because the court permitted J. P. Tucker to testify: "I don't know whether he (defendant) appeared to be excited, or not, when I got there (to his house) he seemed to be in trouble or something. He was taking on a great deal about it." (10) Because the following evidence of Mrs. De Witte was illegally admitted: "Last summer I heard Mr. Roberts call his wife an 'old

bitch.' I guess that is about all I heard. Mr. Roberts was sitting at the east side of the house, and Mrs. Roberts was sitting on the ground, by a tree, when he called her that. I saw Mr. Roberts hit his wife on the day before Thanksgiving, last November, with what looked like a piece of board. I reckon he was angry, or he would not have hit her. I heard Mrs. Roberts scream. I was in my yard, and I saw Mr. Roberts drag her from the north end of the house to the west of the porch, and he struck her just as she went on the porch. She was running at the time, and he was after her. She was screaming. That is what attracted by attention. He struck her awful hard. I heard the lick. He struck her once." (11) Because "a curtain pole, shivered about the middle, which had been identified by witness W. H. Henderson as a pole found in defendant's house, in an adjoining room from that in which the remains of deceased lay, behind a trunk, the day after the homicide, and which was offered in evidence by the state after the defendant had closed his testimony, was illegally admitted" in evidence. (12) Because the following testimony of Miss Lollie Roberts, who testified in rebuttal for the state, was illegally admitted: "My father (defendant) would call her (deceased) a 'bitch' and a 'bastard,' and would always be constantly calling her some words like that. This was frequently during the time I lived at home (prior to 1903). He would call her a 'damn bastard' and a 'damn bitch.' I have heard him use such words ever since I can remember, to my mother. He would come in and be angry about something on the street, and come in cursing and drinking. For instance, if he would speak to her, and she did not hear him, he would curse her. If he would be talking to her, and she would be speaking to one of us, and not hear him, it would make him mad, and he would curse her then. When he came back from Georgia (in October, 1903), we heard our mother screaming in the side room, and I went in there and saw her on the floor, and he was standing over her with a knife in his hands. When he first saw me, he pushed me over her, and I pushed him back, and I started to help her up, and he came at me with the knife, and I pushed him again and the knife dropped, and when I pushed him again a second time he fell. She was on the floor, with her nose bleeding, and he had the knife in his hands, striking at her. I can't remember exactly what my mother said at the time. I just remember her saying, 'Please, Papa, don't kill me,' and then I heard her call my name to come to her. This was when we lived on Catherine street, before we moved. When he was cursing her he would dare her to answer him back, and when she answered him I have heard him say he would beat her brains out with the poker that he had, or anything that he would have in his hands. He would beat her brains out if she would answer him. I have heard this on more than one occasion. He wouldn't always have the same thing in his hands, and it wouldn't be the same reason, but I have heard him threaten her life several times. He would dare her to go to my sister's house, and I have heard him tell her if she went over there he would kill her. On one occasion—I can't remember exactly when it was, but I remember the time—he was drinking, and I persuaded my mother to come into the front room, where I slept, and I tied the door to keep him out, and he beat on the door, and we couldn't get to sleep, for him, but we wasn't so afraid of him. He went to the little house where his shotgun was, and stood out in the door of the little house, and from there would go from the back door to the front door, and would dare any one to open the door. He said that he would shoot the person that opened the door. He stayed there all night. My mother laid down in the room with us, and, as soon as it began to get day, we went out the back way, and I opened the dining-room door a little way to see if I could see him, and he pointed the gun, and would have shot if I had not shut the door. He was out on the sidewalk, and saw me open the door. This occurred two or three years ago. He was always drunk when he would curse and abuse mother. I have had him arrested several times when he would be cursing and abusing her. He has always treated my mother this way. When he would be sober I have known him not to be kind. Some time in the night I heard her screaming, and I went in there, and he was beating her with a stick, and I had seen him abuse her so often before that." (13) Because the court erred in charging the jury: "The defendant is presumed to be innocent, and that presumption enters the trial with him, and entitles him to an acquittal at your hands, unless the evidence has legally and satisfactorily established his guilt." (14) Because the court erred in charging the jury: "It is your duty, gentlemen, to weigh and consider all of the evidence of every kind bearing on all of the issues and every issue in the case, in determining finally whether the defendant's guilt is established in the case to the requisite degree of certainty that I have explained to you—that is, beyond a reasonable doubt—or not. If, after weighing all of the evidence, you are satisfied to a reasonable and moral certainty and beyond a reasonable doubt that the defendant is guilty, you ought to convict him. But if, after weighing it all and considering it all, you are not so satisfied, you should acquit him." (15) Because the court erred in charging the jury: "If, on the other hand, you do not find it established to the requisite degree of certainty that he (defendant) took her (deceased's) life as charged, or if you find that he did take her life, and find that at the time he was of such mental unsoundness as to be incapable of committing crime, and therefore irresponsible for an act which, if committed by a sane

man, would be a crime, then you ought to acquit him." (16) Because the court refused, upon request therefor in writing, to charge the jury as follows: "The defendant in this case has also introduced evidence of his insanity at the time the alleged offense was committed. Proof of insanity is a complete defense to homicide. The burden of this proof is on the defendant, as all men are presumed to be sane until the contrary is shown. The defendant, however, does not have to show his insanity beyond a reasonable doubt, but only by a preponderance of the evidence. Therefore, if you find from a preponderance of the evidence that at the time the alleged offense was committed the defendant was insane, then you would be authorized and should acquit him." (17) Because, during the argument of the solicitor general, he asserted that the pole which had been introduced in evidence was the pole with which the deceased was struck, to which objection was made upon the ground that there was no proof of this, which objection the court overruled. (18) Because, during the examination of Lockhart, a witness for the defendant, the following colloquy occurred: "Sol. Gen.: You said that you got down to Roberts' house about eight o'clock. Ans. I didn't. Sol. Gen.: I say you did." This ground alleges that "said statement of the solicitor general [was] improper and prejudicial to the cause of defendant," and was at the time objected to by the accused, "said objection not being entertained by the court." (19) Because the court erred in permitting the following colloquy between the solicitor general and this witness: "Sol. Gen.: And you hunted from half past eight o'clock in the morning until three o'clock, and never saw a single man? Ans. No, sir; I was in the woods. Sol. Gen.: Now wait— Ans. I was hunting birds and things, and not folks. Sol. Gen.: The witness can get smart." It being alleged that the statement of the prosecuting officer was "improper, and calculated to intimidate said witness and to prejudice the cause of this defendant."

T. C. Latimore, T. R. Hudson, and Bale & Shaw, for plaintiff in error. Jno. C. Hart, Atty. Gen., W. H. Ennis, Sol. Gen., and Payne & Payne, for the State.

FISH, P. J. (after stating the facts as above). 1. There is no merit in the usual general grounds of the motion for a new trial. The evidence that the wife of the accused had been murdered was clear and convincing, and the circumstances tending to show that he was the perpetrator of the crime were sufficient to exclude every reasonable hypothesis to the contrary. The jury were fully authorized to find that the evidence in reference to the insanity of the accused at the time the crime was committed was not sufficient to sustain this defense.

2, 3, 4. The circumstances tending to establish the fact that the deceased was killed with a curtain pole were sufficient to warrant the jury in finding that the charge in the indictment that she was so slain was sustained by the evidence, and there was no error in permitting the state to introduce in evidence the curtain pole referred to in the motion for a new trial. The evidence showed that at the time when the crime was alleged to have been committed the accused and his wife lived by themselves in a little cottage in Walker county, Ga., about five or six miles from the city of Chattanooga, Tenn. Wilson, a witness for the state, who lived in 300 yards of them, testified that between 3 and half past 3 o'clock in the afternoon of January 13th of the present year, while he was chopping wood in the forest, about 300 yards from his own home and about 600 yards from that of the accused, the accused came to him and said he was in trouble, and, upon Wilson asking him what was the matter, said: "My wife is dead. I went to the spring and came back, and she was as dead as the devil. I want you to go to town and let my folks know, and let them come and make arrangements." The witness then went with the accused to his house, and "saw his wife on her back, lying on the bed. She was straightened out, her hands folded across her breast, and her eyes closed. She was dead, covered up there with a blanket or comfort." The accused did nothing at the house, except to put his hand up and shake her head and roll it about. "She had on a dress. Defendant said he didn't know how she died, unless she got strangled on snuff." In a few minutes after he came to the witness in the woods, the accused said his wife had been dead about two hours. At the house the accused threw the blanket back, and let it stay back, and the witness saw a little blood on the back of the deceased. When the defendant came to the witness in the woods, there was a little blood on his face, but no wound or injury there. "It looked like it might have been touched there from being on his hand." The witness did not see any bruises on the body of Mrs. Roberts, except on her hand. "Her hair was down over her forehead sufficiently to hide any wounds that she might have there, if she had any." The spring is about 150 yards from the house of the defendant. The accused did not point out any wounds or say anything about any wounds. J. P. Tucker testified: "I am coroner of this county. I was at the residence of the defendant, James B. Roberts, on or about the 14th day of January last. I was sent for to come and hold an inquest. * * * I got there about ten o'clock on the 14th, in the daytime." There were some five or six people there when he arrived, including Mr. Wilson, Mr. De Witte, and Mr. Roberts' daughters. When he got there. Mrs. Roberts' body was in the room, covered up. He made an examination of the body,

and found the head crushed. "There were two bruises. One of the bruises was up on the head to the right; one on the head to the left. The skull seemed to be mashed down. * * * The skull seemed to be soft; seemed to be mashed down. There was one on her left hand; seemed to be a gash, just like something had struck across. It was a cut." The witness further testified: "I made an examination in the room or about the house for a weapon. We found a curtain pole. (Here a pole was identified by the witness as the one found.) This is a curtain pole that had been used over a window. I found it in the house of Mr. Roberts on the 14th day of January, on the day of the inquest. The pole was lying right behind a big trunk. It was not in the room where Mrs. Roberts' body was lying. It was in the room next to Mrs. Roberts. It now appears like it appeared when I found it. It was fractured as it is now. It was broke on both sides that day. They seemed to be fresh breaks then. I saw a towel there that had some blood on it. It was hanging on a nail in the room where she was. I didn't see any blood on the bedclothing. I don't know as I examined the bedclothing at all. I heard Mr. Roberts make a statement about this transaction while I was there. He was intoxicated at the time he made the statement. When I got there he told me that he had gone down to the spring. He says, 'I went down to the spring and fed my chickens, and when I came back I called to my wife, and she didn't answer. I called her to get up,' to get dinner or breakfast, whatever it was. I believe he said that he asked her to get up and cook something. He said that she didn't answer him, and he went in and saw that there was something wrong. Said then he thought probably she had taken too much snuff, or something, and he didn't know what to think, and he examined her, and saw that she was gone. I did not make any examination of the stick, but the doctor and jury did. The wounds looked like they were made with something smooth. The skull or skin was not broken, and they had to be made with something smooth. The bruises about which I testified could have been made with any smooth stick, instrument, or weapon. I think that it would have to be with some kind of a smooth weapon. It might have been done with a smooth piece of iron, wood, or steel, or any sort of a smooth bludgeon. It could have been caused by falling against a hard substance. It could have been done by falling against a stove. It might have been done by falling down the steps, or anything that way." Dr. W. H. Henderson testified: "I am a practicing physician. I was at the home of the defendant, James B. Roberts, in this county, about the 14th of January last, and examined the body of Mrs. Roberts. When I saw her, she was lying on a bed in the middle room. She was dead. There were two wounds on the head—one just across the left part of the frontal bone, about three and a half to four inches long—and the skull was crushed in something like half of an inch; and near the middle and top of the head, running to the right, there was another wound about the same length. She had one wound on her hand, and several what I took to be bruises over her body in different places. The skin was not broken in those wounds on the head. There was blood on her left hand, and some blood on her face, and her nose had been bleeding. Her face looked as though it had been washed off. She was dressed in her ordinary clothing, lying on her back, straightened out. Her left hand was by her side, and her right hand across her. I examined the bedclothing. They were considerably tousled, and there was some blood on the sheet and bedclothing. and over on another bed— No; there wasn't another bed there, but a cot; and over behind that I found several quilts and bedclothes that had blood on them. It looked as though they were thrown there. I saw a towel that was brought into the room. It had a little blood on it; not a great deal. It looked as though some one had just taken it in their hands and wiped their fingers on it. I saw this instrument. (Pole handed witness.) I would take it to be a curtain pole. It is my judgment that she died from a lick from some blunt instrument, because the skull was crushed in two places. The wounds on her head were sufficient to cause her death. This pole was broken when I saw it, just like it is now. I found it myself in an adjoining room, behind a trunk. The break appeared to be fresh. I just placed this stick down in the wounds. They compared very well. From the wounds that I saw and the examination that I made, it is my opinion that such wounds, to be made, would have had to have been made with a round stick or iron. I think this stick could have caused the injuries. From the condition and appearance of the wounds, the blow which was necessarily inflicted would have been sufficient to have broken this stick as it appears now. It would take two blows to make the wounds I found on her head. * * * I guess it must have been between ten and eleven o'clock in the forenoon of Saturday, January 14th, that I got to Mr. Roberts' house. * * * I went there at the instance of the coroner. I have examined the pole I have in my hand, and think the breaks I see in it appear to be fresh. A piece of poplar, like this is, will stay fresh quite a little while. * * * It looks as fresh now as when I first saw it. The wound or bruise that I saw on the head could have been done with any kind of a smooth instrument. It might have been done with a piece of iron piping, an ax handle, or anything that was round and smooth. Any of the wounds that I saw on the head

could have been made with a smaller weapon than this. The skull is to the brain about what an egg shell is to the meat of the egg. If the skull was broken, we could tell to some extent whether it was done by a large or small weapon. We couldn't say as to the exact size, because the wound might possibly rise up a little. It would be something like breaking an egg. I might use a small instrument on an egg and break a small piece out of it, and then again a large piece out of it with the same instrument. I think the instrument in this case must have been not less than one inch in diameter. But as a matter of fact, I can't tell that, either from a scientific or practical standpoint."

We have set forth this evidence for the purpose of showing that the circumstances, as developed by the evidence, were, as we have said, sufficient to authorize the jury to find that the allegation in the indictment that the deceased was killed by striking and beating her on the head with a curtain pole was sustained by the evidence. We think the circumstances clearly indicated that the crime was committed in the room where the body of the deceased lay. There was nothing in the evidence tending to show that anything which, if used as a weapon, could have produced the fatal wounds on the head of the deceased, except the freshly fractured curtain pole, was found in the house or about the premises. From the description of these wounds by the witnesses who examined them, the character and condition of the pole, its proximity to the dead body, its comparison by one of these witnesses with the wounds, and the result thereof, the fact that bloody bedclothes were found from behind a cot in the same room where the body was, and this fractured pole behind a trunk in an adjoining room, the jury were warranted in finding that this was the weapon used by the murderer.

The curtain pole, when identified by the witnesses who were present when it was found after the commission of the crime, was admissible in evidence. In Betts v. State, 66 Ga. 508, it was held: "The deceased having been found dead, apparently killed by blows from a blunt instrument, a maul found near him, which did not usually remain in that place, his hat found a short distance from him, and his shirt with blood upon it, were admissible in evidence." In Thomas v. State, 67 Ga. 460—a murder case, in which the evidence showed that the deceased was found dead, with her throat cut, and a contusion on the side of her head, as though she had been struck—it was held that "a stick used by a defendant charged with murder, and left by him, shortly after the crime was committed," at a house where he had spent the night, "bearing upon it stains apparently of blood, was admissible in evidence." And in Franklin v. State, 69 Ga. 36, 47 Am. Rep. 748, a knife shown to have been in the possession of the accused a day or two after the throat of the deceased was cut, and then showing traces of blood, was held to be admissible in evidence. The mere fact that the accused had closed his evidence when the state offered to introduce the curtain pole did not render it inadmissible, and the solicitor general had the right to argue to the jury that this pole was the weapon used by the murderer. Of course, the jury understood that the statement of the solicitor general objected to was merely his contention from the circumstances disclosed by the evidence, and this contention he had the right to make.

5. The testimony of Wilson and of Mrs. De Witte and Miss Roberts, respectively, set forth in the motion for a new trial as having been admitted over the objection of the accused, was not inadmissible. In each instance the testimony was objected to upon the ground that specific acts of violence on the part of the accused toward his wife prior to the time of the homicide were not admissible against him, and because the facts testified to were not part of the res gestæ of the transaction for which the accused was on trial. The circumstances disclosed by the testimony of Wilson, to which objection was made, standing alone, seem very slight and trivial, and, unconnected with other testimony in reference to the relations existing between the accused and his wife, was irrelevant and immaterial, but could hardly have been, by itself, prejudicial to the accused. It is, however, unnecessary to inquire whether this particular testimony, or that of Mrs. De Witte set out in the motion for a new trial, was admissible at the time when it was offered. If there was any error in admitting the testimony of Wilson when it was admitted, it was cured when the state subsequently introduced the testimony of Mrs. De Witte and that of Miss Roberts; and, if there was error in admitting the testimony of Mrs. De Witte when it was offered, such error was cured when the testimony of Miss Roberts was introduced. For the testimony of these three witnesses, considered together, tended to show a long course of ill treatment and cruelty on the part of the accused toward his wife, extending down to a period of time shortly before the homicide, thus illustrating the state of his feelings toward her when the alleged crime was committed. This testimony bears upon the question of motive, and tends to show the alienation of the husband's affection for his wife, and also, in the language of Mr. Justice Brewer in Thiede v. Utah, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237, "tends to rebut the presumed improbability of a husband murdering his wife." "In cases of uxorcide the previous relations of the husband and wife, and a course of treatment by one towards the other, may be shown." 1 McLain, Crim. L. § 417; Hughes, Crim. L. & Proc. § 139; Underhill, Crim. Ev. § 333; 2 Bish. New Crim. Proc. § 630;

Painter v. People, 147 Ill. 444, 35 N. E. 64; State v. Cole, 63 Iowa, 695, 17 N. W. 183; Boyle v. State, 61 Wis. 440, 21 N. W. 289; State v. Rash, 34 N. C. 382, 55 Am. Dec. 420; State v. Bradley, 67 Vt. 465, 32 Atl. 238; Malcek v. State, 33 Tex. Cr. R. 14, 24 S. W. 417; Thiede v. Utah, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237; State v. Seymour, 94 Iowa, 699, 63 N. W. 661; Phillips v. State, 62 Ark. 119, 34 S. W. 539; People v. Colvin, 118 Cal. 349, 50 Pac. 539; People v. Buchanan, 145 N. Y. 1, 39 N. E. 846; People v. Decker, 157 N. Y. 186, 51 N. E. 1018; Com. v. Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270.

The evidence of Miss Roberts and that of Mrs. De Witte and Mr. Wilson tended to show a substantially continuous course of conduct by the accused toward his wife, the deceased. As was said by Morton, J., in the case last above cited, in reference to evidence similar to that now under consideration: "It tended to show a settled ill will and malice on the part of the defendant towards his wife, and therefore bore directly on the question whether there was any motive for him to commit the crime. It was not [admissible] for the purpose of showing separate and independent acts and threats, but for the purpose of showing a course of conduct. It was unavoidable that, in showing the course of the defendant's conduct, evidence of his acts and threats should be introduced. His course of conduct could not be shown so satisfactorily in any other way." On the same line, it is held that, upon the trial of a husband for the murder of his wife, it is competent to show that he had become infatuated with another woman, in order to rebut the presumption of a husband committing such a crime, by showing the alienation of his affections, and suggesting a possible reason for his desiring the death of his wife. Gillett, Ind. & Circum. Ev. § 59; People v. Harris, 136 N. Y. 423, 33 N. E. 65. And see Shaw v. State, 102 Ga. 660, 29 S. E. 477, where the accused was charged with wrecking a passenger train, and where such evidence was held admissible, as his wife was shown to have been a passenger upon the train. There is nothing in the cases of Pound v. State, 43 Ga. 88, Daniel v. State, 103 Ga. 202, 29 S. E. 767, and Horton v. State, 110 Ga. 739, 35 S. E. 659, which are cited by counsel for the plaintiff in error, in conflict with our ruling in the present case. In Pound's Case the homicide occurred in February, 1867, and the fact proved which this court held to have been inadmissible was "that in October or November, 1866, the deceased spoke to the prisoner at the Sunday school, and he did not answer him." This was a separate, distinct, and isolated occurrence, and the rule was laid down in the headnote that evidence of this character must not relate to "a separate, distinct, and independent act, but there must be some link of association—something which draws together the preceding and subsequent acts, something which gives color of cause and effect to the transaction, and sheds light upon the motives of the parties—to render such particular act or acts admissible." In Daniel's Case the error assigned was that the court refused "to permit the accused to prove that, several months before the homicide, he had procured a pistol to be used by a person in quelling a disturbance in which the deceased participated, and that ever since that time the deceased had borne him ill will and had repeatedly threatened his life. The court had previously allowed proof of threats communicated to the accused, and the sole question raised by this assignment [was] as to whether it was competent to prove this act of the accused occurring several months prior to the time of the homicide." It was held that it was not. The headnote dealing with this ruling of the court was that "it was not * * * competent for the accused to prove that on a former occasion, remote in time from the day of the homicide, he had done an act which incensed the deceased; it not appearing that what occurred on that occasion was followed up by any subsequent quarrels or difficulties between the accused and the deceased, or that the act of the accused on the previous occasion tended to throw any light whatever upon his motive in taking the life of the deceased." In Horton's Case it was held: "It is not, in a trial for murder, competent to prove that, years before the homicide, there had been a difficulty or quarrel between the accused and the deceased, without showing that in consequence thereof the former had continuously entertained hostile feelings toward the latter, or that the old grudge had something to do with the homicide." To the same effect, the plaintiff in error might have cited Monroe v. State, 5 Ga. 85, and Hatcher v. State, 18 Ga. 460. The distinction between each of these cases and the present one is obvious. These cases are authority for holding that an isolated act or incident, remote in time from the homicide, which tends to show that at the time of its occurrence there was ill will upon the part of the accused toward the person he is charged to have murdered, or of such person toward him, is not admissible in evidence. But they are not authority for holding that a series of acts tending to show a course of conduct on the part of one party toward the other, affirmatively shown to have continued until shortly before the homicide, and tending to illustrate the state of feeling existing between them at the time of the homicide, is not admissible. This distinction was recognized in Monroe's Case, when it was said: "Repeated quarrels may be shown between the parties to establish the malo animo, but you cannot go back to a remote period, and prove a particular quarrel or cause of grudge, unless it be followed up with proof of a continued difference flowing

from that source." In Hatcher's Case, which was a case of assault with intent to murder, the trial court had ruled out testimony offered to show a fight between the prosecutor and the defendant about two years prior to the alleged crime for which the accused was being tried; and this court held it was not error to require him, in introducing testimony of this character, to begin at the offense charged in the indictment, and trace the relations or state of feeling between the parties back to the first difficulty between them. In the case with which we are dealing, this course, whether intentionally or otherwise, was the one pursued; the course of conduct of the accused toward his wife being traced backward from the homicide through a series of years.

The statement of the witness Mrs. De Witte, "I reckon he was angry, or he wouldn't have hit her," was objected to as a conclusion of the witness; but even if the opinion of the witness, when accompanied by the facts upon which it was based, was not admissible, the accused could not have been hurt by its admission, as the conclusion from the facts stated by the witness was self-evident and irresistible. The testimony of Miss Roberts, which was introduced after the accused had closed his evidence and made his statement, was objected to upon the ground that it was not in rebuttal. There would be no merit in this objection, even if the testimony of this witness was not in rebuttal of anything presented by the defendant. It is within the discretion of the court to reopen a case for the admission of further evidence even after both sides have announced closed, and argument has begun. Hoxie v. State, 114 Ga. 20, 39 S. E. 944; Strickland v. State, 115 Ga. 222, 41 S. E. 713; Duggan v. State, 116 Ga. 846, 43 S. E. 253. As a matter of fact, however, the testimony of this witness was in rebuttal of evidence introduced by the accused and of portions of his statement.

6. The testimony of Wilson that the accused did not appear to be excited when he came to the witness in the woods, but did seem to be excited when the witness got back from Chattanooga, was objected to "because how the defendant appeared at the times witness testified about were mere matters of opinion and a conclusion of the witness, and not questions of fact that should go to the jury." This was not a good objection. In Choice v. State, 31 Ga. 424, it was held competent for witnesses to state that the accused "appeared to be drinking." In Pierce v. State, 53 Ga. 365, it was held that, where it was competent to prove drunkenness, a witness might give his opinion thereon, after stating the facts on which he based it. In Travelers' Insurance Company v. Sheppard, 85 Ga. 752 (8), 12 S. E. 18, it was held: "The manner and appearance of a speaker whose acts and utterances belong to the res gestæ, are relevant evidence; and that he looked wild and seemed excited is matter of fact, not of opinion, for which reasons ought to be specified. The signs of emotion may be described by the use of general terms, without any enumeration of particulars." In the opinion, Chief Justice Bleckley said: "An observer may testify to the exhibition by another of excitement or any emotion, such as alarm, without specifying the various minute facts which indicated the same to the mind of the witness. The emotions register themselves in the appearance and manner, and, when a witness testifies to the existence of the emotion, his plain meaning is that he observed the numerous and often nameless indications by which that species of emotion is commonly manifested." To the same effect, see Leary v. Leary, 18 Ga. 696. It is very clear that there was no merit in the objection to this testimony which took the broad ground that how the defendant appeared on the occasions referred to by the witness was mere matter of opinion, which could not go to the jury. This ruling also disposes of the ground of the motion complaining of the admission of the testimony of Tucker of a similar nature, over the same objection by the accused. But even if it did not, it is hardly conceivable that the testimony of Tucker, objected to as being the expression of an opinion, could have been at all prejudicial to the accused. The witness did not know whether the accused seemed to be excited, or not, when he saw him at the house, and so did not express any opinion upon that point. We do not see how his statement that the defendant "seemed to be in trouble or something. He was taking on a great deal about it"—could have been harmful to the accused. The fact that a husband, within a few hours after his wife had been murdered, and while her dead body was almost in his very presence, should seem to be in trouble, and should be taking on a great deal, would certainly not to a rational mind be even a slight indication of his guilt. The most innocent and loving of husbands, under such circumstances, would doubtless seem to be in trouble, and might take on a great deal about the awful calamity which had suddenly befallen him.

7. The assignment of error upon the charge complained of in the thirteenth ground of the motion for a new trial is that its effect was to "withdraw from the consideration of the jury the statement of the defendant, and cause them not to give it that consideration contemplated by law." The error assigned upon the charge complained of in the fourteenth ground is the same. There is no complaint that the judge did not properly instruct the jury with respect to the prisoner's statement, and the entire charge, sent up with the record, shows that he did. It has been repeatedly held that it is not upon the trial of a criminal case, error for the judge to shape his general charge to the jury upon the evidence alone and the law

applicable thereto, but he should at some stage of the charge appropriately instruct the jury with respect to the prisoner's statement. If, however, a proper written request is submitted to the court, to charge on any matter of defense set up in the statement, such request should be granted when the instruction requested is applicable to the matter of the statement, and expressed in appropriate terms. Vaughn v. State, 88 Ga. 731, 16 S. E. 64; Miller v. State, 94 Ga. 1, 21 S. E. 128; Lacewell v. State, 95 Ga. 346, 22 S. E. 546; Sledge v. State, 99 Ga. 684, 26 S. E. 756; Hoxie v. State, 114 Ga. 19, 39 S. E. 944; Hays v. State, 114 Ga. 25, 40 S. E. 13; Tucker v. State, 114 Ga. 61, 39 S. E. 926.

8. There is no merit whatever in the fifteenth ground of the motion. The error assigned upon the instruction here excepted to is not stating in this connection "the degree of evidence required to prove the mental unsoundness of the accused." The judge fully charged the jury with reference to the amount of mental capacity necessary to the commission of a crime, and further that even although the accused was able to distinguish between right and wrong, in relation to the homicide, at the time it was committed, yet if, in consequence of some delusion, his will was overmastered and he had no criminal intent, and the homicide was connected with the peculiar delusion under which he was laboring, he would not be criminally responsible for his act. So, irrespective of the rule that a charge in itself proper is not rendered erroneous by a failure to give another appropriate instruction in the same connection, it is evident that the assignment of error is entirely without merit.

9. While the request to charge set forth in the sixteenth ground of the motion contained a proper statement of the law in reference to the degree of evidence necessary to sustain the defense of insanity, the request, as a whole, was not free from objection. It assumed that the defendant had introduced evidence of his insanity at the time the alleged offense was committed. He had introduced testimony, the object of which was evidence of his insanity at such time, but whether this testimony was evidence of his insanity when the homicide was committed was a question for the jury alone. Suppose the court had instructed the jury that the state had introduced evidence of murder; would not such instruction have been erroneous? We think clearly so. Evidence upon the question of insanity and evidence of insanity are different things. Besides, the request treated any degree or form of insanity as being sufficient to render the accused irresponsible for the homicide, and so was too broad. The insanity which renders the perpetrator of a particular act, which would ordinarily be criminal, incapable of committing a crime by its perpetration, is such as to deprive him of the capacity to distinguish between right and wrong relative to such act. The perpetrator may be insane in a loose and general sense, and yet be, in the eye of the law, sane and responsible so far as the act in question is concerned. The refusal of the court to charge as requested was therefore not erroneous.

10. While the conduct of the solicitor general complained of in the eighteenth ground, in disputing the answer of a witness for the defendant, on cross-examination, in reference to what he had previously testified as to the time that he got out to Roberts' house, was improper, and, upon objection thereto, was not rebuked by the court, yet it was not such as to require the grant of a new trial. The prosecuting officer should not have disputed the answer of the witness, but, as the jurors had heard and doubtless remembered the previous testimony of the witness on the point in question, they were not at all likely to be influenced or misled by this remark of the state's counsel. Besides, the question about which the dispute occurred was not at all material. The last ground of the motion seems too trivial for discussion.

As the evidence fully warranted the verdict, and there was no error in overruling the motion for a new trial, the judgment of the court below is affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 455)

RIGALL v. SIRMANS.

(Supreme Court of Georgia. June 17, 1905.)

1. WRIT OF ERROR—DISMISSAL.
The motion to dismiss the writ of error was without merit.

2. APPEAL FROM COUNTY COURT—CERTIORARI.
A proceeding in a county court to eject an intruder cannot be carried by appeal to the superior court. The remedy of the party dissatisfied with the judgment in such a case is by certiorari.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by T. H. Sirmans against D. J. Rigall. Judgment for plaintiff, and defendant brings error. Reversed.

Sirmans made an affidavit before a judge of the county court for the purpose of evicting Rigall as an intruder. A counter affidavit was interposed, and the papers were returned to the county court for trial. The judge of the county court rendered a judgment in favor of the defendant. The plaintiff filed an appeal bond, which was approved by the deputy clerk, and all the papers were transmitted to the superior court. The case was tried in that court upon its merits, and resulted in a verdict for the plaintiff. The defendant made a motion for a new trial upon various grounds. The motion was overruled, and he excepted. A motion was made in the Supreme Court to dismiss the writ of error on the grounds

that there was no sufficient assignment of error in the bill of exceptions, and that the brief of evidence had not been filed at the time the motion for a new trial was heard. The bill of exceptions recites that the judge passed an order overruling the motion for a new trial, and then assigns error as follows: "To which said order defendant excepted, and now excepts, and assigns the same as error." The brief of evidence was not filed until two days after the motion for a new trial was disposed of, but there was no motion to dismiss the motion for a new trial on this ground.

Alexander & Gary and Buie & Knight, for plaintiff in error. R. A. Hendricks, for defendant in error.

COBB, J. 1. The motion to dismiss the writ of error is without merit. The assignment of error is in exact compliance with the rule of this court on the subject. See Civ. Code 1895, § 5605. Even if the failure to file the brief of evidence before the time for hearing the motion for a new trial would have been a sufficient reason for dismissing the motion at the hearing, it is not a sufficient reason for dismissing the writ of error in this court after the respondent has participated in the hearing of the motion with full knowledge that the brief had not been filed.

2. The affidavit which is the foundation of the proceeding to evict an intruder may be made before any officer authorized to administer an oath. Civ. Code 1895, § 4806. It differs in this respect from the affidavit which is the foundation of a proceeding against a tenant, which is required to be taken before a judge of the superior court or a justice of the peace. Civ. Code 1895, § 4813; Griswold v. Rutherford, 109 Ga. 398, 34 S. E. 602. The county judge therefore had authority to administer the oath, and he also had jurisdiction to hear and determine the issue made by the counter affidavit. Civ. Code 1895, § 4208. The case was therefore properly tried in the county court. The question to be determined is how a judgment of the county court on such an issue may be reviewed by the superior court. The section of the Code which gives the county court jurisdiction to hear and determine applications for the eviction of intruders also confers upon that court jurisdiction in cases of proceedings against tenants, partition of personal property, possessory warrants, distress warrants, attachments, garnishments, habeas corpus, etc. And the section concludes with these words: "And the same rights of certiorari and appeal, when applicable, shall exist in relation to the matter specified in this section as is provided in this chapter." The provisions referred to in reference to appeal and certiorari are found in sections 4214 and 4215. An appeal is allowed in a case where "the principal sum claimed, or the damages claimed, exceeds fifty dollars," and a certiorari is allowed in cases where the "principal sum or damage claimed does not exceed fifty dollars." This provision in reference to appeals cannot be made applicable to a proceeding to evict an intruder, for in such a case there is no sum or damages claimed. It is manifest that this law of appeals applies to suits for money upon a cause of action ex contractu or ex delicto, or upon some statutory proceeding which terminates in a money judgment. There is nothing in the law in reference to the proceeding to evict intruders which seems to contemplate that there should be a money judgment rendered under any circumstances, either by way of rent or otherwise, as would be the case in a proceeding to eject a tenant. The judgment in the proceeding to evict an intruder is a judgment declaring that the plaintiff is entitled to possession, and the writ that issues is a writ of possession, including a fieri facias for costs. Civ. Code 1895, § 4811. The provision in the chapter referred to in section 4214, relating to appeals, is therefore not applicable to the proceeding to evict an intruder. But it may be said that under the general law of appeals an appeal would be allowable in such a case. Section 4453 of the Civil Code of 1895, provides: "In all cases tried and determined by a county judge, or a justice of the peace, * * * where the sum or property claimed is more than fifty dollars, either party may, as a matter of right, enter an appeal to the superior court." If this section authorizes an appeal in such a case at all, it is because of the words "or property claimed." It is to be noted that these words do not appear in the section of the Code of 1882, from which this section was taken. Code 1882, § 3610a. And it is also to be noted that section 3610b of the Code of 1882 does not appear at all in the present Code. That section related to appeals in claim cases, and provided that in such cases, where the property levied on was worth more than $50, there might be an appeal to the superior court from a judgment in the justice's court. It was evidently the purpose of the codifiers of the present Code to make section 4453 exhaustive of the subject of appeals as dealt with by the two sections of the Code of 1882 above referred to; and the words "or property claimed" are to be construed in the light of the fact that their appearance in the section results from the elimination of the section of the Code of 1882 in reference to claim cases. The effect of this change, therefore, is simply to give the same right of appeal in claim cases tried in a justice's court which was allowed under the Code of 1882, and to extend this right of appeal to claim cases in the county court. We do not think that this change in the section should be held to work any greater change in the law than that just stated, and therefore the section does not embrace a proceeding to evict an intruder which has

been tried in the county court. While the section relating to certiorari from the county court does not, in terms, embrace cases of the character now under consideration, still the superior court has jurisdiction under the terms of the Constitution to review the judgments of all inferior judicatories by certiorari, and the party dissatisfied with the judgment of the county court has this remedy. See, in this connection, Fontano v. Mozley, 121 Ga. 46, 48 S. E. 707. The superior court was without jurisdiction to entertain the appeal, and the judgment will therefore be reversed, with direction that the appeal be dismissed, and the judgment of the county court stand unaffected by the pretended appeal.

Judgment reversed, with direction. All the Justices concur.

SIMMONS, C. J., absent.

(123 Ga. 305)

THOMPSON et al. v. HALE et al.

(Supreme Court of Georgia. June 15, 1905.)

1. CHARITABLE TRUST — APPOINTMENT OF TRUSTEES.
A charitable or eleemosynary trust may be created by grant or legislative act. If by grant, the donor may appoint trustees, and confer the power of appointment of their successors on the trustees or the beneficiaries.
2. SAME—POWERS OF TRUSTEES.
The trustees of an unincorporated academy, in the absence of power conferred by grant, have no authority to perpetuate their succession by filling vacancies in the board.
3. SAME—POWER OF COURT.
The superior court has plenary power over trusts for educational purposes, and may fill vacancies in the trusteeship, where no provision has been made therefor, either by grant or by legislative act.
(Syllabus by the Court.)

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Action by F. S. Hale and others against W. W. Thompson and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

F. S. Hale and other patrons of the Smithville Academy, residents and taxpayers of the town of Smithville, brought their equitable petition against W. W. Thompson and others to enjoin them from exercising any further authority as trustees of Smithville Academy, or from electing or contracting with teachers, and to dissolve the board of trustees and appoint a new board, by reason of the following facts: On the 16th day of May, 1863, M. J. Barrow conveyed to the trustees of Smithville Academy and to the worshipful master and wardens of Austin Lodge, F. & A. M., two acres of land therein described. The intention of the donor was to donate this land as a site for the academy and Masonic lodge, and it was accepted by the trustees and the Masons. The Masons abandoned all interest in the same, and it is now used only for school purposes. No trustees of the Smithville Academy were named in said deed, and all the persons who held office as trustees at that time have died or removed from said town, and there are now no trustees to hold the title. That the defendants illegally took possession of the property, styling themselves trustees, and employed teachers who were without experience, and who were objectionable to a large number of the patrons of the school. The defendants had refused to vacate their position as trustees, or to hear any objection to their conduct in managing the school. A copy of the deed from Barrow to the trustees of Smithville Academy was attached to the petition, and is as follows:

"State of Georgia, Lee County. This indenture made and entered into this, the sixteenth day of May, in the year of our Lord eighteen hundred and sixty-three, between Moses J. Barrow of Sumter County State aforesaid, on the one part, and the Trustees of Smithville Academy, and their successors in office, also the Worshipful Master of Austin Lodge F. & A. M., F. H. Cheves, and the senior and junior wardens William J. Tillman and James N. Jones, and their successors in office, of the other part: Witnesseth, That the said Moses J. Barrow for and in consideration of the good will he entertains for education and masonry, hath given, bequeathed and let to the Trustees of Smithville Academy, and to the Worshipful Master and Wardens of Austin Lodge F. & A. M., all that tract or parcel of land consisting of two acres, lying and being in the Town of Smithville, county and State aforesaid, known and distinguished as the east half of lot numbers 10 & 11 and the west half of lots 14 and 15; bounded on the north by Cotton Avenue street. To have and to hold unto the said Trustees and Master and Wardens—the above specified lands for the purposes herein set forth, also for a church—if ever built. The said Moses J. Barrow doth for himself, his heirs and assigns the right and title warrant and defend unto said Trustees and officers of Masonic Lodge, so long as a school, lodge or church either is held, but should all cease—then said lands are to be reverted to said Moses J. Barrow, his heirs and assigns. In witness whereof the said Moses J. Barrow doth hereunto set his hand and affix his seal, the day and year above written. M. J. Barrow. [L. S.]

"Signed, sealed and delivered in the presence of O. C. Pope. J. M. Bond. W. H. Hammock, J. P."

The defendants answered, averring that they are the duly constituted board of trustees of said academy, are in possession of said property, and were managing its affairs. They admitted that they had collected considerable sums of money from various sources for the purpose of operating and maintaining the school, and aver-

red that they had properly accounted for and applied the same. They further averred that they are the regularly elected members of the board of trustees of Smithville Academy, having been elected according to the established method and custom of electing members of such board since it was constituted, 41 years ago, and that they are the successors of the original board; that they are acting within the scope of their authority, and are properly discharging their duties as trustees.

The issue formed by the petition and answer came before the judge of the superior court for a hearing on an interlocutory injunction, at which time the following evidence was introduced by the plaintiffs: The deed attached to the petition. The affidavit of E. A. Booker, who testified that when he became a member of the board of trustees of said academy he asked for the minutes, and was told that there were none, and that only since he became a member of the board had any record been kept of their actings and doings, or itemized statement of the receipts and disbursements made to the board. G. W. Warwick, who testified that at the August session of the board he demanded a record of the selection of members, and the secretary told him there was none. Respondents introduced the following evidence: T. S. Burton, who testified that he had held the office of secretary and treasurer of the board, and, as secretary, had kept a record of all the acts and doings of the board which he considered of sufficient importance; that the present board are the regularly elected trustees of the school, and the successors of the original board of trustees of the academy. W. W. Thompson, who testified that he had been a resident of Smithville for 23 years, and a member of the board of trustees of Smithville Academy for 20 years, during which time he had been chairman of the board; that vacancies on the board occasioned by resignation or death had been promptly filled by the board's electing a successor, according to the uniformly recognized and established custom which had prevailed since the original constitution of the board. O. L. Thompson, who testified that the board of trustees as now constituted had been duly elected as the successors of their predecessors according to the established method of electing trustees; that he had been a resident of Smithville for the past 20 years. There was evidence to the effect that the board had been in the actual possession and management of the school and its affairs for a number of years.

After hearing the evidence, the court passed the following order: "First. That the deed of M. J. Barrow, set forth in the original petition, created a trust, as therein set forth, and vested the title to the real estate therein described in the persons then exercising the office of trustees of the Smithville Academy, in so far as the said deed makes reference to the trustees of said academy; and it further appearing that all the members constituting said board of trustees have died or removed from said town of Smithville, and whose whereabouts are unknown, and as the donor, M. J. Barrow, failed to provide a mode of filling the vacancies in the trusteeship for said property, there now exists a trust without a trustee, and under the law it becomes the duty of the judge of the superior court, acting as chancellor, to appoint trustees to hold office until the further order of the chancellor. Second. Therefore I hereby appoint the following named citizens of said town of Smithville as trustees of said Smithville Academy, to wit: W. W. Thompson, E. A. Booker, T. S. Burton, A. H. Bass, J. R. Cochran, B. I. McKenney, and O. P. Brown—to hold charge of the property described in said deed, to protect and preserve the same, and to do and perform all the duties incident to said office. Third. It is further ordered and decreed that the defendants, as a board of trustees, be, and they are hereby, dissolved, and directed to turn over all of the property belonging to the said Smithville Academy to the board of trustees in this order appointed." The defendants, in their bill of exceptions, allege that the order of the court is erroneous, first, because there was no vacancy in the office of trustees for Smithville Academy, and therefore a court of equity had no jurisdiction of the subject-matter; second, because by the deed from Barrow the title to the property, so far as the school was concerned, was conveyed to the trustees of Smithville Academy, and their successors in office, and that the defendants are the successors to the original board of trustees to whom the property was conveyed; third, because no method of electing successors to fill vacancies in the board having been pointed out in the deed, the trustees had the right to provide for their succession.

Lane & Maynard, for plaintiffs in error.
G. W. Warwick, for defendants in error.

EVANS, J. (after stating the facts). 1-3. It is reasonable to assume that at the time of the execution of the deed from Barrow to the trustees of the Smithville Academy, and to the officers of the Masonic lodge, the Smithville Academy had a potential existence, and its affairs were administered by a board of trustees. The grant, therefore, was to the board of trustees then existing, and to their successors in office. Conceding that the deed did not create the trust, but merely put the legal title of the property conveyed into the trustees and their successors, it does not follow that the trustees possessed the power to fill vacancies occurring in their board. A trust of this character cannot be created otherwise than by grant or legislative authority. It cannot be created by grant unless property is conveyed.

The Legislature has the power to incorporate an academy and to authorize certain persons to act as trustees, and the act of incorporation may further provide for the filling of vacancies in the board of trustees, and the courts will take notice of such legislative acts. But as the General Assembly has not incorporated the Smithville Academy, or empowered any board of trustees to manage it and take charge of its affairs, and as no grant is shown, it would seem that there is no lawful authority for the trustees to name their successors to fill vacancies occurring within the board. If we should construe this deed as creating a trust, the trustees at the time of the execution of the deed had no power to fill vacancies, the deed conferring no such power of appointment. We therefore conclude that, as the legal title to the property was vested in the trustees filling the office at the time of the delivery of the deed, no power of appointing successors having been provided thereby, and there being no legislative authority authorizing the control and management of the academy by the trustees, the burden was shifted upon the defendants to show the legality of their existence as a board of trustees, with authority to manage the affairs of the school. This was not done. The evidence only covered a period extending back 20 or 22 years, during which time it has been the custom of the board to fill the vacancies. This is insufficient to show authority in the present trustees either to hold title under the donor's deed, or to manage the school affairs of that particular locality. The deed from Barrow was to the trustees of Smithville Academy, and their successors, and to certain officers of the Austin Lodge, F. & A. M., and their successors, for the purposes of education and Masonry, and also for a church, "if ever built." There was a provision in the deed that when the premises ceased to be used for church, school, or lodge purposes the land would revert to the grantor and his heirs. It is clear that the grantor intended that the persons holding the office of trustees of the academy and the officers of the lodge should hold the property not for their own individual benefit, but for school and Masonic uses. The designation of the trustees by their official character is equivalent to naming them by their proper names. Inglis v. Sailors' Snug Harbor, 3 Pet. 114, 7 L. Ed. 617. When the trustees died the title did not descend to their heirs, nor was there to be a reversion of the land to the grantor or his estate so long as the premises were used for the purposes specified. The petition alleges that the Masonic lodge had abandoned all interest they might claim under the deed, but the land is still used for school purposes. The case made is that of a charitable or eleemosynary trust without a trustee, and in such cases it is within the power of the superior court to nominate a trustee or trustees to hold the property for the uses declared in the donor's deed. Civ. Code 1895, §§ 4008, 4009; Beall v. Fox, 4 Ga. 404. The beneficiaries under the deed are not the trustees, but all the persons living in the locality of the school who might avail themselves of its educational advantages and opportunities. As the deed did not confer the power of appointment, and the original trustees are no longer in existence, the power of appointing trustees vests in the superior court, exercising equitable jurisdiction. This power of appointment may be exercised by the chancellor upon the petition of the beneficiaries of the trust. Civ. Code 1895, §§ 3178, 3195, 3197, 3199. The chancellor exercised this power in the present case, and we think properly so, under the facts as they appear in the record.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 465)

HENDERSON et al. v. STATE.

(Supreme Court of Georgia. June 17, 1905.)

WRIT OF ERROR — DISMISSAL — FINAL JUDGMENT.

A judgment refusing to allow a general demurrer to a petition to be amended is not a final judgment, nor would a judgment allowing the amendment have been a final disposition of the cause, so as to authorize a writ of error to the judgment first named while the case was pending in the trial court. Under such circumstances the writ of error is premature, and must be dismissed.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

Action by the state against M. Henderson and others. Judgment for plaintiff, and defendants bring error. Dismissed.

Suit was brought in the name of the state against the sureties on the bond of a former ordinary to recover an amount which it was alleged was due the state under the provisions of the act of 1872 (Acts 1872, p. 57), relating to the sale of certain lands which had never been granted by the state, or which had reverted to it. The defendants filed a general demurrer, in which it was averred that "no legal or equitable cause of action is set forth," and also various grounds of special demurrer. The demurrers were sustained, and the state excepted. When the case reached this court (120 Ga. 780, 48 S. E. 334) it was argued that the demurrer was properly sustained because the act of 1872 was unconstitutional; but this court reversed the judgment, and declined to decide this question, upon the ground that a general demurrer of the character above indicated was not sufficient to raise the question of the constitutionality of a statute upon which the action was based. When the case reached the court below, the defendants moved to amend the general demurrer by averring that the

act of 1872 was unconstitutional for the reason that it contained matter different from what was indicated in its title, the amendment setting forth specifically and in detail the matter which it was alleged was not covered by the title. The court refused to allow the amendment, and the defendants excepted.

J. H. Martin and Warren Grice, for plaintiff in error. John C. Hart, Atty. Gen., and Haygood & Cutts, for the State.

COBB, J. In the case of Newman v. State, 101 Ga. 534, 28 S. E. 1005, this court treated the question of the constitutionality of an act as having been raised under a general demurrer which alleged that the presentment did not charge the defendant with any violation of law, and the writer said in the opinion (page 536, 101 Ga., page 1005, 28 S. E.) that "under the general demurrer the constitutionality of the law under which the accused was arraigned is brought in question." But the question of practice was not directly raised in that case, and the expression of the writer was not one which was well considered. In Savannah Railway Company v. Hardin, 110 Ga. 433, 35 S. E. 681, this question of practice was thoroughly considered by the court, and the opinion in that case sets forth the views of the writer after mature thought and diligent investigation. The ruling in the Hardin Case has been subsequently followed without exception.

It has been held that a demurrer cannot be amended at a term subsequent to the first term by adding a ground of special demurrer. City Council of Augusta v. Lombard, 101 Ga. 724, 28 S. E. 994. A defendant may at any time before verdict, either orally or in writing, move to dismiss the case on the ground that the petition sets forth no cause of action, and in such a motion urge any ground which would be sufficient as a basis of a motion in arrest of judgment. Kelly v. Strouse, 116 Ga. 883, 43 S. E. 280 (5). A paper filed after the first term, which is styled a demurrer, but which is really in the nature of a motion to dismiss for want of a cause of action, should be treated by the court as of the latter character. M. & B. Ry. Co. v. Walton, 121 Ga. 276, 48 S. E. 940 (2). In the present case the court treated the motion of the defendants as a motion to amend the demurrer, and not as a motion to dismiss, merely refusing to allow the amendment, which was, in effect, a refusal to decide the question raised by the amendment. The judgment of the court which is complained of was not a final judgment, nor would a judgment allowing the amendment have been a final disposition of the cause. The case is therefore here prematurely, and the writ of error must be dismissed. Civ. Code 1895, § 5526.

Writ of error dismissed. All the Justices concur, except SIMMONS, C. J., absent, and FISH, P. J., disqualified.

E. SWINDELL & CO. v. ALABAMA MIDLAND RY. CO.

(Supreme Court of Georgia. June 15, 1905.)

RAILROADS—FIRES SET BY ENGINE—NONSUIT.

The evidence offered to establish the fact that the fire was communicated to the property of the plaintiff by the engine of the defendant was entirely circumstantial, but was of such a character as to authorize a finding that the fire was so communicated. If this fact were established, the law would raise a presumption that the defendant was negligent, and it was error to grant a nonsuit.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1710.]

(Syllabus by the Court.)

Error from City Court of Bainbridge; B. B. Bower, Judge.

Action by E. Swindell & Co. against the Alabama Midland Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

A. L. Townsend and A. H. Russell, for plaintiff in error. Kay, Bennet & Conyers and T. S. Hawes, for defendant in error.

COBB, J. When this case was here before (Alabama Midland Ry. Co. v. Swindell & Co., 117 Ga. 883, 45 S. E. 264), it was said that the evidence disclosed a case very similar to that of Southern Railway Company v. Pace, 114 Ga. 712, 40 S. E. 723. In the latter case the evidence for the plaintiff was altogether circumstantial, but was sufficient to raise a presumption of negligence, though this presumption was completely rebutted by the testimony for the defendant. The evidence for the plaintiff in the present case is substantially the same as it was before, and therefore did not authorize the grant of a nonsuit. There was evidence from which a jury could find that the fire was communicated to the plaintiff's property from the defendant's engine, and if this fact was established the law would raise a presumption of negligence against the company. If upon another trial the evidence for the plaintiff and the defendant is in substance the same as it was when the case was before this court at the March term, 1903, the judge would be authorized to direct a verdict for the defendant. But even under the ruling then made a nonsuit was improper.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 523)

JENKINS v. STATE.

(Supreme Court of Georgia. June 17, 1905.)

1. HOMICIDE—INSTRUCTIONS.

The theory of voluntary manslaughter was presented by one view of the evidence, and the trial judge properly instructed the jury as to the law bearing on that grade of homicide.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 649–656.]

2. CRIMINAL LAW—ARGUMENTS OF COUNSEL.
The argument of the solicitor general to which objection was made was authorized by the facts proved and such legitimate inferences as might be drawn therefrom.
3. HOMICIDE—REMARKS OF COURT.
Prejudicial error was committed by the presiding judge, who, on being asked to allow the accused to supplement his statement to the jury, said: "Let him finish his statement. I never knew one of them to get through making his statement." This remark was calculated to impress the jury with the idea that the judge entertained the opinion that what the accused might say in his defense was of little importance. Candler, J., dissenting.
4. SAME—INSTRUCTIONS—SELF-DEFENSE.
The charge of the court as to the law relating to self-defense was sufficiently full and explicit, in the absence of an appropriate request in writing to charge more fully as to what might constitute reasonable fears; and the request presented, not being adjusted to the facts of the case, was rightly withheld from the jury.
(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Clem Jenkins, Jr., was convicted of murder, and brings error. Reversed.

A. Y. Clement and A. S. Thurman, for plaintiff in error. J. E. Pottle, Sol. Gen., for the State.

EVANS, J. Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent, and CANDLER, J., dissenting.

(123 Ga. 302)

PINKSTON v. CEDAR HILL NURSERY & ORCHARD CO.

(Supreme Court of Georgia. June 15, 1905.)

HUSBAND AND WIFE—AGENCY—SALE TO HUSBAND.
A person selling goods to the agent of an undisclosed principal, who receives the benefit of the purchase, may go directly upon the principal for the price of the goods; and where the consideration of a contract made with a husband, who has general authority to manage a farm belonging to his wife, reaches her as an accession to her separate estate, and she retains and enjoys it, only slight evidence of the husband's agency in contracting the debt is required to charge her.
[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 148–154.]
(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action by the Cedar Hill Nursery & Orchard Company, for the use of J. W. Shadow, against Lula Pinkston. Judgment for plaintiff, and defendant brings error. Affirmed.

J. T. Harrison and S. T. Pinkston, for plaintiff in error. T. T. James and Graham Forrester, for defendant in error.

FISH, P. J. Suit on an open account was brought in the county court of Stewart county by the Cedar Hill Nursery & Orchard Company, for the use of J. W. Shadow, against Mrs. Lula Pinkston, and judgment was rendered in favor of the plaintiff. The defendant sued out a certiorari to the superior court, but it was overruled, and she excepted. The account sued on was for $30.70, the price of certain fruit trees, grapevines, etc., which an agent of the plaintiff had sold to J. G. Pinkston, the husband of the defendant. She denied that she had ever had any dealings with the plaintiff in person or through any authorized agent, whereas the plaintiff contended she was liable as an undisclosed principal. The agent of the plaintiff testified substantially as follows: In his capacity as salesman, he visited Mrs. Pinkston at her home, and tried to sell her some roses, trees, etc. She stated that she did not want to buy any, but said, if he would call on her husband at his place of business, he would probably buy some trees, as she had heard her husband say he wanted to buy 100 peach trees to replant his orchard. Witness got the order for the trees and vines from Pinkston, who gave witness to understand that he wanted to put them on his place near Lumpkin. The sale was made to Pinkston on his individual account and credit, and not as agent for his wife. Mrs. Pinkston was not known in the transaction, nor was witness informed that the place to which Pinkston referred as his farm really belonged to his wife. The only other witness introduced was Pinkston. He stated that he bought the trees and vines for his own use and on his own account, and not as agent for his wife, but admitted that he "managed her lands as his judgment dictated, and planted them in such ways as he saw proper"; that the trees were planted on the lands of his wife, to which she made no objection; that the trees were an improvement of her place; and that she would get whatever benefit might accrue from them being planted on her lands.

The defendant did not offer herself as a witness, nor introduce any evidence, but moved for a nonsuit. The question is whether or not a finding that Pinkston really purchased the trees, etc., as agent for his wife, with the intention of planting them on her place, which he managed for her as he saw fit, was warranted by the evidence. The judge of the county court thought so, the judge of the superior court entertained the same opinion, and we are not prepared to hold to the contrary. The mere fact that Mrs. Pinkston got the benefit of the purchase would not make her liable to the seller. Hightower v. Walker, 97 Ga. 748, 25 S. E. 386. Nor could she be held accountable unless her husband acted as her agent in the transaction (Axson v. Belt, 103 Ga. 578, 30 S. E. 262); nor even then if the fact of agency was known to the seller, and the seller extended credit to her agent, not to her. Civ. Code 1895, § 3025; Mitchell v.

Printup, 68 Ga. 675; Miller v. Watt, 70 Ga. 885. A seller may, however, go directly upon an undisclosed principal (Civ. Code 1895, § 3024), provided the principal receives the benefit of the contract made with his agent. Miller v. Watt, supra; Mickleberry v. O'Neal, 98 Ga. 42, 25 S. E. 933. Agency may be shown by evidence no stronger than that adduced on the trial of the present case. "Where all the consideration of a debt reaches a wife as an accession to her separate estate, and she retains and enjoys it, only slight evidence of the husband's agency in contracting the debt is required to charge her." Akers v. Kirke, 91 Ga. 598, 18 S. E. 369. That the husband conceals his right to act for her, and leads the seller to believe he owns property belonging to her, is an important fact to be considered. Maddox v. Wilson, 91 Ga. 40, 16 S. E. 213. The agent's insistence that it was his intention to buy on his own account and on his individual credit is by no means conclusive, when the use he makes of the purchase tends to negative such insistence. Simpson v. Patapsco Guano Co., 99 Ga. 168, 25 S. E. 94. See Lewis v. Equitable Mortgage Co., 94 Ga. 573, 21 S. E. 224. In the present case the county judge was authorized to find from the evidence that the husband led the agent of the plaintiff company to believe that he was the owner of the orchard which he wished to replant, and, upon the faith of his ownership thereof, credit was extended to the husband; the wife herself representing to the agent that her husband owned the orchard, and desired to buy trees to plant therein, though in point of fact it belonged to her.

In the petition for certiorari, complaint is made that the court admitted testimony of the agent which contradicted the terms of the written contract evidencing the sale to Pinkston. As the county judge states in his answer that no such objection was offered to the testimony on the trial of the case before him, we cannot undertake to deal with this complaint.

Judgment affirmed.

SIMMONS, C. J., absent.

(123 Ga. 474)

SOUTHERN RY. CO. v. EDMUNDSON.

(Supreme Court of Georgia. June 17, 1905.)

1. CARRIERS—LOSS OF BAGGAGE.

Where it is shown that the baggage of a passenger was received by the carrier at the plaintiff's destination, and there is a total default to deliver same on demand, the onus for accounting for such default is on the carrier.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1562.]

2. SAME—DAMAGES.

The evidence authorized the judgment for the plaintiff rendered by the judge, who tried the case without a jury.

(Syllabus by the Court.)

Error from City Court of McRae; Max L. McRae, Judge.

Action by Georgia Edmundson against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Mrs. Georgia Edmundson, in her petition against the Southern Railway Company, alleged that the defendant had endamaged her in the sum of $100 by reason of the following facts: That petitioner boarded a train of the Atlantic Coast Line Railroad Company at Tampa, Fla., for Helena, Ga., having previously purchased a ticket and checked her baggage, which was a valise, to her destination; that upon her arrival at Helena she presented her check to the defendant and demanded her baggage, but that the defendant failed and refused to deliver the same to her, and still fails and refuses so to do, or to pay her the value thereof; that the defendant contracted and agreed to receive the valise from the initial railroad at the junction point of defendant, and to safely carry the same to Helena, and there deliver it to petitioner; that the defendant did so receive it from the connecting road in good condition, and transported it to Helena, Ga. The contents of the valise and its value were alleged. The defendant was alleged to be guilty of negligence in failing and refusing to deliver to plaintiff the valise and its contents. Petitioner further alleged that the valise and its contents were taken and feloniously appropriated by some of defendant's agents, servants, and employés. The defendant, in its plea, denied certain paragraphs of the petition, and required proof of others, because of want of sufficient information to either admit or deny them. The defendant further specially pleaded that it had exercised all care and diligence required of it in the protection of plaintiff's baggage, and was therefore not liable to her in any sum. The case was tried by the judge without a jury, and on the trial the plaintiff's testimony supported the allegations in the petition as to purchasing a ticket at Tampa, Fla., and checking the baggage to Helena. The plaintiff further testified that she left Tampa at 8 o'clock p. m., and arrived at Helena at 3:45 o'clock p. m. the next day; that upon her arrival she could not find the agent of defendant, but delivered the check to a friend, and directed him to get her baggage, and that the baggage was demanded that day, but not delivered; that she went out to her father's that afternoon, and about a week later she again sent for her baggage, but that she has never received the valise or its contents. She testified as to the contents of the valise and its value. Another witness for the plaintiff testified that he presented the check to the agent of defendant about two weeks after the baggage arrived in Helena, and demanded the valise, and that the agent directed him to a porter, but the porter could not find the valise. The defendant offered its agent at Helena as a witness, who testified

that the plaintiff arrived at Helena on the north-bound train at 3:45 p. m.; that one Mr. Dean, for the plaintiff, asked for her "grip," and that he informed him that it had not come, but would doubtless be in on the night train; that the valise came that night on the north-bound train, and remained in the baggage room for two weeks; that the grip was a common cloth one bound with one strap, which was fastened with a buckle; that the witness was informed by the plaintiff that it contained baby clothes, and that, had he known of its value, he would have kept it in the office with him, instead of in the baggage room; that the baggage room is not in the same building with the office, but is across the tracks, in the old depot; that any one might have stolen it from the baggage room; witness saw it there several times, and kicked it out of his way; it remained there, to his knowledge, for at least two weeks; all the baggage was kept in the baggage room, but it was not kept locked all through the day; any one could have gone there without witness' knowledge and stolen the valise; that the baggage room was frequently allowed to remain open all day, with no one to watch it; the railroad company had a man there to handle baggage, but he did not stay at the baggage room all the time. The court rendered a verdict for the plaintiff, and the defendant moved for a new trial upon the usual grounds, and upon the additional ground that the allegations were not supported by the proof. The motion was overruled, and the defendant excepted.

De Lacy & Bishop, for plaintiff in error. D. C. McLennan, for defendant in error.

EVANS, J. (after stating the facts). The plaintiff's suit was based upon the negligence of defendant's agents. It was alleged, first, that the "agents, servants, and employés" of the defendant had misappropriated her baggage to their own use. It was further alleged that the defendant was guilty of a breach of duty, in failing and refusing to deliver the valise and contents to the petitioner. Counsel for plaintiff in error insist that these two allegations should be construed together, and that, in effect, the petition alleged the liability of the defendant was because of the fraudulent misappropriation of the baggage by the defendant's agents and employés, and that the evidence wholly failed to sustain this charge. We cannot agree with the counsel in their construction of the plaintiff's petition. The suit was for the failure to deliver the baggage. This was alleged to have been as the result of defendant's negligence. The further allegation that the baggage had been misappropriated by the defendant's employés was a statement of an additional reason why the defendant failed to deliver. Construing the petition, therefore, as a suit for failure to deliver baggage, the evidence authorized the plaintiff to recover its proven value. While, under the facts, the defendant most probably was not liable as a carrier, because of the lapse of time after the arrival of the baggage before the demand upon the agent, it certainly was liable to the plaintiff as a warehouseman. Ga. R. R. v. Thompson, 86 Ga. 327, 12 S. E. 640. The defendant's possession of the baggage and the plaintiff's demand for the same are admitted. "Where there is a total default to deliver the goods bailed on demand, the onus for accounting for such default is on the bailee." Home Railroad v. Wimberly, 75 Ga. 320, 58 Am. Rep. 468; Civ. Code 1895, § 2896. The defendant company was bound to account for the valise, and to show how it left its custody. The evidence which it submitted established that it was grossly negligent. It had put the baggage in a room which was frequently left open during the day, and under no proper surveillance by any of its agents. The valise was a cheap one, and the agent treated it contemptuously, by kicking it out of his way, instead of exercising proper diligence in putting it in a place of safety. There was a failure by the railroad company to exercise proper care in the protection of the plaintiff's baggage, and its loss occasioned by the lack of such care rendered the defendant liable to the plaintiff.

Judgment affirmed. All the Justices concur.

(123 Ga. 470)

UNION CENTRAL LIFE INS. CO. v. WYNNE.

(Supreme Court of Georgia. June 17, 1905.)

1. PLEADING—PLEA—GENERAL DEMURRER.

Where a plea sets up matter which, if sustained by competent written evidence, would constitute a good defense to the action, and it does not appear from the plea itself that the defendant depends for its establishment upon parol evidence, the plea should not be stricken on general demurrer. Brown v. Drake, 28 S. E. 606, 101 Ga. 130; Walker v. Edmundson, 36 S. E. 800, 111 Ga. 454. See, also, Anderson v. Hilton & Dodge Lumber Company, 49 S. E. 725, 121 Ga. 688.

2. NOTE—PAROL AGREEMENT.

The terms of an absolute, unconditional promissory note cannot be varied by ingrafting upon it a condition made by a parol contemporaneous agreement. Civ. Code 1895, §§ 3675 (1), 5201.

(a) Upon the trial of an action on such a note given for the premium on an insurance policy, evidence of a parol contemporaneous agreement between the maker of the note and an agent of the payee that the policy was to be delivered within a given time was, in the absence of fraud, accident, or mistake, inadmissible, in connection with proof that the policy had not been so delivered, to show failure of consideration of the note.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2043, 2044.]

(Syllabus by the Court.)

Error from Superior Court, Dodge County, D. M. Roberts, Judge.

Action by M. Wynne against the Union Central Life Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed.

J. E. Wooten, for plaintiff in error. W. M. Clements, for defendant in error.

FISH, P. J. Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 427)

LITTLEJOHN v. STELLS.

(Supreme Court of Georgia. June 17, 1905.)

1. CRIMINAL LAW—PUNISHMENT OF CRIME—STATUTE LAW—ORDINANCES.

The General Assembly may, by express enactment, authorize the corporate authorities of municipalities to provide by ordinance for the punishment of an act which in its nature affects the health, peace, and good order of the community, notwithstanding that such an act has already been made penal under the general law of the state.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1312.]

2. SAME — VIOLATION OF ORDINANCE — JURY TRIAL.

An ordinance passed in pursuance of such authority does not provide for the punishment of an offense against the laws of the state, and one arraigned in a municipal court for a violation of such ordinance is not entitled to a trial by jury.

3. INTOXICATING LIQUORS — ILLEGAL SALE—PUNISHMENT.

The act of 1903 (Acts 1903, p. 96) which confers upon the corporate authorities of the cities of this state the power to provide by ordinance for the punishment of selling liquor on Sunday limits the punishment to be inflicted to fine and imprisonment. A sentence under an ordinance passed under the authority of such act, providing that the accused shall work upon the city chain gang, is without authority.

4. HABEAS CORPUS—ILLEGAL SENTENCE—PROCEDURE.

Direction is given that the applicant be taken from the city chain gang and carried before the mayor's court of the city in order that a legal sentence may be imposed upon him.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gaber, Judge.

Application of Tom Littlejohn for writ of habeas corpus to James Stells. From an order denying the writ, petitioner brings error. Affirmed, with direction.

Littlejohn applied for a writ of habeas corpus to be directed to Stells, alleging that the latter was holding him in custody in violation of law. At the hearing it appeared that the applicant had been arraigned in the police court of the city of Marietta charged with selling liquor on Sunday, in violation of an ordinance of which the following is a copy: "Be it ordained by the city council of Marietta that from and after the passage of this ordinance it shall be unlawful for any person to sell in any quantity, directly or indirectly, any spirituous, malt, vinous or intoxicating liquors of any character within the corporate limits of the city of Marietta from twelve o'clock on Saturday night until twelve o'clock on Sunday night. Any person violating this ordinance, upon conviction thereof shall be fined by the mayor not exceeding $300, or imprisonment not longer than three months, or both at the discretion of the mayor." This ordinance was adopted in pursuance of authority conferred in an act approved August 15, 1903 (Acts 1903, p. 96), of which the following is a copy: "Be it enacted by the General Assembly of Georgia, that from and after the passage of this act it shall and may be lawful for the corporate authorities of each city in this state to pass ordinances prohibiting any person within the corporate or jurisdictional limits of such city from selling in any quantity, directly or indirectly, any spirituous, vinous, malt or intoxicating liquors of any character, from 12 o'clock Saturday night to 12 o'clock Sunday night, and the corporate authorities of such cities are further empowered in such ordinances to provide that any person or persons violating any of the provisions of such ordinances shall, on conviction thereof before the police court of such city, whether known as mayor's or recorder's court, or otherwise designated, be subject and liable, as punishment for each and every such offense, to a fine of not more than $300 and to imprisonment not exceeding three months, either or both, at the discretion of the officer presiding in such police or other municipal court; and to further provide in such ordinances, that the aforesaid penalties shall not affect the power of the mayor or corporate authorities of such city to revoke the license of any barroom or tippling house." The validity of both act and ordinance was attacked upon various grounds. The judge remanded the applicant to the custody of the respondent, and the applicant excepted.

H. B. Moss, for plaintiff in error. D. W. Blair and J. E. Mozley, for defendant in error.

COBB, J. It is well settled that a municipal corporation cannot by ordinance provide for the punishment of an act which constitutes a criminal offense under the general law of the state, in the absence of express legislative authority conferring this power upon the municipality. Moran v. Atlanta, 102 Ga. 840, 30 S. E. 298. Prior to the adoption of the present Constitution the General Assembly could confer this power upon municipalities either by general or special law. Hood v. Von Glahn, 88 Ga. 405, 14 S. E. 564. The present Constitution prohibits the General Assembly from passing special laws upon this subject. Aycock v. Rutledge, 104 Ga. 533, 30 S. E. 815. But the power to pass a general law on the subject still exists. The General Assembly cannot delegate to a municipality the authority to punish in a municipal court a state offense as such. Grant v. Camp, 105 Ga. 428, 31 S. E. 429. But it may authorize the punishment of an act as a city offense which would also be a state offense, provided the terms of the act conferring the authority are clear and unequivocal, and manifest a legislative intent to confer

authority for the punishment of such act. Hood v. Von Glahn, supra. The sale of liquor is prohibited in the county of Cobb. Hence a sale on Sunday, as well as other days, would be a violation of the state law, and the authorities of the city of Marietta would have no power to provide for the punishment of one making such a sale on Sunday, in the absence of express legislative authority. The act of 1908, under which it is claimed that this authority is conferred, is a law general in its terms, and purports to confer authority upon each city in this state, and it is manifest from the language of the act that there was a legislative intent to authorize the corporate authorities of the various cities in this state to provide for the punishment of the act of selling liquor on Sunday. "The act of selling spirituous liquors on Sunday is not, under all circumstances, in and of itself, a distinct offense under the criminal laws of this state." Moran v. Atlanta, supra. The act of selling liquor at any time is, however, a distinct offense, under the criminal law of this state, in any county where a prohibitory law prevails. Hence, in order to confer authority upon the police courts of cities to punish for the sale of liquor on Sunday in such counties, express legislation is necessary; but the corporate authorities of cities located in those counties where no prohibitory law prevails could provide for the punishment of those selling liquor on Sunday under the general powers in the charters of the different cities. The act in question clearly and unequivocally confers power upon the corporate authorities of the cities to punish the act of selling liquor on Sunday, and the fact that such legislation was unnecessary, so far as one class of cities is concerned, would not make the act invalid in so far as it was necessary to confer authority upon another class of cities. The act does not purport to confer authority to punish for a state offense, but it, in terms, grants to the corporate authorities of the different cities the right to provide for the punishment of an act which, when committed in cities of a given class, would be a violation of the criminal law of the state. We think it sufficiently appears from the terms of the act that there was a manifest legislative intent to authorize the city authorities of the different cities of the state to provide for the punishment of those who engage in selling liquor on Sunday, whether such sales were had in cities where such act would be a state offense, or whether it were in cities where such an act would not be an offense against the state. Such being the case, the ordinance passed by the corporate authorities of the city of Marietta was a valid ordinance.

The police court of the city of Marietta had jurisdiction to punish for the city offense defined in the ordinance, and could proceed according to the lawfully authorized procedure and practice of that court. The applicant, when arraigned before that court, not being charged with a crime against the state, but simply with a violation of a municipal ordinance, would not be entitled, under the Constitution, to a trial by jury. The case of Hood v. Von Glahn, supra, is controlling on this point.

Under the act, the municipal authorities could not provide for any other character of punishment than fine or imprisonment, either or both. The ordinance provides only for the punishment authorized by the act, and the mayor, therefore, had no authority to sentence the applicant to work upon the city chain gang. There was no error in refusing to discharge the applicant, but he should not have been remanded to the respondent to work upon the city chain gang. Direction is given that he be remanded to the custody of the respondent, to be carried before the mayor of Marietta to be sentenced in accordance with the act and the ordinance. He should have been released from the chain gang, but held in custody as one duly convicted in the mayor's court, subject to sentence therein according to law. Wells v. Newton, 101 Ga. 142, 28 S. E. 640 (4); Russell v. Tatum, 104 Ga. 332, 30 S. E. 812; Screen v. State, 107 Ga. 715, 33 S. E. 393. The judgment will be affirmed, with direction to this effect.

Judgment affirmed, with direction. All the Justices concur.

SIMMONS, C. J., absent.

(123 Ga. 444)

REAVES v. MEREDETH.

(Supreme Court of Georgia. June 17, 1905.)

1. MECHANICS' LIENS—FORECLOSURE—SALE—PROPERTY OF THIRD PERSON.

There was evidence to sustain the jury's finding that the property sold under the foreclosure of a materialman's lien belonged, not to the person against whom the lien was asserted, but to his wife.

2. SAME—ENFORCEMENT OF LIEN—NOTICE.

Under Civ. Code 1895, § 2801, prior to the Act of 1899 (Acts 1899, p. 33) such a lien must be asserted, if at all, against the true owner, who is entitled to the statutory notice for the giving of which that section provides.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 161.]

3. SAME—DUTIES OF OWNER—ESTOPPEL.

The true owner, though cognizant that a stranger to the title is having improvements made on the premises, is under no legal duty to give to a materialman any information touching the ownership of the property; and the owner will not be estopped from setting up title thereto, as against a materialman, when nothing has been done by any one to mislead him as to the ownership of the premises improved.

(Syllabus by the Court.)

Error from Superior Court, Colquitt County.

Action by Dora L. Meredeth against N. O Reaves. Judgment for plaintiff, and both

parties bring error. Judgment on named bill of exceptions affirmed, and cross-bill dismissed.

In an equitable petition presented to the superior court of Colquitt county, the plaintiff below, Mrs. Dora L. Meredeth, asserted ownership of a certain house and lot in the town of Moultrie, alleging that she purchased and acquired title to the premises on February 13, 1896, since which time she has been in possession of the same. Her complaint was as follows: On November 3, 1896, while she was on a visit to North Georgia, the house and lot were sold by the sheriff as the property of her husband, under an execution issued against him from the county court of Colquitt county. The premises were bid in at the sheriff's sale by D. M. Reaves, who is seeking, through the sheriff, to dispossess her. Her property is not subject to the payment of her husband's debt, and Reaves has no right to enforce the writ of possession issuing from the county court. She has a family of children, and has nowhere to go if deprived of the possession of her home, and for this reason is she entitled to an injunction to prevent her unlawful eviction by the sheriff, acting in behalf of Reaves. By an order of the court passed subsequently to the filing of the petition, N. C. Reaves, the wife of D. M. Reaves, was substituted in his stead as the sole defendant. An answer was filed by Mrs. Reaves, in which she admitted that the plaintiff was in possession of the premises, but denied that she was the owner thereof. By way of special defense, the defendant averred: In the early part of 1896, W. J. Meredeth, the husband of the plaintiff, purchased of C. J. Kendall the lot to which she claims title, and subsequently entered into a contract with A. B. Turner, a materialman, for the furnishing of materials with which to erect a dwelling on the land, which materials were furnished, and Turner recorded his lien on the premises in terms of the law. He subsequently sought to foreclose his lien. Meredeth resisted the effort, but the court rendered judgment to the effect that the lien was valid, and binding on the property. It was sold by the sheriff under this judgment, and defendant became the purchaser at the sale. Thereafter one Wood rented the premises from her, but failed to pay the rent. She sued out a dispossessory warrant against him, which was met with a counter affidavit, and Meredeth appeared on the trial of the issue with counsel, and defended the suit, which resulted in her favor. After purchasing the property, Meredeth made a deed to it to his wife, but it was withheld from the records, the parties to it acting in collusion with a view to defeating the enforcement of the materialman's lien against the premises. Meredeth thereafter represented to different parties that he was the owner of the premises, and held himself out to the world as such by living thereon; his wife participating with him in practicing this deception. The plaintiff's real purpose in bringing the present action is to keep defendant out of possession of her premises, which she purchased in good faith, and of which she is the true owner. On the hearing of the dispossessory warrant sued out against Wood, the plaintiff, claiming to be the owner of the house and lot, assisted Wood in presenting his defense, having previously induced him to attorn to her. The deed from Meredeth to his wife is a cloud upon defendant's title. Plaintiff is hopelessly insolvent, and she should not be permitted to retain possession of the premises without furnishing a good and solvent bond conditioned to pay the rents thereof in the event the premises should be awarded to defendant. The pleadings have heretofore been considered. See 120 Ga. 727, 48 S. E. 199. The case went to a trial on the merits, and the jury returned a verdict in favor of the plaintiff. The defendant excepts to the overruling of her motion for a new trial, and the plaintiff, by a cross-bill of exceptions, complains of various rulings made during the progress of the trial.

J. D. McKenzie and Shipp & Kline, for plaintiff in error. T. H. Parker and F. W. Mattox, for defendant in error.

EVANS, J. (after stating the facts). 1. The controlling issue in the case was whether or not Mrs. Meredeth, not her husband, was the purchaser of the lot from C. J. Kendall. It appears that on January 15, 1896, Kendall deeded the land in controversy to W. J. Meredeth, though the deed was not recorded till October 23, 1900, and that on March 13, 1896, Meredeth conveyed the land to his wife, this latter conveyance being recorded on July 15th of the same year. The plaintiff introduced testimony to the following effect in explanation of how she acquired title: She was the owner of several cows, and authorized her husband to trade them for a suitable lot in Moultrie, saying to him that she wanted a home, and that a poor home was better than none at all. Her husband concluded a trade with Kendall for the lot in dispute, telling him the cows belonged to Mrs. Meredeth, and she wanted the deed to the lot made to her, as she was also to furnish the sum of money agreed on as constituting, in addition to the cows, the consideration of the purchase. By the mistake of the lawyer who prepared the deed, Meredeth was therein named as the vendee, and for that reason he objected to the deed, but took it home, and read it over to his wife. She said she would not have it, and told her husband to take it back to Kendall, and have him execute a conveyance to her. Meredeth undertook to carry out his wife's instructions, but the lawyer told him he could

made a deed to his wife, and prepared the deed to her which he signed. She furnished the whole of the consideration for the sale of the lot. The defendant introduced Kendall as a witness. His recollection was not clear as to what was said when the trade was made as to the deed being made to Mrs. Meredeth, but understood Meredeth to say the deed should be made to him. Witness was informed by Meredeth that the cows belonged to his wife. He paid $10 at the beginning of the trade, and gave his note for $5, saying nothing as to whose money it was. When the deed was delivered to him, nothing was said about it not having been made to his wife, but several months afterwards he brought it back to the witness. In view of this evidence, a finding that the lot was really bought and paid for by Mrs. Meredeth was fully warranted. In the further discussion of the case we will therefore treat her as the owner of the premises, giving effect to the finding of the jury upon this issue.

2. The materialman's lien filed by Turner was asserted and foreclosed against "Jackson" Meredeth as the owner of the land upon which the improvements were made. Mrs. Meredeth was not a party to the foreclosure proceeding, and was not, therefore, bound by the judgment therein rendered. On March 13, 1896, not only was she the equitable owner of the land, but she at that time held the legal title thereto. It does not appear when the materials with which to build the house were furnished by Turner, but it was some time prior to June 6, 1896, the date of which he filed his lien. His right to assert a lien on the premises improved was therefore governed by the law as it stood at that time (Civ. Code 1895, § 2801), and not by the act of December 19, 1899 (Acts 1899, p. 33), amending that section. As Mrs. Meredeth was the "true owner" of the premises, statutory notice of the assertion of a lien should have been served upon her as such true owner, and the lien should have been filed and enforced against her, not against her husband. Porter v. Wilder, 62 Ga. 521, 527; Gross v. Butler, 72 Ga. 187; Bullard v. Dudley, 101 Ga. 299, 28 S. E. 845. Such a lien being in derogation of common-law right, the statute creating it is to be strictly construed, and the provisions of the statute are to be strictly complied with. Gross v. Butler, supra; Seeman v. Schultze, 100 Ga. 603, 28 S. E. 378.

3. It only remains to inquire whether or not Mrs. Meredeth is estopped from asserting ownership of the property. Though she may, as owner, have assisted Wood in defending the dispossessory warrant sued out against him, she was not a party to that proceeding, and the decision therein rendered in favor of Mrs. Reaves in no way affected the question as to whether she or Mrs. Meredeth was the real owner of the premises. Doubtless that decision was put on the ground that Wood could not dispute the title of his landlord; but, be this as it may, there is no estoppel by judgment as against Mrs. Meredeth, she not having been a party to the case. Nor, under the evidence submitted, was she estopped by her conduct, so far as Turner, the materialman, was concerned. Although she knew that improvements were being made on her land by her husband, she was under no legal duty to put Turner on notice that she was the owner of the premises. Rice v. Warren, 91 Ga. 759, 17 S. E. 1032. He could not complain that she failed to sooner record her deed, for, as to him, she was under no obligation to do so. She did nothing and said nothing to mislead him into the belief that her husband owned the land. The deed from Kendall to her husband was not put on the record till 1900, so Turner could not have relied on the record title being in Meredeth; and it does not appear that he made to Turner any representations as to the ownership of the property, either at the time the materials were purchased or subsequently. Turner evidently took it for granted that Meredeth owned the land, without making any inquiries to find out what was the truth in this regard. No materialman's lien against the land has ever been asserted against it as the property of Mrs. Meredeth, the true owner. The judgment in favor of Turner was binding only upon her husband, and the effect of the sale had thereunder was simply to divest whatever interest he had in the premises. The purchaser under the doctrine of caveat emptor, can claim to occupy no better situation, relatively to Mrs. Meredeth, than that occupied by Turner, the materialman, who failed to properly pursue his statutory remedy. Accordingly, the court did not err in charging the jury that, if they believed the land really belonged to her, and the deed to her from her husband was executed before the judgment against him was rendered, then she would be entitled to recover. As already pointed out, she held the legal title to the premises long before Turner attempted to assert his lien.

Judgment on main bill of exceptions affirmed; cross-bill of exceptions dismissed.

(123 Ga. 477)

TOOMER v. WARREN.

(Supreme Court of Georgia. June 17, 1905.)

1. BANKRUPTCY—EXEMPTIONS.

The material facts of this case being substantially the same as those involved in Bell v. Dawson Grocery Company, 48 S. E. 150, 120 Ga. 628, the rulings there made are controlling in the present case.

2. EQUITY—ANSWER OF DEFENDANT — EVIDENCE.

It is only where discovery is expressly prayed for in plaintiff's petition that two wit-

nesses, or one witness and corroborating circumstances, are required to rebut the answer of defendant as to facts within his own knowledge responsive to the discovery sought. Civ. Code 1895, § 3950; Acts 1898, p. 53.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 715–724.]

3. JUDGMENT—VALIDITY.

A judgment overruling a demurrer to a petition for injunction and receiver, rendered upon an interlocutory hearing in vacation before the appearance term, is a mere nullity. Reynolds & Hamby, etc., Company v. Kingsbery, 45 S. E. 235, 118 Ga. 254.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action by R. E. Warren against Nathan Toomer. Judgment for plaintiff. Defendant brings error. Affirmed.

D. R. Pearce and W. D. Nottingham, for plaintiff in error. W. L. & Warren Grill and T. S. Felder, for defendant in error

FISH, P. J. Judgment affirmed.

(123 Ga. 431)

GOSSETT v. STATE.

(Supreme Court of Georgia. June 17, 1905.)

1. HOMICIDE—JUSTIFICATION.

A father may protect his minor female child from seduction or debauchery, and, if necessary for that purpose, where the criminal act is in progress or about to take place, may slay the wrongdoer. But to deliberately kill in revenge for a past injury, however heinous, after reason has had time to resume its sway, is not justifiable.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 179.]

2. SAME—EVIDENCE—PROTECTION OF CHILD.

Under the facts of this case there was no error in failing or refusing to charge section 74 of the Penal Code of 1895.

3. SAME—INSTRUCTIONS.

The charge given by the court did not clearly and distinctly place before the jury the issues involved as to whether the homicide was murder, voluntary manslaughter, or justifiable.

4. SAME—EVIDENCE—CHARACTER.

On the trial of an indictment for murder, the defendant having admitted the homicide, but having sought to justify it on the ground that the deceased was seeking and actually proceeding to ruin his minor daughter, and that he was outraged in his feelings, and acted for the purpose of protecting his child and preventing the wrong, it was admissible in rebuttal for the state to introduce evidence of notorious character for lewdness on the part of the defendant's daughter in the community where the defendant and the deceased resided and worked.

5. SAME.

It was not permissible for the state to show that the defendant's daughter had been seen by a witness between 9 and 10 o'clock at night, sitting on a fence, talking to a man, no connection between such fact and the homicide appearing, and no knowledge thereof on the part of the defendant being shown.

(Syllabus by the Court.)

Error from Superior Court, Walker County; W. M. Henry, Judge.

John Gossett was convicted of voluntary manslaughter, and brings error. Reversed.

John Gossett was indicted for the murder of John Doner. He was found guilty of voluntary manslaughter, moved for a new trial, and upon its refusal excepted. The evidence for the state showed, in brief, the following facts: The defendant killed the deceased by stabbing, at a place where the deceased lived in Walker county. The defendant and the deceased lived a few hundred yards apart. None of the witnesses saw the actual homicide, but some of them heard what appeared to be a fight in progress, and on going to the scene found the deceased in a dying condition, and the defendant standing over him. One of the witnesses testified as follows: "Mr. Gossett stated to me that he killed Doner, and that he would do it again under the same circumstances. He just stated that he would do it again if it was to do over. He said it was about his daughter. He said his daughter was there in Doner's room, in Doner's bed. He said that Mr. Doner had been in the habit of coming up there to his house [Gossett's house] for six or eight months, and that he was there on the evening of the killing, prior to the killing. I think that Gossett said that he was waked up by his wife, and told that his daughter was gone. Gossett also stated that he went to the door of Doner, and knocked, and that Doner got up, and that he turned the knob and found the door unfastened, and that he walked into the room. He said that he found his daughter in there. He said he asked Doner where his daughter Callie was, and Doner said he didn't know. Callie was Gossett's daughter. He didn't say that it was in the dark. He didn't tell me that Doner said she wasn't there. He said he didn't know where she was at, and this was in answer to Gossett's question as to Callie's whereabouts. * * * When I got down there, they decided that they would want Callie at the coroner's inquest, and I went up to the house where they lived, and went in, and Mrs. Gossett said that she had not seen Callie. I found her at a house where colored people lived. She was in bed with two negro children." Both the plaintiff and the defendant were connected with the United States army post in Walker county, the defendant being employed with the pack train. The defendant introduced no evidence, but relied on his statement, which was similar to that detailed by the witness, only fuller. Among other things, he stated as follows: The deceased and he had worked together for two years, and were intimate friends—almost like brothers—and the deceased was a constant visitor in his family. On the night of the homicide he was at the defendant's house, and when the latter became tired he excused himself, leaving the deceased and several members of the family together. In the night his wife waked him, and told him that their daughter was gone, and that she thought Doner had run away with the girl. He went to Doner's house, and called for his (Doner's) roommate to see if

she was there, and to make inquiries after her. After knocking and calling twice and receiving no answer, he turned the door knob, and the door came partly open. Doner came to the door, and on inquiry denied knowledge of the girl's whereabouts. Defendant went in, and found his daughter in Doner's bed. He smelled whisky strongly on her breath, and "that caused me to think that he had brought her there to ruin her, and the rest of us, for the rest of my days. And I tell you what's a fact, when such feelings as that come over you, it sure hurts you, and to ruin a child of mine it sure hurts." He turned on Doner, a scuffle ensued, and Doner was killed.

In rebuttal the state introduced the evidence of several witnesses to show that they knew the general character as to virtue or lewdness of Callie, the defendant's daughter, in that neighborhood; that the general talk around there was that she was not considered a virtuous woman, and that her character for lewdness was bad; that the general talk among those who worked around that place was that she was of bad character, and had been for a year previous; that Gossett worked with the pack train, which was right in the neighborhood of where this gossip was going on, and that both he and Doner lived there; that this was talked among the soldiers and employés of the United States government. One of the witnesses testified that the girl appeared to be about 17 or 18 years old; that she "was a medium-sized woman"; that she wore short dresses when the witness first knew her, but had put on long dresses, reaching about to her shoe tops. Evidence was also admitted to show that she had been seen on several occasions at night away from home—once on the road with a negro girl, once sitting on the "corral" fence, talking with a man, between 9 and 10 o'clock at night, and at another time coming out of the pack train quarters about 8 o'clock at night; and that she had been seen in the pack train quarters, running and playing with the men in their sleeping quarters, and in the kitchen; also that she had been seen at the railway station at 8 or 9 o'clock at night.

The defendant made a further statement in which he said that his daughter was only 15 years old, and that if she had done anything wrong, or had a bad reputation, he had no knowledge of it.

The motion for new trial was based on the grounds that the verdict was contrary to law and the evidence, and that the court erred in various charges and omissions to charge, and in the admission of evidence to show the general character of Callie Gossett to be lewd, over objection on the ground that it was not in rebuttal, that it was immaterial and irrelevant, and that there was no evidence that the defendant knew at the time of the homicide of such lewd character. Another ground of the motion was based on the evidence of a witness who testified that he saw her in the "corral" between 9 and 10 o'clock at night, talking to a man, over objection on the ground that the state was singling out some specific act of Callie Gossett to show bad character, and that this was improper; also that there was no evidence that defendant had notice of the fact.

Payne & Payne, R. M. W. Glenn, W. A. Schofield, and F. W. Copeland, for plaintiff in error. W. H. Ennis, Sol. Gen., and Bale & Shaw, for the State.

LUMPKIN, J. (after stating the above facts). 1. It was said in the case of Wilkerson v. State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63: "This court will go as far as the rules of established law will permit in protecting the virtue and chastity of the wives and daughters of this state from the criminal wiles of the adulterer and seducer, and will uphold husbands and fathers in all they may lawfully do to maintain and protect the sanctity of their homes and firesides." And again: "The law permits and will justify the homicide of another by the husband to prevent the seduction of the wife, or even to prevent the committing with her of a single act of adultery, if by his previous conduct he has not forfeited the right." Page 734, 91 Ga., page 993, 17 S. E., 44 Am. St. Rep. 63. But in all such cases, whether relating to wife or daughter, the idea of prevention or defense against an impending or progressing wrong must be involved in order to render the homicide justifiable. "To deliberately kill in revenge for a past injury, however heinous, after reason has had time to resume its sway, cannot be justifiable." Hill v. State, 64 Ga. 453 (2). "A husband may attack for intimacy with his wife in his presence, raising a well-founded belief that the criminal act is just over or about to begin." Drysdale v. State, 83 Ga. 744, 10 S. E. 358, 6 L. R. A. 424, 20 Am. St. Rep. 340; Wilkerson v. State, supra. But the law will not justify deliberate revenge. However grievous a past wrong may have been, the law does not intrust its punishment to individual vengeance. For cases where the defense was under section 75 of the Penal Code of 1895, on account of wife or daughter, see Jackson v. State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; Futch v. State, 90 Ga. 472, 16 S. E. 102; Channell v. State, 109 Ga. 150, 153, 34 S. E. 353; Cloud v. State, 81 Ga. 444, 7 S. E. 641; Mays v. State, 88 Ga. 399, 402, 14 S. E. 560; Baker v. State, 111 Ga. 141, 142, 36 S. E. 607; Richardson v. State, 70 Ga. 825; Bone v. State, 86 Ga. 108, 12 S. E. 205; Perry v. State, 102 Ga. 365, 30 S. E. 903; Elliot v. State, 46 Ga. 159. While the case of Biggs v. State, 29 Ga. 723, 76 Am. Dec. 630, contains many strong and forcible expressions, it has not been considered by the court as conflicting with later rulings. Wilkerson v. State, 91 Ga. 733, 17 S. E. 990, 44 Am. St. Rep. 63.

2. Several of the grounds of the motion for a new trial complain that the court did not

give in charge to the jury the whole of section 74 of the Penal Code of 1895, which reads as follows: "Parents and children may mutually protect each other, and justify the defense of the person or reputation of each other." It is urged that the court should have instructed the jury that, if the defendant killed Doner in defense of the person or reputation of his daughter, it was justifiable homicide. Prior to the codification of 1895 the section quoted did not form any part of the Penal Code, but was in the Civil Code. It was first codified in the original Code of 1863 as section 1747, in the chapter relating to parent and child. It was continued in the civil division of the successive Codes until that of 1895, when it was transferred and became section 74 of the Penal Code. Sections 70, 71, 72, 73, and 75 of the Penal Code of 1895 date back to the Penal Code of 1833, where they form sections 39 to 43, inclusive. Cobb's Dig., pp. 784, 785. With these five sections in the penal division of the Code and what is now section 74, then incorporated in the civil division of the Code, nearly all of the decisions above cited were made. In Hill v. State, supra, it was held that section 75 should be construed in connection with sections 70–73, that the expression, "all other instances which stand upon the same footing of reason and justice as those enumerated" had reference to those sections, and that the idea of defense against some impending and pressing wrong entered into all of them. In our judgment, the insertion of section 74 into the Penal Code of 1895, and its adoption, were not intended to wholly change the law as previously adjudicated. The protection of the parent or child by the other, when necessary, would have fallen within section 75 under the former arrangement of sections. But it must be considered in the light of the other sections mentioned. The rules which justify, or under the ancient law excuse, a homicide in self-defense, have long been held to extend to parent and child and husband and wife. Armistead v. State, 18 Ga. 704; 4 Bl. Com. 186 (Hammond's Ed. 230). What effect is to be given to the expression, "or reputation of each other," it is not necessary now to decide. Certain it is that a man cannot be justified in committing a homicide because some slander has been perpetrated upon him or upon his child. If any case can exist where a man may lawfully slay to prevent a libel or slander upon him or upon his child from being published it has not been suggested to us. But no question of preventing injury to reputation is involved in this case. There was no evidence to show that any violent personal injury was sought to be accomplished upon the daughter of the defendant, or that there was any threatened or impending libel or slander which would affect her reputation. It would not have been proper, under the evidence, to have instructed the jury, in effect, that the defendant had the right to kill the deceased to protect his daughter's person or reputation. The writer has found but one place in which section 1796 of the Code of 1882 (Pen. Code 1895, § 74) has been cited in a criminal case, and there only passingly. Osgood v. State, 63 Ga. 793.

3. Without discussing the various grounds of the motion separately, it may be said that the charge given by the court did not clearly and distinctly place before the jury the issues involved in the case. It was in question whether the killing of the deceased by the defendant was murder; or whether, under the circumstances disclosed by the evidence, the defendant was guilty of voluntary manslaughter; or whether, under section 75 of the Penal Code of 1895, as construed in the Hill Case and other decisions above cited, this was one of the "other instances which stand upon the same footing of reason and justice as those enumerated" in sections 70–73, so as to make the homicide justifiable.

4. "The general character of the parties, and especially their conduct in other transactions, are irrelevant matter, unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct." Pen. Code 1895, § 993. In a murder case the state cannot put in issue the character of the defendant for violence, or the character of the deceased for peaceableness, but may introduce evidence on that subject in rebuttal. Pound v. State, 43 Ga. 88. In some cases evidence as to character for chastity is relevant and admissible; as on an indictment for keeping a lewd house (McCain v. State, 57 Ga. 390), or being a street walker (Braddy v. City of Milledgeville, 74 Ga. 516, 58 Am. Rep. 443). For other rulings on the subject, see, also, Blackman v. State, 36 Ala. 295; Foulkes v. Sellway, Esp. 234; Fall v. Overseers of Poor of Augusta County, 3 Munf. 495; Commonwealth v. Gray, 129 Mass. 474, 37 Am. Rep. 378. Here the character sought to be proved is not that of the defendant or the deceased, but of the daughter of the former, to protect whom from ruin he claimed to have slain the deceased. The homicide was not denied. The defense rested upon the contention that the defendant acted for the purpose of saving his daughter from being seduced or debauched. He contended that she was a very young girl, and sought in his statement to put the deceased in the attitude of being on the point or in the act of ruining her. Was this true? Or, if not entirely so, under the actual facts, was the defendant guilty of murder or manslaughter, or was he justifiable? Where the defense is based on section 75 of the Penal Code of 1895, and it is claimed that the facts of the particular case make it one of the instances which stand upon the same footing of reason and justice as those enumerated in other sections of the Code already referred to, it will be perceived that the alleged conduct of the deceased is to be somewhat analogized to an effort to slay the defendant, or by

violence or surprise to commit a felony upon habitation, property, or person, or seeking to make a forcible invasion upon the property of another with intention to commit a serious injury, or in such manner that serious injury might accrue to person, property, or family; and the person who kills and relies on that section of the Penal Code for his defense occupies a position somewhat analogous to one claiming to have defended against the acts referred to in the other sections of the Penal Code mentioned as therein provided. This is clearly stated in Hill's Case, 64 Ga. 467. Where the defense rests upon the section just referred to, the case involves a consideration of the conduct both of the deceased and of the defendant in connection with the transaction. In the case of Biggs v. State, 29 Ga. 723, 725, 76 Am. Dec. 630, evidence in regard to the general character of Mrs. Biggs (the defendant's wife) for virtue and chastity was admitted. Lumpkin, J., in delivering the opinion, said: "Her reputation in this respect has been implicated both by the conduct and evidence of Eleazer M. Parish. And if she was the woman he took her to be, the conduct of her husband would have been less justifiable in resorting to the means he did to rescue and protect her from insult and importunity. We hold, therefore, that the proof should have been received." 2 Bish. Cr. Proc. (4th Ed.) § 95. The evidence in that case was offered by the defendant; but, if the general character of the defendant's wife for virtue and chastity was implicated, so as to authorize the defendant to introduce evidence to sustain it, why was it not so far brought into the present case by the defendant as to authorize the state to introduce rebutting evidence on the subject? In a word, the case stands thus: The homicide is admitted. The defendant, however, asserts that he was justified in killing the deceased because the latter was proceeding to ruin the defendant's little daughter, and she was found by defendant in his bed, her breath full of the odor of whisky. The state responds by seeking to prove that this is not true; that the deceased was not proceeding to ruin the defendant's daughter; that she was a young woman of lewd character; and that this was so notorious in the neighborhood where the defendant and the deceased both worked and resided, among those with whom they dealt, that defendant must have previously known of the fact; and therefore his statement in regard to his own conduct and that of the deceased, and also in regard to his own motives, and the unexpected discovery which outraged his feelings as a father, were not in fact as he stated them to be. It is competent for the state to introduce evidence to rebut the defendant's statement. Halsenbake v. State, 45 Ga. 44 (3). In the Hill Case, 64 Ga. 453, evidence of previous lewd conduct on the part of the defendant's wife, and to show that he knew of it, was admitted, and commented on as a material factor in the case; and this is also a fact in other cases hereinbefore cited. It is true that no ruling was made upon the admissibility of the evidence, but it was discussed as a material part of those cases. It is also true that the defendant might claim the right to prevent cohabitation with his minor daughter, even though she had fallen, and to use force, if necessary for that purpose, unless by his conduct he had forfeited that right. But whether or not under a certain state of facts the defendant would be justified in killing the deceased, this furnishes no reason why he should be permitted to state what may be an entirely different state of facts, and yet exclude the state from disproving his statement. It would savor too much of trying a case by excluding light, rather than by admitting it. Of course, we do not mean to express an opinion as to what was the character of the girl, or whether the father had any knowledge of it if it was bad. What weight the jury would give to the evidence of her general bad character, and whether they would believe that in fact the defendant had knowledge of it or not, does not affect the admissibility of the evidence in rebuttal. But with all legitimate evidence in, it remains to be decided whether the case is one of murder, voluntary manslaughter, or justifiable homicide. Section 5176 of the Civil Code of 1895 declares that "when, in a legal investigation, information, conversations, letters and replies, and similar evidence, are facts to explain conduct and ascertain motives, they are admitted in evidence, not as hearsay, but as original evidence." As to the question of knowledge on the part of the defendant in Kuglar v. Garner, 74 Ga. 765, it was held that "it is admissible to prove the notoriety in the neighborhood where the parties reside of a fact already proved to exist, to lay the foundation for an inference that the plaintiff was cognizant of that fact." This was a civil case, and the rule of civil law which charges a person who is put on inquiry with notice of whatever such inquiry reasonably prosecuted would develop does not apply to criminal cases. Nevertheless, it has been held that in certain criminal cases, where it is material to bring home to a party cognizance of a particular fact, common reputation where he resides or does business is admissible. Whart. Crim. Ev. (9th Ed.) § 254. At common law, if a man caught another in the act of adultery with his wife, and killed the adulterer upon the spot, it was not justifiable or excusable homicide, but manslaughter. Blackstone says: "So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot, though this was allowed by the laws of Solon, as likewise by the Roman civil law (if the adulterer was found in the husband's own house), also among the ancient Goths, yet in England it is not abso-

lutely ranked in the class of justifiable homicide as in a case of forcible rape, but it is manslaughter. It is, however, the lowest degree of it; and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation." 4 Bl. Com. pp. 191, 192 (Hammond's Ed. top p. 237). This seems to have been the common law, although East, in his Pleas of the Crown (page 272), referring to the act of 24 Henry VIII, c. 5, uses the expression: "But though the statute only mentions certain cases, it must not be taken to imply an exclusion of any other instances of justifiable homicide which stand upon the same footing of reason and justice." 2 Bishop's Crim. Law (8th Ed.) § 708. On this subject, see People v. Cook, 39 Mich. 236, 33 Am. Rep. 380; s. c., 6 Lawson, Def. Crime, Supp. 368. In Texas a special statute was passed on the subject. Price v. State, 18 Tex. App. 474; s. c., 5 Lawson, Def. Crime, 1095, 51 Am. Rep. 322, 328, and note; Varnell v. State, 26 Tex. App. 56, 9 S. W. 65 (involving a minor daughter); State v. Herrell, 97 Mo. 105, 10 S. W. 387; s. c., 10 Am. St. Rep. 289 (adultery with defendant's mother). As to the construction which has been placed upon section 75 of the Penal Code of 1895 in cases involving a claim of debauchery or seduction of wife or minor daughter in this state, see cases above cited. See, also, Wair v. State, 51 Ga. 310.

Under the construction which has been placed upon that section allowing somewhat greater latitude for justification in cases of the kind referred to than did the common law, and in view of the right of the accused to make a statement, which is accorded in this state, there is all the more reason why, when one relies upon that section for his defense, all the light legitimately derivable from the evidence should be obtained. Haynes v. State, 17 Ga. 465, 484; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711. We are aware that evidence of character is not usually received, when offered for the purpose of throwing light on the probability of the doing of a certain act by a person whose character is thus testified about. 1 Greenleaf's Ev. (16th Ed.) § 14 (b), (a). But this is quite different from the question presented in the case at bar.

5. Where character is a part of the issue—as, by way of illustration, in an indictment for seduction—special acts have sometimes been admitted. For instance, see 1 Greenleaf, Ev. (16th Ed.) § 14 (h); Com. v. Gray, 129 Mass. 474; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Caldwell v. State, 17 Conn. 467; Foulkes v. Sellway, Esp. 234; Blackman v. State, 36 Ala. 295; Wood v. State, 48 Ga. 192, 15 Am. Rep. 664. But otherwise particular conduct as evidence of character is generally held inadmissible. Unchaste conduct of a wife or daughter known to a husband or father prior to a homicide by him claimed to have been committed to prevent a seduction or criminal intimacy with her may throw light on his motives and acts. On the trial of an indictment for rape, or assault with intent to rape, general character, but not particular acts, to show want of chastity in the female alleged to have been raped, has been held admissible. Black v. State, 119 Ga. 746, 47 S. E. 370; Camp v. State, 8 Ga. 417; Seals v. State, 114 Ga. 518, 40 S. E. 731, 88 Am. St. Rep. 33. We do not see how evidence that the defendant's daughter was seen talking to a man at night, not shown to have been known to the defendant, could have illustrated the issue. It should have been rejected.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(122 Ga. 336)

SELLERS v. SAVANNAH, F. & W. RY. CO.

(Supreme Court of Georgia. June 16, 1905.)

1. CARRIERS—DELIVERY OF FREIGHT—IDENTIFICATION.

Inasmuch as the law imposes liability upon a common carrier when a delivery of freight is made by mistake to a person not entitled to receive the same, it is the right of the carrier to call upon an unknown person claiming a shipment to identify himself and establish his claim thereto; and, where a bill of lading covering the shipment has been issued, the carrier may demand its production, as a condition precedent to making delivery.

2. SAME—INSTRUCTIONS.

The charge of the court was in accord with the law as above announced, and fully and fairly presented to the jury the issues they were called on to determine, notwithstanding some slight verbal inaccuracy of expression.

3. APPEAL—HARMLESS ERROR.

Though the court may, in passing upon a demurrer to the plaintiff's petition, have erroneously held he was not entitled to recover punitive damages in the event he established his alleged cause of action, the error so committed does not constrain the ordering of another trial; the jury having found, upon ample evidence, that the defendant railway company had not committed any breach of its duty as a common carrier.

(Syllabus by the Court.)

Error from Superior Court, Echols County; R. G. Mitchell, Judge.

Action by Philip Sellers against the Savannah, Florida & Western Railway Company. Judgment for defendant. Plaintiff brings error. Affirmed.

W. E. Thomas and Wilcox & Johnson, for plaintiff in error. Kay, Bennet & Conyers and R. G. Tison, for defendant in error.

FISH, P. J. The plaintiff, Philip Sellers, purchased a bill of goods from a mercantile firm in Brunswick, Ga., and gave directions to have the goods shipped to him at Statenville, Ga. The goods duly arrived at that station over the line of the defendant railway company, and the plaintiff called upon the local agent to deliver them to him. They were marked with his initials "P. S." The agent declined to make delivery to him. According to the testimony

of the plaintiff, the reason assigned by the agent for refusing to do so was that he had not received the waybill, and did not know the amount of the freight charges, though he at the same time expressed some doubt as to the plaintiff being the consignee of the goods. The plaintiff had but recently established a place of business 24 miles from the station, was a stranger in the community, and was unknown to the agent. The plaintiff offered to deposit with the agent $20 to cover the freight charges, but the agent declined to receive the money; saying it was against the orders of the company to deliver freight in the absence of a waybill. He further said he did not know the plaintiff, nor whether he was "the party entitled to the goods, or not, and didn't know whether the goods were shipped 'to order, notify,' bill of lading attached, or not. That was the reason he gave [for refusing to make delivery], and the only one. The agent said he wanted to see the waybill. He never mentioned the bill of lading at all." This occurred about the 23d or 24th of December. The plaintiff subsequently sent a neighbor who was known to the agent for the goods. The agent declined to deliver them on the ground that he had not received the waybill, and did not know what the freight charges were, but promised to deliver the goods to the teamster of this neighbor as soon as the amount of the freight charges was ascertained. Acting in behalf of the plaintiff, this party again called for the goods, but was confronted with the same statement from the agent. No tender of the goods was ever made to the plaintiff until some 10 months thereafter, when he declined to accept delivery, as the goods consisted of provisions and supplies, and had greatly deteriorated in value. Upon this evidence the plaintiff relied as sustaining his complaint that the defendant company had been guilty of a conversion of the goods, and was liable to account to him for the value of the same. In support of its defense that it had committed no breach of its public duty as a carrier, the company introduced as a witness its local agent, who testified substantially as follows: He had himself but recently gone to Statenville, and, while he had seen the plaintiff once in the latter part of November, the plaintiff was unknown to him when he came to see about his goods. The plaintiff being a stranger to him, he asked for the bill of lading; not knowing whether or not the goods, which were simply marked "P. S.," belonged to him. The plaintiff replied that he did not have the bill of lading, whereupon the agent said that if he had the "purchase bill," and it was marked "Paid," the goods would be delivered to him upon his paying $5. The agent thought the goods might have been shipped "to order, notify," and he knew that if they were so shipped, and he should deliver them to the wrong party, without requiring the production of the bill of lading, he would have to pay for the goods. Plaintiff did offer to pay the freight, but the agent had not received the waybill, and did not know the amount of the charges. He found out about January 7th that the goods were intended for the plaintiff, and, on the same day he received this information, tendered the shipment to him, but the plaintiff refused to accept delivery, saying he had already instituted suit against the company. The agent had previously delivered freight to responsible persons, whom he knew, without requiring them to produce a bill of lading. His reason for calling on the plaintiff to show a bill of lading was that the plaintiff was a stranger to him, and he did not know whether or not the plaintiff was the proper person to whom to deliver the shipment. The jury accepted the explanation given by the company's agent, excusing his refusal to make delivery of the goods prior to January 7th, and the court below declined to set aside the verdict which they returned in favor of the defendant.

1. Inasmuch as the law exacts of a common carrier of freight that it shall ascertain beyond question, before delivering goods to a person claiming the right to receive them, that he is the proper person to whom to make delivery, and puts upon the carrier the entire risk of making a mistake as to the identity of the consignee, it is but reasonable that the carrier should be permitted to exercise the right of calling on the consignee to establish his claim to the shipment. Hutch. Car. (2d Ed.) § 344. If the person who applies for the goods is not known to the carrier, and there is any doubt as to his right to receive them, the carrier "should require the most unquestionable proof of his identity." Id. And, to this end "the carrier may properly require the production of the bill of lading by the consignee as evidence of his right to demand delivery of the goods." Id. § 423a. Accordingly it was held by this court in Bass v. Glover, 63 Ga. 745, that "A railroad company completing the transportation of freight, begun by other common carriers whose lines are connected with the railroad by an intermediate line or lines, may, for its own security, exact the production of the bill of lading before making delivery of the goods to the consignee." Failure to do so may, indeed, establish liability for an improper delivery to him. Boatmen's Savings Bank v. Railroad Co., 81 Ga. 221, 7 S. E. 125. The company sued in the present case was not the initial carrier, and its local agent was not presumed to know what were the terms of shipment until he received the waybill, or a bill of lading was produced by the plaintiff. It is clear that, if the agent's version of what occurred be true, the company was not liable, and the verdict of the jury was right, and should be upheld.

2. The charge of the court was in accord with the law as above announced. Complaint is made, however, that the judge, in referring to the paper which the company contended its agent called on the plaintiff to produce as evidence of his right to demand delivery of the shipment, alluded to it as "the waybill or bill of lading." The use of the term "waybill," the plaintiff in error insists, was calculated to convey to the jury the idea that it was incumbent on the plaintiff to produce a paper which should have accompanied the shipment, and should have been in the hands of the carrier, not in the possession of the consignee. The technical meaning of the term is doubtless that indicated by the plaintiff. See 2 Bouv. L. Dic. 1222; 30 Am. & Eng. Enc. L. (2d Ed.) 440; Peixotti v. McLaughlin, 1 Strob. Law (S. C.) 468, 47 Am. Dec. 563. But we do not think the jury could have been misled as to the meaning of the judge when he undertook to instruct them as to the right of the local agent to demand of the plaintiff the paper evidencing his claim to the shipment. The term "bill of lading" was not the precise, technical word by which that paper could be accurately referred to, since, strictly speaking, the term is one to be applied only to the written evidence of a contract for the carriage and delivery of goods sent by sea, though it is now in common use in connection with the affreightment of goods by water other than the sea, or carriage by rail. See 4 Am. & Eng. Enc. L. (2d Ed.) 509; 5 Cyc. 707; Cyc. L. Dic. 965. "Freight bill" or "freight receipt" was perhaps the most technically correct term to employ. Id.; Hutch Car. (2d Ed.) § 120. Still a presiding judge may be accorded some latitude of expression, and it may well be presumed that an intelligent jury understand that which should be perfectly plain to a person of ordinary mental capacity.

Exception is also taken to the following excerpt from the charge of the court: "If you find from the evidence in this case that there was any delay in tendering the goods to the plaintiff, if they were tendered to him by the agent, * * * and that this delay was occasioned because the defendant's agent, in good faith, had doubt as to whether the plaintiff was the person rightfully entitled to have the goods, * * * such delay would not constitute a conversion of the goods, * * * and would not render the defendant liable." This and another instruction along the same line are subjected to the criticism that the court, in so charging "excluded from the consideration of the jury the necessity of a demand for the bill of lading by the agent of the company, and tended to convince them that doubt alone of the identity of the consignee and of his right to receive the goods would free the company from liability in the absence of the demand." A reference to the full charge of the court, which appears in the record, discloses that these instructions were given to the jury while the judge was charging upon the right of a carrier, acting in good faith, to demand identification of a consignee, and that in another portion of the charge the judge submitted to the jury the question whether or not the agent did, by calling upon the plaintiff to produce the bill of lading, afford him an opportunity of thus identifying himself or showing his right to receive delivery. As the plaintiff did not pretend that he had a bill of lading, it was really not necessary for the company to prove a demand on him to produce it, and the charge given to the jury was as favorable to him as he had any right to expect. It would seem to be as much incumbent upon an unknown consignee to produce, of his own volition, a bill of lading, if he has one, as it is incumbent on a railway agent to make demand to see the bill of lading before making delivery of freight. Upon the consignee rests the burden of offering proof of his identity, and establishing his right to receive the goods consigned to him. The real and controlling issue in the case was whether the agent had no reason for declining to make delivery, other than that he did not know the precise amount of the freight charges, and arbitrarily and capriciously refused to accept a deposit which would fully cover the same, or in good faith declined to make delivery for the reason that the consignee was unknown to him, and he doubted his right to claim the goods. Whether the agent did or did not demand a production of a bill of lading was unimportant, save as the truth in this regard went to illustrate his good faith in endeavoring to ascertain whether the plaintiff was the proper person to whom to make delivery.

3. The plaintiff, in his petition, alleged that the company's agent, with full knowledge of plaintiff's right to claim the goods, "willfully, maliciously, impertinently, and disrespectfully, and without any reason whatever, refused to allow petitioner to have said goods"; and for this alleged willful breach of the defendant's duty as a common carrier the plaintiff asserted the right to recover punitive damages in addition to the value of the shipment. On demurrer to certain paragraphs of the plaintiff's petition, the court held that he was not entitled "to recover damages beyond the difference in the value of the goods shipped at the time they should have been delivered and at the time they were offered for delivery by the defendant company." Exception to this ruling was duly taken. Granting it was erroneous, no cause for ordering another trial of the case is made to appear. The plaintiff was afforded full opportunity to establish his alleged cause of action, being restricted in no way in making proof thereof; and the jury has found, upon sufficient evidence, that he is not entitled to recover in any amount. Had the court ruled that he was entitled to recover punitive as well as actual damages if he

established the alleged breach of duty on the part of the carrier, the result would have been the same, as he failed to satisfy the jury that this was, in point of fact, true.

Judgment affirmed.

SIMMONS, C. J., absent.

(123 Ga. 378)

SAVANNAH, F. & W. RY. CO. v. TOLBERT.

(Supreme Court of Georgia. June 16, 1905.)

1. CARRIERS—LIEN FOR FREIGHT.

A carrier acquires no right, by virtue of its employment as such, to hold goods delivered to it by a wrongdoer, to whom they do not belong, until the charges are paid, against the claim of the true owner; nor has the carrier any lien on the goods for the transportation charges.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 892.]

2. APPEAL—REVIEW—QUESTIONS NOT RAISED BELOW.

The Supreme Court will not pass on a question not made in the trial court. Thus where the sole prayer of the petition is for injunction, and the defendant, without demurring, pleads to the merits, and consents to a trial on the merits by the judge without a jury, he cannot, after an adverse judgment, for the first time raise the point in a direct bill of exceptions that the plaintiff had not pursued his proper remedy.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1053–1059.]

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action by T. M. Tolbert against the Savannah, Florida & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This case arose upon a petition brought by T. M. Tolbert against the Savannah, Florida & Western Railway Company to enjoin it from selling a certain mare under a claim of lien, as provided under sections 2303 and 2304 of the Civil Code of 1895, for freight charges. The petition alleged that the plaintiff is the owner of a certain dark-bay mare, of the value of $300, which is held by the defendant; that the defendant is seeking to wrongfully sell the mare under the named sections of the Code under a claim of lien for the sum of $74 freight charges; that said mare was wrongfully received by the defendant; that she was shipped by the plaintiff's direction from Rochester, N. Y., to his brother, H. Tolbert, at Columbus, Ohio, under bill of lading, a copy of which is attached to the petition; that the mare arrived at Columbus, Ohio, in due or reasonable time; that, without plaintiff's knowledge or consent, and without the knowledge or consent of the consignee, the mare was transported in some way from Columbus, and got into the possession of the defendant, without the knowledge, authority, or consent of the plaintiff, the consignee, or any authorized agent of the plaintiff; that the transportation was entirely voluntary, and that the defendant had no right to charge freight for such transportation, and had no lien on the mare for such charges; that the defendant refuses to deliver the mare to petitioner, or to refrain from selling the same under its alleged claim of lien. The prayer was for an injunction to restrain the sale, and to prevent the enforcement of the lien for freight charges. The defendant, in its answer, admitted the possession of the mare, and that it was seeking to sell her, under sections 2303 and 2304 of the Code, for the payment of its lien for freight charges in the sum of $74.90. It averred that it received the mare in the usual and ordinary business way from the Louisville & Nashville Railroad Company at Montgomery, Ala., and transported her from Montgomery to Valdosta, Ga., in good faith; that defendant's possession of the mare is a legal possession, because it was received in the ordinary and usual course of business, and brought by the defendant to the place of destination in good faith; that after reaching said destination the mare could not be delivered, and the defendant is therefore holding the same for its freight charges; that the mare was shipped from Cincinnati, Ohio, to Valdosta, Ga., and a bill of lading was issued at Columbus, Ohio, to H. Tolbert, and that the mare was shipped to Valdosta by said H. Tolbert; that defendant and its connecting lines transported the same according to the shipping contract; that when the mare reached Valdosta the consignee refused to accept the same and to pay the freight charges.

The case came on to be tried on its merits before the judge of the superior court, without a jury, upon an agreed statement of facts and certain evidence which was introduced. It was agreed by the parties that on June 30, 1901, W. E. Foster delivered the mare to the New York Central & Hudson River Railroad Company at Rochester, New York, to be transported to Columbus, Ohio, said railroad company accepting and delivering its bill of lading, the material parts of which are as follows:

"New York Central & Hudson River R. R. Co. Received subject to the classification in effect on the date of issue of this bill of lading at Rochester Station, July 30, 1901, from W. E. Foster, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown) marked, consigned and destined as indicated below, which said company agrees to carry to said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed in consideration of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property that every service to be

performed hereunder shall be subject to all the conditions whether printed or written, herein contained (see conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns as just and reasonable.

"Marks: Consignee, H. Talbot, Destination, Columbus, Ohio.

"Description of Articles: 1 horse, OOR val $100, man in chg.

"Car, D 22867.

"A. R. Laurence, Agent.

"(The signature of the Agent here acknowledges only the receipt of the property and the charges advanced, if any.)"

"[One cent revenue stamp.]

"NYC 7-30, 1901.

"[On the other side.] Not negotiable. If the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the Bill of Lading, properly endorsed, shall be required before the delivery of the property at destination, as provided by Section 9 of the conditions of the Uniform Bill of Lading, on the back hereof."

Among the conditions placed on the back of said bill of lading, which is headed, "New York Central & Hudson River R. R. Co. Uniform bill of lading conditions," is the following:

"(5) Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination, may be kept in the car, depot or place of delivery of the carrier at the sole risk of the owner of said property, or may be at the option of the carrier removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges."

"(9) If the word 'order' is written hereon immediately before or after the name of the party to whose order the property is consigned (without any condition or limitation other than the name of the party to be notified on the arrival of the property, the surrender of this bill of lading properly endorsed shall be required before delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading.

"(10) Owner or consignee shall pay freight at the rate herein stated and all other charges accruing on said property before delivery and according to weights as ascertained by any carrier hereunder."

It was further admitted that the mare was transported under this bill of lading to Columbus, Ohio, but was not delivered to H. Tolbert, the consignee, who lived there, but came on to Valdosta without his knowledge or consent, and that it is now at Valdosta, and is claimed by, and is the property of, the plaintiff. It was further agreed that the defendant received the mare from the Louisville & Nashville Railroad Company at Montgomery, Ala., in good faith and in the usual course of business, and that the amount of advanced charges mentioned in the waybill was paid by defendant to its connecting lines, and that the charge of $15.32 by the defendant is a reasonable charge for the transportation of the mare from Montgomery to Valdosta; that the material parts of the waybill are as follows: "Plant System of Railways, Collect way-bill; Waybill series and No. LP 497, date, Aug. 5, 1901, LS & MS Car 22867, From Montgomery to Valdosta, Ga., via Alb. Consignor, L&N, Cinti. 258 8-2, 1901. Columbus, O, CCC&St. L. Consignee, H. Talbot, Valdosta. Articles, 1 Horse, Released. Weight, 2000, Class 2, Advanced charges, $59.62, Freight $15.32, Collect $74.94."

It was further agreed that Leonard Johnson was the man in charge mentioned in the bill of lading, that he had the bill of lading in his possession, and surrendered the same to the initial carrier at Columbus, Ohio, and directed that the mare be shipped to Valdosta, and that it was shipped under this direction. The plaintiff also introduced the following oral testimony: T. M. Tolbert: "I know Leonard Johnson. On August 30, 1901, he was a half-grown negro boy, uncouth, fifteen or sixteen years old, such as we have around here on the streets. He did not have any business with the horse. He was put in charge of the horse, looking after it in the car, and taking care of it. His duties were to feed and water the horse." On cross-examination he testified: That Leonard Johnson was in Rochester, N. Y., when the mare was shipped to Columbus, Ohio. That he did not know that Johnson was there. Did not know whether he was dressed in broadcloth at the time he was put in charge of the mare. He had not seen him for 3½ months prior to that time, and did not know what Johnson's duties were in reference to the mare, except what somebody else told him. He did not know what instructions or restrictions as to the management or control of the mare were placed upon Johnson by the person who put him in charge. Neither did he know about what information was given to the Hudson River Railroad Company as to the boy's relation to the mare, or as to the right or authority he had over it. The defendant introduced J. F. Passmore, who testified that he knew Leonard Johnson; that he was at that time from 20 to 25 years old, and that in 1901 he looked like he would weigh 130 or 135 pounds, and that mentally he was a bright "fellow"; that he weighs now about 165 pounds; that he is a follower of race horses; that he did not know his business, but has seen him about the stables at the fair grounds; that he would lead the horses around, cooling them off, after they had run their races; that he did not know that Johnson was exercising authority or ownership

over any of the horses when he saw him thus engaged. Upon the agreed facts and the evidence introduced, the court rendered a judgment in favor of the plaintiff, granting a perpetual injunction against the defendant, to which judgment the defendant excepts, alleging that the judgment is contrary to law, and without evidence to support it for the reasons, first, that the agreed statement of facts and the evidence submitted showed that the defendant, as a common carrier of freight for hire, received the mare in good faith from its connecting road, and while the mare was in the custody of Leonard Johnson, who had been placed in charge of the same by the consignee; second, that the agreed statement of facts and the evidence showed that the plaintiff had a complete and adequate remedy at law by an action of trover against the defendant; third, that the agreed statement of facts and evidence showed that the defendant had neither done nor threatened to do any act which was illegal, nor was it guilty of any conduct which would authorize the granting of an injunction, but, on the contrary, it was only proceeding lawfully to collect freight charges which were due and which had been advanced to its connecting lines of carriers, and for a proper freight charge which was due to the defendant, as a common carrier, for transporting the freight which it had received in good faith.

Kay, Bennet & Conyers and Cranford & Walker, for plaintiff in error. W. H. Griffin and A. T. Woodward, for defendant in error.

EVANS, J. (after stating the facts). 1. The right of the railroad company to collect its transportation charges is dependent upon whether the person who started the shipment of the mare from Columbus to Valdosta had authority to direct such shipment. It is contended that Leonard Johnson, who was in charge of the mare when it left Rochester, N. Y., was clothed by the consignor with apparent authority to direct this shipment from Columbus to Valdosta. The bill of lading which the New York Central & Hudson River Railroad Company issued to Foster stated that there was a man in charge of the "horse." This man was Leonard Johnson, and it is inferable from the evidence and agreed statement of facts that he had no authority over the mare except to feed, water, and look after its general welfare while in transit. It is true that he had possession of the bill of lading, but that bill of lading authorized a delivery to the consignee without its production. It was the duty of the carrier to deliver the mare to the consignee, and it was liable for a delivery to any other person than the consignee named in the bill of lading, or his authorized agent. When the mare arrived at Columbus it was not delivered to the consignee, Tolbert, but, without his knowledge or authority or consent, was reshipped over the line of defendant's road and its connecting carriers. The delivery to Johnson at Columbus was wrongful, and Johnson's possession was that of a wrongdoer. He had no authority either to receive the mare, or to continue the shipment from Columbus to Valdosta. His surrendering the bill of lading in his possession to the initial carrier at Columbus, and directing that the mare be shipped to Valdosta, was without the knowledge or consent of either the consignee or the owner. "A carrier acquires no right by virtue of its employment as such, to hold the goods delivered to it by a wrongdoer, and to whom they do not belong, until the charges are paid, against the claim of the true owner, and it therefore has no lien upon them, but must, on demand, surrender them to the owner." Hutch. Car. § 491. This rule is based upon that universal principle that no one's property can be taken from him without his consent, expressed or implied. It is not a harsh rule, as applied to common carriers, for the reason that the carrier has the right to demand of the consignor the transportation charges in advance. When a carrier receives goods for shipment from one who has neither title nor rightful possession, the true owner may reclaim the goods wherever found. The right of a connecting road is no better than that of the initial carrier, in the collection of its freight charges, even though it may have received the goods in good faith, and without notice that the consignor's possession was wrongful and fraudulent. The liability in such case is on the principle that the true owner of personal property has the right to the possession of his property which has been fraudulently taken from him, even though it be found in the possession of an innocent purchaser. And in such cases the true owner is not liable for any expenses to which the person in possession may have been put, either in the purchase of the property or otherwise. The evidence in this case authorized the finding that the possession of Johnson, who started the shipment from Columbus to Valdosta, was tortious, and that the shipment was made without authority from either the consignee, in Columbus, or the plaintiff, who resided in Valdosta. It follows, therefore, that the defendant is not entitled to its freight charges, however reasonable they may be, and that if has no lien therefor. It was not error for the court to permanently enjoin the collection of the charges by sale under the provisions of the Code.

2. The plaintiff in error further contends that the judgment of the court is erroneous for the reason that the evidence disclosed that the plaintiff had an adequate and complete remedy at law by an action of trover. If the defendant desired to avail itself of the objections that the owner had gone into a court of equity and invoked the aid of that court, when his remedy at law was complete, it should have done so by appropriate demurrer. It cannot submit the determination of

the case to a court of equity, and, after an adverse judgment, for the first time raise the point that the plaintiff has not pursued the proper remedy. The only prayer in the petition was for injunction. The only issue submitted to the court by the pleadings was whether, under the facts, the plaintiff was entitled to relief by injunction. The failure of the railroad company to demur at the proper time, and the trial of the case by the judge without a jury, amounted to a consent that the issue made by the pleadings should be determined in that manner; and it is now too late, after the case has been decided, to raise the question that the plaintiff's legal remedy was ample, and that there was therefore no necessity to invoke the extraordinary powers of a court of equity. See Hay v. Collins, 118 Ga. 247, 248, 44 S. E. 1002.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 411)

DU VALL v. BROGDEN.

(Supreme Court of Georgia. June 16, 1905.)

1. WRIT OF ERROR—FINAL JUDGMENT.

"No cause shall be carried to the Supreme Court upon any bill of exceptions, so long as the same is pending in the court below, unless the decision of judgment complained of, if it had been rendered as claimed by the plaintiff, would have been a final disposition of the cause, or final as to some material party thereto." Civ. Code 1895, § 5526.

2. SAME—CERTIORARI TO JUSTICE.

Where a case was carried to the superior court by certiorari, the answer of the justice of the peace traversed, verdict rendered against the traverse, and a motion for new trial made and overruled, a writ of error did not lie, as the main case was still pending, and it would not have been finally disposed of, had a new trial been granted. Brakelow Steamship Company v. West, 48 S. E. 693, 121 Ga. 104.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action between W. L. Du Vall and James Brogden. From the judgment, Du Vall brings error. Dismissed.

Levi O'Steen, B. T. Allen, and Buie & Knight, for plaintiff in error. R. A. Hendricks, for defendant in error.

FISH, P. J. Writ of error dismissed.

SIMMONS, C. J., absent.

(123 Ga. 393)

ATLANTIC & B. RY. CO. v. OWENS.

(Supreme Court of Georgia. June 16, 1905.)

1. CARRIERS—NEGLIGENCE OF EMPLOYÉ—INJURY TO LICENSEE AT STATION.

A railroad company owes to one who comes to its passenger station to receive a friend or guest upon arrival ordinary care for his safety while at the station, and is liable for an injury resulting from the negligence of an employé in the handling of baggage.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1113.]

2. SAME—EVIDENCE.

The evidence authorized the verdict, and no reason appears for reversing the judgment overruling the motion for a new trial.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. S. Humphreys, Judge.

Action by J. A. Owens against the Atlantic & Birmingham Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Owens sued the railway company, alleging in his petition: Plaintiff went to defendant's passenger station in the city of Moultrie to await the arrival of a friend upon one of the defendant's trains. As the train approached the station, and while the passengers were leaving it, plaintiff was standing on the platform of the depot, immediately next to the train, and, while he was watching the passengers as they were coming out of the train, a porter of the defendant, employed to work about the depot and to assist in taking baggage from the trains of the defendant, brought a heavy trunk from the baggage car of the train, and, approaching that portion of the platform where plaintiff was standing, pitched the trunk violently and negligently in his direction, and caused it to strike his left leg and foot, and crush his foot, breaking several bones in the same. Plaintiff was not at fault. The petition contains allegations as to the plaintiff's age, suffering, and earning capacity, and prays damages in the sum of $10,000. The defendant filed a demurrer to the petition on the following grounds: No cause of action is set forth. The place where the plaintiff was standing when injured is not alleged with sufficient clearness, nor is it alleged why he was not in the waiting room of the depot, nor is the alleged negligence of the defendant's servant sufficiently set forth. It appears from the petition that the plaintiff's injury was the result of a pure accident, and was the result of his own fault in placing himself in the way of the trunk, and exposing himself to danger. The demurrer was overruled, and the defendant excepted pendente lite. The defendant filed an answer in which it denied any liability for the acts complained of in the petition. The trial resulted in a verdict in favor of the plaintiff. The defendant moved for a new trial. The motion was overruled, and it excepted.

J. L. Sweat, J. H. Merrill, and J. A. Wilkes, for plaintiff in error. Shipp & Kline and W. A. Covington, for defendant in error.

COBB, J. 1. One who expressly or impliedly invites another upon his premises is bound to see that they are in such condition that the person invited may approach and remain thereon in safety. This rule applies to railroad companies. A person who enters the premises of a railroad company for the purpose of transacting business with its agent is lawfully upon the premises, and

the company owes him a duty to keep the premises in safe condition. Ga. Railroad v. Richmond, 98 Ga. 495, 25 S. E. 565. A railroad company owes a duty to keep its passenger station in safe condition not only to those who come there for the purpose of embarking upon trains, or those who use the station in alighting from trains, but also to those who may accompany others about to become passengers, or who resort there for the purpose of meeting incoming passengers. The company owes to one who goes to its station for the purpose of meeting an incoming passenger the same duty in regard to the station and the conduct of its employés thereat as it does to any person going there for the purpose of transacting business with an agent of the company. While such a person is not a passenger, the company owes to him ordinary care for his safety, and will be liable to him if he is injured as a result of ordinary neglect on the part of the agents or servants of the company. See 1 Fetter on Carriers of Passengers, § 237; Ray's Neg. Imposed Duties (Passenger Carriers) pp. 6, 7; 26 Am. & Eng. Enc. L. (2d Ed.) 510; 6 Cyc. 610; Macon R. Co. v. Moore, 108 Ga. 84, 33 S. E. 889; Sullivan v. R. Co., 39 La. Ann. 800, 2 South. 586, 4 Am. St. Rep. 239; McKone v. R. Co., 51 Mich. 601, 17 N. W. 74, 7 Am. Rep. 596; Tobin v. R. Co., 59 Me. 183, 8 Am. Rep. 415; notes to Little Rock Ry. Co. v. Lawton (Ark.) 29 Am. St. Rep. 54. Applying these rules, there was no error in overruling the demurrer.

2. It appears from the evidence that a minister of the gospel was boarding at the plaintiff's house; that the minister was expecting a young lady organist to arrive on the train, and requested the plaintiff to go with him to the station to meet this young lady, asking that he would take charge of her upon her arrival; that the two went to the station to await the arrival of the train; that the plaintiff was standing upon a portion of the platform where it was usual for persons upon business similar to that which carried the plaintiff to the station to stand; and that while on the platform he was injured by a trunk falling upon his foot. The evidence amply justified a finding that this trunk was handled in a negligent manner, and that there was nothing to place the plaintiff upon notice that it would be so handled. Taking the evidence most favorably for the plaintiff, a finding in his favor was amply warranted. It was argued that, as the young lady was the friend of the minister, the duty of safety on the part of the company might be owing to him, but would not extend to his friend, the plaintiff. We think that under the evidence the jury were authorized to find that the plaintiff was the one who really went to the station for the purpose of taking charge of the passenger, and that therefore the duty was owing to him. But there is authority for the proposition that a carrier of passengers owes a duty not only to a friend of an incoming passenger who goes there to assist the passenger, but also to a person who accompanies such friend on this mission. See Langton v. Board of Land & Works, 6 Vict. Law Rep. 316, cited in a note to 1 Fetter on Carriers of Passengers, § 237. There was no error requiring a reversal of the judgment.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 427)

O'BRIEN v. FLETCHER et al.

(Supreme Court of Georgia. June 16, 1905.)

1. ADVERSE POSSESSION—COLOR OF TITLE.

Where a deed was executed in 1887, record of it was not necessary in order for it to operate as color of title, so that possession of a part of the tract of land covered by it would extend constructively to the limits of the lot or known tract described in it. Roberson v. Downing Co., 48 S. E. 429, 120 Ga. 833, and citations.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 468.]

2. SAME—EVIDENCE.

The verdict was supported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

Action by E. S. O'Brien against H. T. Fletcher and others. From the judgment, O'Brien brings error. Affirmed.

E. D. Graham and Z. D. Harrison, for plaintiff in error. L. Kennedy and W. L. and Warren Grice, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 360)

SLOCUMB v. STEWART.

(Supreme Court of Georgia. June 16, 1905.)

USURY—EVIDENCE.

It appearing from the evidence of the defendant that the promissory note and mortgage given by him to the plaintiff were infected with usury, in that the principal of the note was made up of two items aggregating $450, upon which sum $50 interest had been charged for a period of a little over nine months; the plaintiff saying he would exact 12 per cent. upon $350 of that amount, and 8 per cent. upon the remaining $100; and the plaintiff testifying that he was not, for want of recollection, in a position to swear positively that any other items of indebtedness were included in the principal of the note, and admitting that it was his intention to charge 80 cents on every $10 of the principal for the time the note was to run, a period considerably less than a year—a charge by the court based on the theory that the plaintiff made an honest mistake of fact in calculating interest on the principal at the rate of 8 per cent. per annum, and that he had no intention to exact any usury, was not warranted by the evidence, and the finding of the jury that he had no such intention should have been set aside.

(Syllabus by the Court.)

Error from Superior Court, Jones County; H. G. Lewis, Judge.

Action by E. F. Stewart against W. A. Slocumb. Judgment for plaintiff. Defendant brings error. Reversed.

Johnson & Johnson, for plaintiff in error. Hardeman & Moore and R. N. Hardeman, for defendant in error.

EVANS, J. Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 412)

GOLUCKE v. LOWNDES COUNTY.

(Supreme Court of Georgia. June 16, 1905.)

1. ACTION—JOINDER OF CAUSES.
A party may not, in one suit growing out of a single transaction, maintain an action for damages for the alleged breach of a written contract of employment, and also sue for the value of services rendered, "regardless of the contract."

2. CONTRACT—ACTION FOR BREACH—PLEADING.
Treating the suit as one for damages for the breach of a contract, and reading the contract declared on in connection with the allegations of the petition, the plaintiff did not allege with sufficient definiteness a fulfillment by him of the obligations imposed by the writing, or show with the legal certainty required the amount in which it was alleged he had been damaged.

(Syllabus by the Court.)

Error from City Court of Valdosta; W. H. Griffin, Judge.

Action by J. W. Golucke against Lowndes county. Judgment for defendant. Plaintiff brings error. Affirmed.

Cranford & Walker, Moore & Pomeroy, Felder & Rountree, and A. G. Golucke, for plaintiff in error. Demmark, Ashley & Smith, for defendant in error.

CANDLER, J. The county of Lowndes, through its board of county commissioners, entered into a contract with J. W. Golucke & Co. (the firm name of the plaintiff in error), of which the following are the material parts: "We have this day employed Messrs. J. W. Golucke & Co., of Atlanta, Ga., as architects for a county courthouse for Lowndes county, located at Valdosta, Ga. They are to prepare full plans, specifications, and detail drawings, and furnish supervision to inspect the work, not exceeding twenty visits during its construction, and for said services we agree to pay them the sum of five per cent., and their expenses to amount of $200 on total cost of said building when fully completed and furnished. We also agree to pay them two per cent. of their fee when plans and specifications are completed and delivered, two per cent. when contract is let, and balance in equal installments as estimates are given contractors." According to the petition, the cost of the building was to be $50,000. It was also alleged that in accordance with the contract the plaintiff submitted plans, which were adopted by the county, and he was ordered to proceed to make working plans, detail drawings, and specifications, so that bidders might intelligently estimate and bid on the cost of erecting the building; that he complied with these orders, and submitted the plans, specifications, and drawings required, which were accepted by the board of county commissioners, and he was thereupon paid $1,000 as the first installment on the contract. He alleged that subsequently, at a meeting of the board of commissioners, the publication of a notice was authorized, inviting bids for the construction of the courthouse building under his plans; that a number of bids were submitted, all of which were rejected; and that the county commissioners decided to postpone further action, advising plaintiff that he would be notified when the county would advertise for other bids. From time to time the plaintiff wrote to the chairman of the county board, asking when the county would be ready to proceed with the construction of the building, but received no definite reply to his inquiries. In July, 1903, nearly three years after the execution of the contract heretofore set out, the plaintiff was advised by the chairman of the board of county commissioners that the county would not use the plans furnished by him, and later he learned that the county had secured plans and specifications from another architect. The plaintiff alleged that he was at all times ready and willing to comply with his part of the contract, and expected to do so up to the time he received the letter advising him that his plans would not be used. He alleges, also, that in January, 1901, on the day on which the letting of the contract was advertised to take place, he went to Valdosta for the purpose of co-operating with the board of county commissioners in the letting of the contract, incurring an expense of $20, which was authorized by his contract, and that the cost of supervision and other matters required of him under the contract would not have exceeded $100, "leaving a balance due petitioner under the terms of said contract of $1,420, besides interest, * * * which is past due and unpaid." "Petitioner further shows that, regardless of the price fixed by said contract, the services and work rendered and performed by your petitioner to and for the defendant, and duly approved and accepted by the defendant, * * * were and are of the reasonable value of $1,420, in addition to the amount already received by him." To this petition the county filed a demurrer, which the court sustained, and the plaintiff excepted. The demurrer contained 20 grounds, many of which were repetitions of each other. We will therefore not attempt to pass on the various grounds seriatim, but will consider only such as, in our opinion, have a material bearing on the case.

1. Clearly the plaintiff could not maintain in one action a suit on the contract, and "re-

gardless of the contract," as he sought to do. There can be no doubt, however, that he intended to declare on the contract, as he does not contend that he did anything, except in accordance with its terms, which would entitle him to recover. We will therefore treat the action as a suit on a contract.

2. The contract sued on is quite vague in its terms, but, reading it together with the petition, it appears that the plaintiff undertook to design a courthouse building to cost $50,000, and to supervise the work of construction. For this he was to be paid 5 per cent. of the total cost of the building when completed and furnished. Looking alone to the contract, it would seem that he was to be paid 2 per cent. of his fee when the plans were accepted, 2 per cent. when the contract for the building was let, and 96 per cent. in equal installments as estimates were given contractors; but in the light of the petition, it is presumable that the intention of the parties was that he was to be paid 2 per cent. of the cost of the building, or 40 per cent. of his fee, when the plans were accepted, etc. At all events, he has already been paid 40 per cent. of his fee, taking the total cost of the building at $50,000 as a basis. What part of the fee was intended to remunerate him for making plans and drawings, and what for supervising the construction, does not appear, nor does it appear that the plans submitted by the plaintiff called for a building which could be constructed for $50,000. True, the contract is silent as to the cost of the building contemplated, but the plaintiff, in his petition, supplied that omission; and consequently, in passing upon the sufficiency of the petition, a provision to that effect is to be read into the contract. We think it is clear that the plaintiff has failed to allege with sufficient definiteness a performance by him of his part of the contract, or to show with legal certainty the amount in which he has been damaged by the alleged breach by the defendant.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 391)

REDFEARN v. HINES.

(Supreme Court of Georgia. June 16, 1905.)

VENUE—PLEA TO JURISDICTION—EVIDENCE.

The evidence demanded a finding in favor of the plaintiff on the issue raised by the plea to the jurisdiction.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by J. H. Hines against R. L. Redfearn. Judgment for plaintiff. Defendant brings error. Affirmed.

Hines sued Redfearn in Brooks county, and the defendant filed a plea to the jurisdiction, averring that he was a resident of Thomas county. The trial of this issue resulted in a finding against the plea, and a verdict was rendered against him on the merits of the case. The defendant made a motion for a new trial, which was overruled, and he excepted. The evidence, taken most strongly for the defendant, showed that he was an unmarried man, with his mother and sister living with him, whom he referred to as his family; that he had lived in Thomas county, and about January 1, 1903, sold his home in Thomas county, and temporarily removed to Brooks county until he could build another home in Thomas county; that he always regarded Thomas county as his home, worked the roads there, and only removed to Brooks county until he could get his house built in Thomas county; that he taught school in various places; that his family had lived on his farm in Thomas county; that at the time the suit was brought he had sold his home in Thomas, and had no home, and had moved his family to Brooks county, where he was keeping house with his mother and sister, and teaching school; that he had taken the school census in Brooks county, and also in Thomas; that he paid his poll tax in Thomas; and that the school that he was teaching was a county line school, located in Brooks county, just across the line from Thomas, and was patronized by pupils from both counties. There was also evidence from others to the effect that Redfearn had claimed Thomas county as his home. The contract sued on was in writing, and stated that it was between Hines, of Brooks county, "and R. L. Redfearn of Thomas."

Bennet & Bennet, for plaintiff in error. L. W. Branch, for defendant in error.

COBB, J. The only question argued in this court was that of jurisdiction. Domicile is determined by act and intention. The evidence undoubtedly discloses an intention on the part of the defendant to make Thomas county his domicile. But the undisputed evidence as to his conduct is such as to clearly indicate that this intention has not been carried into effect. Even if the mother and sister of an unmarried man can be so far treated as his family as to authorize service upon him by leaving process at the place where they are found, these relatives of the defendant had been carried by him from Thomas county to Brooks county, and were there keeping house with him. He owned no home and had no family residing in Thomas county at the time the suit was brought. There would have been no way under the law to have perfected service of process upon him in Thomas county. We think the evidence demanded a finding that he was domiciled in Brooks county at the time the suit was filed, and that therefore the suit was well brought in that county. This being so, if any errors were committed in charging on this issue, they were immaterial.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 418)

MITCHELL v. SCHMIDT.

(Supreme Court of Georgia. June 16, 1905.)

1. AUDITOR'S REPORT—RECOMMITTAL.
Under the facts of this case, there was no error in refusing to recommit it to the auditor.

2. APPEAL—REMAND—AMENDMENT OF PLEADINGS.
Where a case was referred to an auditor, exceptions taken to his report, a trial had thereon, and the case brought to this court, where it was held that there was nothing in the pleadings which raised an issue as to whether there had been a misappropriation of payments made by a debtor to a creditor holding more than one claim, and the point was not decided by the auditor, on the return of the case to the superior court a motion on the part of the defendant to file a plea raising that issue was properly overruled.

3. SAME—SECOND TRIAL—LAW OF CASE.
Where this court ruled that a certain issue was not made by the pleadings in a case, and that the judge of the trial court should have instructed the jury not to consider that question, on a second trial there was no error in not submitting to the jury an exception to an auditor's report which merely raised the same question.

4. TRIAL DIRECTING VERDICT.
There was no error in directing a verdict in favor of the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; T. A. Parker, Judge.

Action by Augustus Schmidt against T. I. Mitchell. Judgment for plaintiff, and defendant brings error. Affirmed.

Schmidt commenced a proceeding against Mitchell in Wilcox superior court to foreclose a mortgage. The defendant answered, showing cause against the foreclosure. The case will be found reported in 117 Ga. 6, 43 S. E. 371. The answer of the defendant is there sufficiently set out, except certain allegations, and a prayer substantially as follows:

"Plaintiff and defendant have had large dealings for a number of years, and it is impossible for this defendant to set out an itemized statement of all said dealings, but they consisted of the shipment by defendant to plaintiff of quantities of timber and lumber which plaintiff bought from defendant according to measurement in Darien, where plaintiff resided, and after paying charges against such shipments the balance should have been applied to such note and mortgage; and defendant has reason to believe that upon a proper accounting said plaintiff is indebted to him in a large sum. The ascertainment of the true status of accounts between the parties will require the investigation of numerous transactions, and long and complicated accounts. Wherefore defendant prays that said plaintiff be required to come to an accounting with this defendant, in order that the true indebtedness of said plaintiff to this defendant may be ascertained, and that upon the same being ascertained the defendant may have judgment thereof." By amendment it was alleged that the defendant had made numerous payments by shipments of rafts of timber which were accepted by plaintiff at their cash value in Darien, and were to be credited on the note and mortgage sought to be foreclosed. An itemized statement of the date of receipt of the rafts by the plaintiff, the number of them, and the amount of cash value of each raft, was set out as an exhibit. Defendant prayed for judgment against the plaintiff for the amount of excess of the payments over and above the note and mortgage. After the judgment on the first trial had been reversed, and the case returned to the superior court, the defendant moved to recommit it to the auditor, in order that he might get the benefit of a plea of misappropriation of payments. This motion was overruled. He then tendered an amendment to his plea setting up this defense. It was rejected. The defendant did not insist upon any of the exceptions to the auditor's report, except two, numbered respectively 10 and 18. On motion of the plaintiff the court directed a verdict in his favor. Defendant excepted.

J. W. Haygood and Eldridge Cutts, for plaintiff in error. Hal Lawson, for defendant in error.

LUMPKIN, J. (after stating the above facts). 1. There was no error in refusing the motion to recommit this case to the auditor. If it was not too late to make the motion, and if the presiding judge had a discretionary power in regard to it, he did not err in refusing it. On the subject of recommitting to an auditor, see Littleton & Lamar v. Patton & Co., 112 Ga. 438, 37 S. E. 755 (5); Fleetwood, Adm'r, v. Bibb, Adm'r, 113 Ga. 618, 38 S. E. 980; Sanford v. Tanner, 114 Ga. 1006, 1015, 41 S. E. 668; Cureton v. Cureton, 120 Ga. 563, 48 S. E. 162.

2. It was determined by this court when the case was previously before it that there was nothing in the pleadings which raised the issue whether or not there had been a misappropriation of payments. But on that subject the jury could only inquire whether the demand to which the payments had been applied was correct, just, and due at the time they were made. When the case came on for trial after this ruling it was sought to amend the pleadings by setting up as a defense misappropriation of payments. This the court rightly refused to allow. In Cureton v. Cureton, 120 Ga. 560, 48 S. E. 162, it was held that "an amendment to the pleadings, raising new and distinct issues, is not allowable after the filing of an auditor's report. But an amendment of a pleading to conform to the evidence submitted before the auditor without objection, and which does not raise any new issue, is permissible." In that case it appears that evidence was introduced before the auditor, without objection, on the subject of whether the demand of Cureton, one of the parties, was stale. He reported that Cureton by his own delay

and laches lost his right to enforce contribution, and his demand was barred by the statute of limitations; but, inasmuch as no plea of the statute of limitations had been filed, he (the auditor) recommended that the pleadings be amended so as to set up this defense, and, when so amended, that such claim of Cureton be held barred by the statute. This court held that under such circumstances the amendment was properly allowed. Mr. Justice Evans, delivering the opinion, said distinctly that: "An amendment to pleadings setting up new and distinct issues is not allowable after the filing of an auditor's report. * * * The matter to which the amendment related was involved in the original issue, and no new issue was raised." In the case at bar, as already noted, it has been distinctly held that there was no issue of misappropriation of payments made in the case as heard before the auditor. Therefore to file a plea to that effect now would be to raise a new and distinct issue. It was never intended by what was said in Cureton v. Cureton that if, in the course of an investigation before an auditor, some evidence should find its way into the record touching a point which was not in issue after his report had been filed and a trial had on exceptions to it, one of the parties could amend his pleadings so as to set up a new and distinct issue, based upon such casual statements or pieces of evidence. To allow this would be, as Mr. Justice Evans said, "to make trials interminable." On a hearing before an auditor many things may be said casually by witnesses which are not objected to, or as to which there is no cross-examination, because they do not apply to any issue on trial, and are considered of little or no consequence. To allow a party to proceed until he fails before the auditor, and then to file an entirely new plea based on such evidence, might work grave injustice, or necessitate a reopening of the entire litigation. If there had been a misappropriation of payment to an older debt, the defendant must have known it before the auditor made his report.

3. The thirteenth exception merely seeks to have this same point submitted to the jury, which the defendant was not entitled to have done. The bill of exceptions stated that none of the exceptions to the auditor's report were insisted on at the last trial, except those numbered 10 and 13. Exception No. 13 has been disposed of by what has been said above.

4. Exception No. 10 alleges error in the auditor's finding of fact which is numbered 5 in his report, on the ground that, to reach the conclusion therein stated, the auditor charged the defendant with interest on the mortgage debt at the rate of 8 per cent. per annum, while it is contended that the evidence showed that subsequent to the date of the mortgage an agreement was reached whereby the defendant was not to be charged with any interest whatever, and that this was based on a valuable consideration and was binding. The auditor's finding of fact which is numbered 5, and to which this exception is directed, is as follows: "There was due and unpaid on said note on the 20th day of September, 1895, the sum of $1,396.44, and nothing has been paid on it since that date. There is now due said sum of $1,396.44, and interest on the same at eight per cent. per annum from said 20th day of September, 1895." Immediately following this finding in the auditor's report occurs finding of fact No. 6, which is as follows: "The items of interest included in the statements of account rendered by plaintiff and by Smith and Wylly to defendant after October 30, 1891, were the interest on said note, and no other interest was charged. The agreement between plaintiff and defendant that no interest should be charged did not apply to said note." To this finding no exception was taken, or at least none is now insisted on or contained in the present record. Therefore it stands as being unexcepted to and conclusive. If the agreement to charge no interest did not apply to the note, then it follows, as matter of course, that, in estimating the amount due on the note, interest would be calculated at the rate stated in it. And therefore the exception to the finding numbered 5, standing alone, is without merit. It is contended by plaintiff in error that this case was one at common law, and not in equity, and therefore that exceptions of fact should have been submitted to the jury, or that, if it should be treated as an equitable proceeding, having already been submitted once to the jury, it could not afterwards be withdrawn from their consideration by the presiding judge. It is immaterial whether either of these positions be correct or not. The presiding judge did not strike or dismiss the exception, but directed a verdict; holding in effect that there could be but one finding by the jury. In this we concur with the judge. One exception being covered by the former ruling of this court, and the other point being concluded by a finding unexcepted to, and also being without merit, there was but one possible finding. Moreover, it was held when this case was formerly here that "the general rule is that, in the absence of clear indications to the contrary, promises, each of which forms the whole consideration for the other, will not be held to be independent of one another, and a failure of one party to perform will exonerate the other from liability to perform."

The plaintiff testified that the defendant did not deliver the timber as he agreed. In the brief of the defendant's evidence accompanying the auditor's report occurs the following statement: "When I applied for last advancement, I told Mr. Schmidt that I expected to have a good deal of dealings with him. He declined to advance me money,

and that stopped me. I could not go on without help, and his refusal to help me further placed me where I had to stop. (Objection to this evidence—no evidence to support it.) My recollection is, I wrote him I could not go on because he would not advance balance of the five hundred dollars agreed on." Accompanying the auditor's report in the record, and apparently forming a part of it, is a statement of his rulings on the evidence. One of these is that "plaintiff objects to defendant's testimony that he stopped sawing timber for plaintiff because the latter refused to make him further advances on the ground that there is nothing in defendant's plea to support this evidence. Sustained, and evidence ruled out." As to considering this ruling, see Tifton Ry. Co. v. Chastain, 122 Ga. 250, 50 S. E. 105.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 415)

TIPPINS v. PHILLIPS.

(Supreme Court of Georgia. June 16, 1905.)

SPECIFIC PERFORMANCE — INDEFINITE CONTRACT.

Neither specific performance, nor damages for its breach, will be decreed in an action on a written option to purchase land, where the land is so vaguely described that the writing furnishes no key to its identification.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 71–82; vol. 48, Cent. Dig. Vendor and Purchaser, § 27.]

(Syllabus by the Court.)

Error from Superior Court, Telfair County; D. M. Roberts, Judge.

Action by J. U. Tippins against D. W. Phillips. Judgment for defendant, and plaintiff brings error. Affirmed.

J. U. Tippins brought suit against D. W. Phillips, alleging that on June 22, 1904, Phillips sold to petitioner a certain tract of land lying in the 1403d G. M. district of Tattnall county, containing 424 acres, having boundaries as specified in the petition, and being known as the "D. W. Phillips Tract of Land," which he had obtained from his father's estate; that Phillips also sold petitioner his share of the crops then growing on said tract. It was further alleged that the contract of sale was in writing, as follows:

"State of Georgia, Telfair County. Lumber City, Ga., June 22, 1904. For and in consideration of the sum of $5.00 to me in hand paid, and receipt of which is hereby acknowledged. I have granted to Mr. J. U. Tippins, a 30 days option on 424 acres of land in Tattnall County. The price of said land if taken in the limit of this option, is to be $1100.00 said price to also include my share of the crops now growing on the said land. In Witness wnereof, the parties hereto have hereunto subscribed their names and affixed their seals the day and year first above written. D. W. Phillips. [L. S.] J. U. Tippins. [L. S.]

"In presence of: R. C. Holaday, C. E. Sikes."

Plaintiff alleged that within the time limit of the option he tendered to the defendant $1,100 in cash, and that at the time of the tender the defendant refused to accept the same. He further charged that D. W. Phillips then admitted the execution and delivery of the option, but refused to comply with its conditions, merely offering to return the $5 received as earnest money to bind the contract; that on August 6, 1904, the defendant verbally sold to petitioner two other tracts of land adjoining each other and the 424-acre tract for $10 per acre, and as evidence of such contract petitioner attached to his petition the following letter:

"Lumber City, Ga. July 21, 1904. Mr. J. U. Tippins, Altamaha, Ga. — Dear Sir: I would like you make me an offer on Mrs. McLeod's little place there are 160 acres in the tract. If you will pay her the worth of it, you certainly will have no trouble in securing a deed to my property. You may not have any trouble to get it any way, as I told you the other day while up here that I meant to do the clean thing, and expected to do it, but that I would make no deed until I made some investigation as to certain matters in your neighborhood. Now I will soon go down there, but can't say for certain that I will get off next week, but will say that it will not be later than ten or twelve days, but if can arrange with my people, will try to be there by the middle of next week. If you don't care, make me an offer in writing, you can think the matter over, and if you are in a notion for it, we will see what can be done when I go down. If you feel like it, you can answer this letter. Yours truly, D. W. Phillips."

Petitioner alleged a continuous tender of $1,100 for the lot of land mentioned in the option and of the price named for the adjoining tracts; that the value of the 424-acre tract was $2,968. He prayed judgment for the difference between $1,110 and $2,968, unless defendant would make him a good and sufficient title to the 424 acres of land. The defendant demurred to the petition on the ground that the alleged option was not sufficiently definite and certain in its terms and in its description of the land to authorize the court to require a specific performance by the defendant; that the alleged parol contract as to the tracts adjoining the 424-acre tract was void because it was not in writing; and that the option contract was void for uncertainty and indefiniteness, and the allegations of the petition were insufficient to authorize a decree for specific performance or damages for the breach of the contract. The court sustained the demurrer, and the plaintiff excepts.

W. T. Burkhalter and J. K. Hines, for plaintiff in error. B. M. Frizzelle and E. D. Graham, for defendant in error.

EVANS, J. (after stating the facts). In order to recover damages in lieu of specific performance, it is essential that a case for specific performance be made out. Prater v. Sears, 77 Ga. 28. Was the contract sufficiently certain as to the subject-matter as would authorize a court of equity to decree specific performance? The statute of frauds requires all contracts for the sale of land or any interest therein to be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized. Civ. Code, 1895, § 2693. (4) Every essential element of the sale must be expressed in the writing to meet the statutory requirement. One of the essentials is that the land must be so described that it is capable of identification. While it is not necessary that the land be described with such precision that its location and identity is apparent from the description alone, yet the description must be sufficiently clear to indicate with reasonable certainty the land intended to be conveyed. Parol evidence cannot be invoked in aid of a vague and uncertain description, but is available under the maxim of "Id certum est quod certum reddi potest," to show the application of a description which itself furnishes a means of identification. If the land is so imperfectly and indefinitely described in the writing that no particular tract or lot is designated, parol evidence is not admissible to supply a description. Douglass v. Bunn, 110 Ga. 159, 35 S. E. 339. The land described in the writing is "424 acres of land in Tattnall county." Nothing could be more indefinite than this description. Not the slightest key is furnished to locate the land. It is not even as specific as the description in Gatins v. Angier, 104 Ga. 386, 30 S. E. 876. There the land was described as "a certain piece of land described as follows: Commencing about one hundred (100) feet from the land lot line on M. & T.'s Road and extending along said road four hundred and twenty (420) feet and running back a uniform width to the S. land"; and this description was held to be so indefinite and vague as to render it impossible to identify any particular land. There is a distinction between a vague and an ambiguous description. In the latter case parol evidence is permissible to explain the ambiguity. It was on this principle that the court in Mohr v. Dillon, 80 Ga. 572, 5 S. E. 770, allowed parol proof to show that the 100 acres referred to in the auctioneer's memorandum were bounded in a certain way. The question in that case was whether the memorandum as to who was the purchaser and who was the vendor and as to the land itself was ambiguous on its face, and the court held that it was. As to insufficient description in deeds see Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691; Crawford v. Verner, 122 Ga. 814, 50 S. E. 958. But it is insisted that the clause, "The price of said land if taken in the limit of this option is to be $1,100.00, said price to also include my share of the crops now growing on the said land," serves to point out a definite and certain tract of land in Tattnall county upon which D. W. Phillips had a share in a crop. For aught that the writing discloses, there may be other lots of land in which Phillips had an interest in the crops. After all, it would be first necessary to locate the land to find the crops, and the writing does not identify the land. The salutary rule that contracts for the sale of land must be in writing would be practically abrogated if courts were to allow the parties to supply by parol a description to the land when the writing contains no descriptive words indicating any particular land. Neither does the letter attached to the petition supply the deficiency in the description in the option. The letter was written about a month after the execution of the option, and makes no reference to the option. The connection of the two writings cannot be shown by parol evidence. North v. Mendel, 73 Ga. 400, 54 Am. Rep. 879.

There is no prayer in the petition either for specific performance of the parol contract in reference to the two tracts adjoining the tract of 424 acres or for damages resulting from the breach of the contract; hence it is unnecessary to decide whether the letter attached to the petition was sufficiently certain to prove the subsequent sale by parol of these two tracts. The written agreement on which the suit is based is void for lack of a sufficient description of the land, and there was no error in sustaining the demurrer which pointed out this vital defect in the plaintiff's petition.

Judgment affirmed. All the Justices concur.

SIMMONS, C. J., absent.

(123 Ga. 353)

WHITE v. SOUTHERN RY. CO.

(Supreme Court of Georgia. June 15, 1905.)

1. CARRIERS—DEATH OF PASSENGER—ACTION—PETITION—AMENDMENT.

In a suit against a railway company to recover damages for the homicide of a passenger, it is proper to disallow an amendment to the plaintiff's petition when the allegations thereof need no amplification, and the only additional matter sought to be introduced by way of amendment is the assertion that the defendant company owed to the passenger a legal duty, the nonobservance of which could in no way have brought about or contributed to the injury of which complaint is made.

2. DEPOSITION — IMPROPER EXECUTION—RETURN FOR CORRECTION—SUPPRESSION.

Interrogatories which have not been properly executed and returned into court cannot

without an order authorizing steps to be taken to have the same re-executed and returned, be lawfully taken out of the office of the clerk by counsel and sent back to the commissioners, with instructions to make another return of them to the court.

(a) In view of the admissions made in open court by plaintiff's counsel, the depositions were incompetent evidence.

(b) That the defendant did not in writing except to the improper execution and return of the interrogatories, and serve the plaintiff with the notice prescribed by statute, afforded no reason, under the facts appearing, why the court should have declined to suppress the depositions.

3. CARRIERS — INJURY TO PASSENGER—EVIDENCE—RES GESTÆ.

A narrative as to the circumstances under which a person was injured in alighting from a moving train, given by him a half hour or more after he was hurt to persons arriving on the scene, is not admissible as a part of the res gestæ of the occurrence. Nor can a statement as to what occurred, made by him on the following day to an agent of the defendant, who reduced the statement to writing, be regarded as competent evidence.

4. SAME—EVIDENCE.

The uncontradicted evidence submitted by the defendant company demanding the finding which the jury returned in its favor, the plaintiff was not entitled to a new trial, irrespective of whether the court correctly charged the jury as to the law governing the case.

(Syllabus by the Court.)

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Action by Carrie White against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff below, Carrie White, brought an action against the Southern Railway Company to recover damages for the homicide of her son Titus White, who at the time of his death was 19 years of age. The allegations of fact on which the plaintiff relied for a recovery were as follows: On or about January 7, 1901, Titus boarded one of the passenger trains of the defendant company at Dames Ferry, and, after the train started, informed the conductor that he wished to be put off at a place called the "Coal Chute," some seven miles north of Dames Ferry, where the company was in the habit of taking on and letting off passengers. The conductor agreed to put him off at the coal chute, as did also the porter of the train. Plaintiff's son was unacquainted with the location of the stations and the distance between them. The train stopped at the coal chute, and started on again, without any of the company's officials advising Titus of the fact that the coal chute had been reached, and without his knowing it; and, when the train started to running again, the conductor informed him that the coal chute had been reached, and told him to get off the moving train. He accordingly got off the train, not knowing how fast it was running, being governed entirely by the conductor's advice and command. While in the act of alighting, plaintiff's son was thrown violently to the ground in the darkness, and the moving train passed over his leg and arm, and he was so grievously wounded that he died on the following day.

The negligence charged against the company was (1) that the servants having charge of its train carelessly and negligently failed to stop it long enough at the coal chute to put off plaintiff's son safely, or to afford him an opportunity to alight; (2) that the conductor improperly directed him (an ignorant country boy) to get off the moving train, which was "unusual negligence," in that the conductor and porter were thoroughly familiar with the road in that locality, and with the surroundings and the speed of the train, whereas plaintiff's son had no such knowledge, and was relying absolutely upon the direction and will of the conductor, in whom he trusted, and whose duty it was to see that he got off the train safely; and (3) in addition to such gross negligence, the defendant company was also negligent in failing to exercise towards plaintiff's son that extraordinary diligence which the law imposes upon it.

At the trial the plaintiff offered an amendment to her petition, wherein she reiterated the statement that her son was a passenger on the train, and the company was under a duty to put him off safely at the coal chute, or afford him an opportunity to alight with safety, and wherein she further alleged "that, defendant company being advised that Titus White desired to get off at the chute, it was its duty to afford him a safe place to get off, and to select such a safe place, and to see to it that he did get safely off," but nevertheless the defendant negligently started its train without giving him an opportunity to safely alight, and he was thrown from the train and killed. The court declined to allow this proffered amendment for the reason that its allegations were substantially covered by those in the original declaration, "except the one that it was defendant's duty to afford a safe place to alight at," which was demurrable. To this ruling the plaintiff excepted pendente lite. A verdict in favor of the railway company was returned by the jury, and she also excepts to the overruling of her motion for a new trial.

W. C. Lane, M. W. Harris, J. R. Cooper, and Saml. Rutherford, for plaintiff in error. Dessau, Harris & Harris, for defendant in error.

EVANS, J. (after stating the facts). 1. No harm resulted to the plaintiff from the refusal of the trial judge to allow the amendment to her petition, the allegations of which needed no amplification. The only new matter sought to be introduced by way of amendment was the assertion that the company owed to her son the duty of providing a safe place at which he could alight. That it failed to observe this duty is not alleged. Even regarding the company's coal chute as a regular station at which it received and discharged passengers, its failure to provide a

place where passengers could safely alight in no way brought about or contributed to the injury received by him. On the contrary, the plaintiff alleges that the train was negligently started before her son was given an opportunity of leaving it in safety, and that his injury was caused by the negligent act of the conductor in directing him to get off the train while it was in motion. The allegation that the company owed him the duty of furnishing a safe place at which he could alight was wholly irrelevant and immaterial.

2. Upon the call of the case, counsel made to the court a statement to the following effect: Certain interrogatories which the plaintiff had sued out for S. A. Alexander, of Mississippi, were returned to the superior court of Monroe county, and were received by the clerk of that court. Upon the request of plaintiff's counsel, the clerk mailed them to him at Macon, Ga. Upon receiving the package, counsel discovered that the commissioner who had made the return of the interrogatories had not signed and sealed the same upon the back of the envelope, and and that the receipt of the postmaster at Forsyth, Ga., was not signed as written out. Thereupon counsel returned the package to the postmaster in Mississippi from whom it came, with the request that the commissioner be required to sign and seal same on the back. Subsequently the clerk of the court received the interrogatories by due course of mail, the package being signed by the postmaster at Forsyth, and the names of the two commissioners appearing upon the back of the envelope with their seals. Before receiving the interrogatories from the clerk, counsel had taken an order from the judge to open the same; but he did not open the package while in his hands, nor was anything written thereon. At the conclusion of this statement, the court, on motion of the defendant, held that the interrogatories could not be received in evidence, and announced that they would be suppressed because they had not been returned under an order of the court for correction and re-execution. Counsel for the plaintiff then stated in his place that he had construed the order to open the interrogatories as granting leave to take them out of the clerk's office. The court replied that this was an unauthorized liberty, and an unwarranted construction of the order. Complaint is made that the plaintiff was thus unjustly deprived of the benefit of the interrogatories, inasmuch as "no contention was made by anybody that the interrogatories had been opened, changed, or tampered with after they had been re-executed."

It was certainly not incumbent on the defendant to make any charge of fraud which could not, because of the defendant's lack of knowledge of the facts, be substantiated. The defendant was informed that counsel for the plaintiff had, without right, procured the clerk to mail the interrogatories to him, and had then, upon discovering that they had not been properly returned to the court, started them off on an unauthorized journey to Mississippi. Into whose hands they actually fell, or what transpired during their sojourn in that state, the defendant was not expected to know, nor was counsel for the plaintiff in a position to say. It did appear that the interrogatories had not been executed and returned into court conformably with law. This fact was all-sufficient to warrant the court in suppressing them, for, until properly executed and returned, they could not be used as evidence. Counsel, upon ascertaining that they had not been returned into court in accordance with law, had the choice of two courses—that which the court ruled he should have pursued, and that which he followed. He chose the wrong one. The question is not whether any fraud was perpetrated in the present instance, but whether such an inexcusable disregard of the prescribed practice for securing the testimony of witnesses by interrogatories can in any case be countenanced. In view of the opportunities for fraud which would be afforded if so grave a departure from the practice to be observed were tolerated, no doubt should be entertained that the ruling of the trial judge was eminently right and proper.

Counsel for the plaintiff insisted before this court, however, that the defendant had no right to move to suppress the depositions; not having complied with the provisions of Civ. Code 1895, § 5314, which declares that "all exceptions to the execution and return of commissions must be made in writing, and notice thereof given to the opposite party." Where a party fails to comply with the requirements of this section, he cannot, of course, complain that the trial court declines to suppress interrogatories because of want of proper execution. Galceran v. Noble, 66 Ga. 367; Langford v. Driver, 70 Ga. 589. But in the present case counsel for the plaintiff invoked a decision of the court as to the propriety of treating the depositions as trustworthy evidence, waiving all benefit of the provisions of the statute with respect to notice of exceptions which the opposite side might have presented. Counsel admitted he had so far meddled with the depositions as to send them into a sister state, and secure upon the package the indicia of a legal execution and return, which had not in point of fact been had in the first instance; and he voluntarily called down upon his client the just wrath of the court, which was warranted, of its own motion, to thereupon exclude the interrogatories. The conduct of counsel in thus bringing to the attention of the court the truth with regard to the matter was straightforward and manly. That the result of so doing operated to the prejudice of his client is perhaps something to be regretted, but not something which affords cause for reversing the decision of the trial court.

3. The fact was developed by the plaintiff's evidence that, after the train on which

her son had taken passage had proceeded on its journey after having stopped at the coal chute, he was found lying near the track, and was seriously injured. The plaintiff sought to show by two witnesses who arrived on the scene some half an hour after the train had departed that the injured man told them he had gotten on the train at Dames Ferry, and had informed the conductor he wanted to get off at the coal chute, and that the way in which he received his injury was that the conductor had hurried him to get off the moving train—had pushed him and told him to get off "damned quick"—and he obeyed the order and was injured. The plaintiff also offered to prove, as a part of the res gestæ of the occurrence, the statement made by her son on the following morning, in the presence of a physician and an agent of the company, who reduced his statement to writing, concerning the manner in which he got hurt. As a matter of course, the court ruled that none of this evidence was admissible. The court also declined to require either the company's agent or its counsel to produce the written statement so that plaintiff might introduce it in evidence, and the court rightly declined to do so. In reply to the complaint which the plaintiff makes of these rulings, it is only necessary to cite a few of the many instances in which this court has expressly held that such declarations are incompetent: Railroad Co. v. Randall, 79 Ga. 304, 4 S. E. 674; Holland's Case, 82 Ga. 257, 10 S. E. 200, 14 Am. St. Rep. 158; Roach v. R. Co., 93 Ga. 785, 21 S. E. 67; Electric Ry. Co. v. Carson, 98 Ga. 652, 27 S. E. 156; Newsom v. Georgia Railroad, 66 Ga. 57; Poole v. Railway Co., 92 Ga. 337, 17 S. E. 267; Weinkle v. Railroad Co., 107 Ga. 367, 33 S. E. 471; W. & A. R. Co. v. Beason, 112 Ga. 553, 37 S. E. 863. The writing made by the company's agent had no evidentiary value whatsoever. Carroll v. Railway Co., 82 Ga. 452 (4), 473, 10 S. E. 163, 6 L. R. A. 214.

4. The evidence introduced in behalf of the plaintiff failed to establish any of the specific acts of negligence alleged in her petition, or to disclose under what circumstances her son met with his injuries. She therefore necessarily had to rest her case entirely upon the presumption of negligence raised by law from the fact that he was injured by the running of the defendant's train. Civ. Code 1895, § 2321. The company submitted evidence bringing to light the following facts: The coal chute was not a station or a regular stopping place, though passengers were permitted to get off when trains stopped for coal or water. On the evening of January 7, 1901, a north-bound passenger train arrived at the coal chute shortly before 8 o'clock, and stopped there four or five, or possibly as long as seven, minutes. The engineer had charge of the stopping and starting of the train at the coal chute, it not being a station. After the train came to a standstill, the conductor assisted a gentleman, a lady, and a child to alight; at the same time warning them not to go on the main line, as a freight train was expected to pass at any moment. The conductor then went inside the second-class car, sat down, and began reading a newspaper. He was approached by a negro passenger who had a ticket from Dames Ferry to Juliette, a station a mile beyond the coal chute, and was asked if that place was the coal chute. The conductor said, "Yes," and the negro then said he wanted to get off there. The conductor told him, "All right;" to get off if he wished, but he had better be in a hurry. The train was at the time standing still. The negro immediately went out upon the platform, apparently for the purpose of getting off, and was not afterwards seen. He appeared to be an able-bodied man, 22 or 23 years of age, and capable of taking care of himself. The ground was level at the point where the car was standing, and he could have alighted therefrom in safety within half a minute. A few minutes after the negro left the conductor, the passenger train "pulled up" to let the freight train pass, and in a few moments afterwards proceeded on its journey. The statement of the conductor as to the conversation inside the car between him and the negro was corroborated by the testimony of the only other occupants of the car —a colored preacher and the newsboy—both of whom testified that the conductor merely cautioned the negro by telling him he had better get off pretty quick, and one of whom added that the conductor displayed no anger or impatience towards the negro. After this conversation the car remained motionless for from one to two minutes. The front end of it was 65 feet distant from the coal chute, opposite which the engine and tender had been stopped for the purpose of taking on coal, and under the apron of which the plaintiff's son was found shortly after the departure of the train. There was at that point blood on the track, and also on a post which stood within a distance of 14 inches of the point to where the eaves of a passing passenger coach would extend. Had the injured man been on the bottom step of a car, leaning outward, after the train was started, he might have been knocked off by coming into contact with this post. No attempt was made by the plaintiff to discredit any of the defendant's witnesses, and this being so, and their testimony fully exonerating it, and overcoming the presumption of negligence upon which the plaintiff relied for a recovery, a verdict in her favor would have been wholly unwarranted. W. & A. R. Co. v. Beason, 112 Ga. 553, 556, 37 S. E. 863, and cases cited. And the verdict returned by the jury being demanded by the evidence, it is unnecessary to consider whether the charge of the court is open to any of the criticisms made upon it, or whether it fully

covered all the issues in the case. People's Savings Bank v. Smith, 114 Ga. 185, 39 S. E. 920. For the trial judge to have granted a new trial would have been an abuse of discretion.

Judgment affirmed.

SIMMONS, C. J., absent.

(123 Ga. 342)

HENDRICKS v. SOUTHERN RY. CO.

(Supreme Court of Georgia. June 15, 1905.)

1. NEW TRIAL—GROUNDS.

An action for damages was brought against a railway company on the ground that a house located near the railroad track was set on fire by sparks negligently emitted from an engine pulling one of the defendant's trains. A verdict was rendered in favor of the plaintiff, and, on motion, a new trial granted. On a second trial a verdict was again rendered for the plaintiff for a slightly smaller sum. A second motion for new trial was made, and, upon the hearing before a different judge from the one who presided at the trial, it was granted. The motion contains no grounds assigning error in rulings of the court which would authorize a new trial, and the evidence was sufficient to sustain the verdict. *Held*, that the verdict should have been allowed to stand, and the grant of a second new trial was error.

2. WILL—CONSTRUCTION—INJURY TO ESTATE—ACTION BY EXECUTOR.

The will of a married woman named her husband as executor, "with full and ample power to take charge of her entire property, personal and real, to manage it as in his discretion seemed best to him, to sell and convey and reinvest the proceeds of any sale made in both personalty and realty as he deemed best; and all sales of both personal and real property to be solely in the discretion of her said executor at private or public sale, or in such manner and on such terms as he saw fit to adopt relative to any and all her property without any order from the court of Ordinary for such sale or reinvestment. That her said executor was to be left in the management of her said estate to his own discretion, and should not be compelled to make returns of his acts and doings in the premises, she reposing entire confidence in his judgment and discretion to manage the property for the best interest of his and her children without any interference by the court or orders and directions therefrom; she therefore gave him power to manage without restrictions all her said property, leaving it with him when and where to divide it out among their children, or to keep it together as long as he lived, or until the youngest child became of age, before any division thereof; or to make division earlier or at any time that he saw fit and in the manner that he thought best; that her said executor should not be made to account for the management or disposition of her property or the proceeds thereof, but should have absolute and untrammelled control of her entire estate during his life without liability therefor; and at his death the estate then in his hands should be divided equally between his children, share and share alike; but should the said executor make any advances to any child during his or her life as part of his or her said child's distributive share in the estate of testator, then such advances so made shall be accounted for by such child in the distribution among the children of testator." *Held*, that this provision did not vest the legal estate at once in the husband individually. The executor had the right to keep the estate intact and manage it, at least until the youngest child became of age, and, for the negligent destruction of property forming a part of such estate during that time, he could sue as executor.

3. FIRES SET BY LOCOMOTIVE—EVIDENCE.

On the trial of an action based on the contention that property was negligently set on fire by sparks emitted by a railroad engine, it being in controversy whether the engine was properly equipped and handled, evidence tending to show that on that day, and near the time of the alleged burning, the same engine threw out sparks and cinders which set fire to grass along the right of way of the railroad at two different points, was admissible.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; D. M. Roberts, Judge.

Action by T. R. Hendricks, executor, against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. L. & Warren Grice, for plaintiff in error. De Lacy & Bishop, for defendant in error.

LUMPKIN, J. T. R. Hendricks, as executor of his deceased wife, brought suit against the Southern Railway Company to recover damages for the burning of a house and contents located near the right of way of the railway, and which, it was alleged, was set on fire by sparks or cinders carelessly thrown from one of its engines. The defendant denied the allegations of the declaration that the fire was caused by its engine, and that there was negligence on its part. Two verdicts were found in favor of the plaintiff. A second motion for new trial was made, containing 14 grounds. But we think that none of them authorized the verdict to be set aside. Among these grounds was one complaining that the court held that under the will of Mrs. Hendricks, the substance of which is set out in the second headnote, the executor had the right to keep the estate intact until the youngest child became of age, and that the executor consequently had the right to sue for an injury to the property resulting from a negligent tort. In this we think he was right.

There was conflict in the evidence as to whether the fire was the result of sparks or cinders thrown off by the defendant's engine. A witness testified that when the engine, which it is claimed emitted sparks, passed a place about 4½ miles from the place of the burning, it was throwing out sparks which set fire to the grass along the right of way. Another witness testified to a similar state of facts at a place about five miles from the point where the plaintiff's house was burned. The latter witness stated that he saw grass on fire about 75 or 80 feet from the railroad, and that it began to burn as soon as the train passed. A third witness testified that the engine emitted cinders and sparks as large as a man's thumb, and in considerable quantities; that they remained red-hot until they fell to the ground and set the grass along the right of way on fire.

Evidence was introduced on behalf of the defendant to show that the engine was properly equipped with a spark arrester which was in good condition. Its boiler inspector testified that the meshes or holes in the netting on this locomotive were three-sixteenths of an inch in size, that if smaller holes were used it would clog the engine and prevent the necessary draft, and that if the netting was all right nothing larger could pass through. On cross-examination he testified that a spark larger than a pencil could not pass through the spark arrester, and that "if an engine had thrown out sparks larger than that cedar pencil, and thrown them from 60 to 80 feet, and they stayed alive until they got on the ground, such an engine could not have been equipped with a first-class spark arrester." The plaintiff did not, therefore, rely upon a mere presumption arising from proof of injury, but introduced additional evidence bearing on the question of negligence. It was not only admissible; it was very material. A careful examination of the record discloses no reason why this second verdict should have been set aside. See Brown v. Benson, Rec., 101 Ga. 753, 29 S. E. 215; Central of Ga. Ry. Co. v. Trammell & McCowen, 114 Ga. 312, 40 S. E. 259.

Judgment reversed.

SIMMONS, C. J., absent. EVANS, J., disqualified.

(123 Ga. 319)

MAXWELL v. WILLIS et al.

(Supreme Court of Georgia. June 15, 1905.)

1. ALTERNATIVE ROAD LAW—REPEAL—ADOPTION—ROAD DUTY.

What is known as the "Alternative Road Law," contained in Pol. Code 1895, §§ 573–583, was not repealed by the act of 1896 (Acts 1896, p. 78). The alternative road law created by the act of 1891, and embodied in the sections referred to, goes into effect upon recommendation of the grand jury. The act of 1896, amended by the act of 1898 (Acts 1898, p. 110), provided for a road law to take effect on a vote of the people of the county. The one does not repeal the other, but the one or the other may take effect upon being adopted by the grand jury or by popular vote. The act of August 8, 1903 (Acts 1903, p. 103), is an amendment to the act of 1896, and affects the road law provided for in that act. It does not directly amend any section of the Political Code. Therefore, in counties where the alternative road law has been adopted as provided by the sections of the Political Code cited, each male citizen between the ages of 16 and 50 years is subject to road duty, although in any county where the other alternative road law provided for by the acts of 1896, and the amendments thereof, has been adopted, each male inhabitant of such county between the ages of 21 and 50 years, who is not physically or mentally disabled, is made subject to road duty, and although the time of service and the amount of commutation tax is different from that under the other system. McGinnis v. Ragsdale, 42 S. E. 492, 116 Ga. 245; Commissioners of Roads, etc., v. Burns, 44 S. E. 828, 118 Ga. 112.

2. SAME.

The amendment to the act of 1891 (Acts 1897, p. 20) does not affect the point now decided.

3. SAME—DECATUR COUNTY.

Decatur county is not within the provisions of the act of August 12, 1903 (Acts 1903, p. 106).

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action by J. D. Maxwell, Jr., by his next friend, against E. J. Willis and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Randolph Russell and John R. Wilson, for plaintiff in error. Albert H. Russell, for defendants in error.

PER CURIAM. Judgment affirmed.

SIMMONS, C. J., absent.

(123 Ga. 323)

FLETCHER v. FLETCHER.

(Supreme Court of Georgia. June 15, 1905.)

1. INJUNCTION—RESTRAINING TRESPASS—PETITION.

It is not necessary for a plaintiff, who alleges himself to be the true owner and in possession of a tract of land, to attach an abstract of his title to an equitable petition to restrain a trespass by an insolvent trespasser.

2. SAME—PLAINTIFF IN POSSESSION.

A plaintiff in possession of land under claim of ownership, upon proof of such possession, and without showing a complete title, may maintain against an insolvent wrongdoer an action to enjoin any interference with his possession.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by George H. Fletcher against Joe Fletcher. Judgment for defendant, and plaintiff brings error. Reversed.

George H. Fletcher brought an equitable petition against Joe Fletcher, and a demurrer was filed by the defendant. The petition was amended, and, as amended, alleged substantially that the petitioner was the true and lawful owner and in the possession of a certain described tract of land; that the defendant unlawfully, and without authority from petitioner, had entered upon the land and commenced cutting the sawmill timber thereon with the intention of cutting and carrying away all of the sawmill timber upon the described tract of land; that petitioner claims title to the land and timber by virtue of a deed from James H. Fletcher to himself dated January 9, 1902; that the defendant claims title to 65 acres of said described land by reason of a deed from J. P. and Tucker Mauldin; that J. P. and Tucker Mauldin claim title from J. L. Fletcher, who claims title from James H. Fletcher, petitioner's grantor; that the deed from James H. Fletcher to J. L. Fletcher was never delivered to J. L. Fletcher, but was by him fraudulently obtained from the

wife of James H. Fletcher by false and fraudulent representations to her that his father, James H. Fletcher, had directed and requested that she deliver the deed to him, and that, relying upon this statement of J. L. Fletcher, Caroline Fletcher, wife of James H. and mother of J. L. Fletcher, delivered the deed to him; that James H. Fletcher never directed that the deed be delivered to J. L. Fletcher, and never ratified the delivery which was made by his wife; that on the day following the delivery of the deed to J. L. Fletcher, and as soon as he ascertained the fact, James H. Fletcher demanded of J. L. Fletcher the return of the deed, and was informed that J. L. Fletcher had sold a portion of the land described in the deed to J. P. and Tucker Mauldin, and had delivered the deed to them, whereupon James H. Fletcher demanded of the Mauldins a return of the deed, and at the same time informed them that the deed had never been delivered by him to J. L. Fletcher; that the Mauldins returned the deed to James H. Fletcher, and it was destroyed by him. It was further alleged that at the time of the return of the deed to James H. Fletcher and its destruction by him J. L. Fletcher had not conveyed the land to the Mauldins, but that they had actual notice, at the time the deed was made to them by J. L. Fletcher, that he had fraudulently procured possession of the deed from James H. Fletcher; that the defendant also had actual notice that J. L. Fletcher had never had title to the land at the time he (the defendant) purchased it from J. P. and Tucker Mauldin; that petitioner went into possession of the land immediately upon receiving his deed from James H. Fletcher, which deed was upon a fair and valuable consideration, and that he still is in possession of the same; that the title claimed by Joe Fletcher is a cloud on petitioner's title; and that the defendant is insolvent. The prayer was for the cancellation of the deeds from J. H. Fletcher to J. L. Fletcher, from J. L. Fletcher to J. P. and Tucker Mauldin, and from J. P. and Tucker Mauldin to the defendant; and that the defendant be restrained from interfering with the timber on said land, or with the plaintiff's possession. The demurrer was upon the ground that the allegations in the petition, taken together with the alleged abstract of title, failed to show that the plaintiff had sufficient title to the lands described in the petition to entitle him to the relief prayed. The demurrer was sustained, and the plaintiff excepts.

R. A. Hendricks and McDonald & Quincey, for plaintiff in error. H. B. Peeples and L. Kennedy, for defendant in error.

EVANS, J. (after stating the facts). The petition was not good as a proceeding to cancel title to land because the parties to the deeds sought to be canceled were not parties to the petition. Neither was there any prayer for damages for the trespass actually committed. So the petition was solely a proceeding for injunction to restrain the defendant from cutting or removing the timber, or in any wise interfering with the plaintiff's possession. An action of trespass upon realty, brought to recover damages to the freehold, is not maintainable by one who is not in possession of the land, unless he shows himself to be the true owner thereof. Whiddon v. Williams Lumber Company, 98 Ga. 700, 25 S. E. 770. If the plaintiff is in possession of the land under a claim of ownership, upon proof of such possession, and without showing a complete title, he may maintain against a wrongdoer an action for a trespass upon the property committed while such possession existed. McDonough v. Carter, 98 Ga. 703, 25 S. E. 988. Where the plaintiff relies upon possession, he must have the actual physical possession of the property upon which the trespass was alleged to have been committed to support his right to recover even as against a wrongdoer. Ault v. Meager, 112 Ga. 148, 37 S. E. 185. The petition is not a suit to recover damages to the freehold, but is solely to enjoin an interference of the plaintiff's possession by a trespasser. The allegations as to the manner in which the defendant claimed his right to the timber upon a part of the land described in the petition were evidently intended by the pleader to show that the defendant was a trespasser, and that his title was fraudulent. If the defendant relied upon his conveyance from the Mauldins as authority to cut the timber, and had knowledge at the time he purchased from the Mauldins how their title had been obtained, his status would in no wise be superior to that of his grantors. His grantors, the Mauldins, according to the allegations of the petition, knew at the time they purchased and obtained their deed from J. L. Fletcher that J. L. Fletcher had fraudulently possessed himself of a deed which had been executed, but never delivered, by plaintiff's grantor. So that the case made by the petition is that of a plaintiff who alleges himself to be in the actual possession of a tract of land under a deed, and who is seeking to enjoin an interference with that possession by an insolvent trespasser. It is not necessary to show a perfect title to land to entitle a complainant to enter a court of equity and seek relief against an interference of his possession by a trespasser. A prima facie title is sufficient in the absence of a better outstanding title. McArthur v. Matthewson, 67 Ga. 134. The possession of land under a deed raises the presumption that the possession is rightful, and that the possessor has a prima facie title. The petition in this case should not have been dismissed on demurrer, but the plaintiff should have been given an opportunity to prove the facts alleged in his petition, and upon proof of the allegations therein contained he would be entitled to a permanent injunction against

the defendant, unless he showed a better title to the timber than that held by the plaintiff. Accordingly, it was error to sustain the demurrer on the ground that the plaintiff had not shown such right or title as would entitle him to the writ of injunction.

Reversed.

SIMMONS, C. J., absent.

(123 Ga. 326)

FLETCHER v. FLETCHER.

(Supreme Court of Georgia. June 15, 1905.)

1. INJUNCTION—CUTTING TIMBER—PETITION.

Section 4927 of the Civil Code of 1895 provides for applying for an injunction against cutting timber in certain cases and upon certain conditions therein stated without the necessity for alleging or proving insolvency of the defendant or the irreparable nature of the damages which will result. But where this section is not relied on, and the plaintiff seeks to enjoin the commission of a trespass on the ground that the defendant is insolvent and the damages will be irreparable, the requirement of that section that the plaintiff shall attach an abstract of his title has no application.

2. SAME—IRREPARABLE DAMAGE.

Where the plaintiff seeks to enjoin a trespass on the ground that the defendant is insolvent and the damages will be irreparable, an allegation that he is the true and lawful owner of the land described in the petition is sufficient to withstand a demurrer.

3. SAME.

Section 5002 of the Civil Code of 1895 does not apply to such a case, it not being an action to recover land, but an equitable proceeding to enjoin a trespass.

4. SAME—PETITION.

In such an action, where the plaintiff did not affirmatively allege without qualification that he was the owner of the land described, or set up any possession thereof, but alleged merely that he was the only true and lawful owner, and had a true and complete title to the land, "as will fully appear by reference to abstract of title hereto attached," and thereupon voluntarily attached such an abstract thus referred to and made a part of his pleading, and where it showed on its face that one of the muniments of title on which the plaintiff relied was a partitioning of land lying in one county by partitioners appointed by the superior court of another county, and there was nothing to show how the court acquired jurisdiction of such partitioning proceeding, the petition was demurrable. Williamson v. White, 28 S. E. 846, 101 Ga. 276 (3), 279, 65 Am. St. Rep. 302.

5. SAME—ABSTRACT OF TITLE.

The decision in Yonn v. Pittman, 9 S. E. 667, 82 Ga. 637, had reference to the abstract of title attached to a statutory action of complaint for land.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Application by Joe Fletcher against Jos. H. Fletcher. Judgment for plaintiff, and defendant brings error. Affirmed.

R. A. Hendricks and McDonald & Quincey, for plaintiff in error. H. B. Peeples and L. Kennedy, for defendant in error.

LUMPKIN, J. Judgment affirmed.

SIMMONS, C. J., absent.

(123 Ga. 470)

FLETCHER et al. v. FLETCHER.

(Supreme Court of Georgia. June 17, 1905.)

1. LANDLORD AND TENANT—SUMMARY PROCEEDINGS.

When a tenant places a subtenant in possession, and the latter remains in possession beyond the term, the original tenant is to be regarded as holding over beyond his term, and a summary joint proceeding for possession against him and the subtenant is authorized.

2. SAME—JUDGMENT.

In such a proceeding a judgment in favor of the plaintiff for the possession of the premises should be entered against both of the defendants, and a judgment for double rent against the original tenant only.

3. SAME—INSTRUCTIONS.

Those portions of the charge which were objected to were not erroneous for any reason assigned. The requests to charge, so far as legal and pertinent, were covered by the general charge, which fairly submitted to the jury the controlling issue in the case. The evidence amply warranted the verdict, and no reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

Action by Joe Fletcher against George H. Fletcher and others. Judgment for plaintiff, and defendants bring error. Affirmed, with directions.

Joe Fletcher made affidavit before a justice of the peace that he was the owner of a described parcel of land; that he had rented the same to George H. Fletcher for the year 1901; that the term had expired, and he desired possession; that George H. Fletcher and one David Christmas were holding possession as tenants holding over; and that he had demanded possession of each of them since the expiration of the term, and they had refused to deliver possession to him. The affidavit was amended by adding an averment that Christmas was holding under George H. Fletcher and claiming possession as a subtenant of George H. Fletcher, and that they were holding over beyond the term. George H. Fletcher and Christmas each filed a counter affidavit and gave bond. The papers were returned to the superior court for trial. The defendants moved to dismiss the proceeding on the following grounds: (1) The affidavit fails to allege that the plaintiff had consented that Christmas should become the subtenant of George H. Fletcher or the tenant of plaintiff. (2) George H. Fletcher and Christmas could not be proceeded against jointly. (3) Unless the plaintiff consented that Christmas should become the tenant of George H. Fletcher, Christmas was an intruder, and should have been proceeded against as such. The court overruled this motion, and the defendants excepted pendente lite. The trial resulted in a verdict in favor of the plaintiff for the possession of the premises and $50 rent. Upon this verdict a judgment was entered that possession be delivered to the plaintiff, and that he recover of the defendants $50 rent and costs. The

defendants made a motion for a new trial, which was overruled. They excepted, assigning error upon the judgment overruling the motion to dismiss and upon that overruling the motion for a new trial.

McDonald & Quincey, for plaintiffs in error. L. Kennedy and E. D. Graham, for defendant in error.

COBB, J. 1. When a tenant, either with or without the consent of the landlord, sublets the premises and places the subtenant in possession, and the latter, claiming only under the tenant, remains in possession after the term has expired, such possession is a holding over of the tenant, and authorizes a proceeding by the landlord against the tenant as a tenant holding over. A tenant holding over is liable for double rent, and he cannot evade this liability by so arranging the possession that the same is not actually in him, but in another claiming under him. The landlord is permitted, under certain circumstances, either during the term or after it has expired, to treat the subtenant as his own tenant, and to proceed against him as such either for rent or for possession. Hudson v. Stewart, 110 Ga. 37, 35 S. E. 178, and cit. But the landlord is not compelled to do this. He may still treat the person with whom he dealt as his tenant, and nothing done by such person can relieve him from any of the liabilities to the landlord which the relation imposes. The purpose of the summary proceeding which the law gives against a tenant holding over is to oust the tenant and place the landlord in possession. If the landlord sees fit to treat the subtenant as his tenant and proceed against him as such, he cannot afterwards hold the original tenant to any liability for double rent, for this liability arises under the statute, and is an incident to the proceeding to oust the tenant. The landlord is therefore entitled by this summary proceeding to have possession delivered to him and a judgment against his tenant for double rent. To completely accomplish the purpose of the statute and give to the landlord a judgment for double rent against the person with whom he had dealt it is therefore necessary that the proceeding should be so directed that the actual occupant would be ousted and a judgment for the double rent entered against the tenant. This cannot be accomplished unless both the tenant and the subtenant are parties to the proceeding. The affidavit, as amended, set forth the exact condition of affairs as they existed. The tenant was holding over, not by himself, but by another, and the landlord desired possession from the subtenant, and a judgment for double rent against the tenant. This could be accomplished by making them both parties to the proceeding. In Richardson v. Harvey, 37 Ga. 229, there is a dictum by Mr. Chief Justice Warner to the effect that in a proceeding against a subtenant to evict him as a tenant holding over it was discretionary with the court whether the original tenant should be made a formal party to the proceeding; that he could defend in the name of the subtenant, but that the court might permit him to be made a formal party if it saw fit to do so. In that case the court had refused to allow the tenant to be made a party, and this judgment was not reversed, simply for the reason that it appeared from the record that he had not been deprived of any substantial right by this ruling, as his defenses had been fully made in the name of his subtenant. If in a proceeding against the subtenant, where the landlord has elected to treat him as his tenant, the original tenant could, in the discretion of the court, be made a party defendant, it would seem for a stronger reason that the landlord, at the inception of the proceedings, could make both the original tenant and the subtenant or actual occupant parties to the eviction proceedings. There was no error in overruling the motion to dismiss the proceeding. In the case of Grizzard v. Roberts, 110 Ga. 41, 35 S. E. 291, the persons who were sought to be made parties in the proceeding claimed to be the owners of the land, and desired to set up a claim adverse to that of the landlord, alleging that the defendant was their tenant. They were entire strangers to the only issue made by the proceeding, and therefore could not, under any circumstances, be made parties to the case.

2, 3. The motion for a new trial contains numerous grounds, assigning error upon extracts from the charge and upon the refusal to give various requests to charge. The case turned upon the question whether Christmas had gone into possession before the term expired as the tenant of George H. Fletcher, or as the tenant of the plaintiff, or whether George H. Fletcher had, during the term, abandoned possession, Christmas entering as an intruder, and having no connection with George H. Fletcher, and after the term had expired made a contract of rental with George H. Fletcher, who then claimed to be the owner of the premises by a title paramount to that of the plaintiff. This issue was fairly submitted to the jury under the judge's charge. Those portions of the charge that were excepted to were not erroneous for any reason assigned, and the requests to charge, so far as legal and pertinent, were covered by the general charge. The evidence fully authorized the finding that the possession of George H. Fletcher during the term and the entry of Christmas was the result of a collusive arrangement to defeat the rights of the plaintiff, and therefore neither Christmas nor George H. Fletcher could, as against the plaintiff in the proceeding to oust them from possession as tenants holding over, set up a title adverse to the plaintiff until they had surrendered possession to him. Grizzard v. Roberts, supra. While the proceeding was properly brought against George H. Fletcher and Christmas for the possession,

we do not think that Christmas is liable to the plaintiff for double rent, and that the judgment for rent should have been entered against George H. Fletcher alone. Direction is given that the judgment be amended so as to be a judgment for possession against both of the defendants and a judgment for the double rent against the defendant Fletcher only. There was no error requiring a reversal of the judgment.

Judgment affirmed, with direction. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 336)

BEDGOOD-HOWELL CO. v. MOORE.

(Supreme Court of Georgia. June 15, 1905.)

1. CONTRACTS—FRAUDULENT ALTERATION.
"If a written contract be altered intentionally, and in a material part thereof, by a person claiming a benefit under it, with intent to defraud the other party, such alteration voids the whole contract, at the option of the other party." Civ. Code 1895, § 3702.

2. CHATTEL MORTGAGE — FRAUDULENT ALTERATION.
An intentional and fraudulent insertion of additional property in a chattel mortgage by the mortgagee renders the instrument void. Bowser v. Cole, 11 S. W. 1131, 74 Tex. 222; Hollingsworth v. Holbrook, 45 N. W. 561, 80 Iowa, 151, 20 Am. St. Rep. 411.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Alteration of Instruments, §§ 117, 135–139.]

3. APPEAL—HARMLESS ERROR.
"The materiality of an alteration is a question of law; the fact of an alteration is a question for the jury." Civ. Code 1895, § 3703. That the court, in one portion of its charge, leaves the materiality of an alleged alteration to the jury, is not cause for new trial when the alteration, if made, was unquestionably material, and the jury found that it was made.

4. NEW TRIAL—INSTRUCTIONS.
Refusal to give an oral request in charge is not cause for a new trial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4223; vol. 46, Cent. Dig. Trial, §§ 514–516.]

5. CHATTEL MORTGAGE—FORECLOSURE.
The verdict was authorized by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Action by the Bedgood-Howell Company against W. R. Moore. Judgment for defendant, and plaintiff brings error. Affirmed.

J. D. McKenzie, Roddenberry & Luke, and Shipp & Kline, for plaintiff in error. W. H. Hammond, for defendant in error.

FISH, P. J. Judgment affirmed.

SIMMONS, C. J., absent.

(123 Ga. 295)

RUMBLE et al. v. TYUS et al.

(Supreme Court of Georgia. June 15, 1905.)

BANKS—INSOLVENCY—REORGANIZATION—SUBSEQUENT FAILURE—RIGHTS OF CREDITORS.
A bank was placed in the hands of a receiver. Pending the receivership proceeding the bank filed a motion alleging that it was solvent and able to pay all of its creditors, set forth a scheme under which it claimed that it could be reorganized to the advantage of its creditors, and prayed that its assets be surrendered to it for this purpose. Certain of its creditors and depositors agreed in writing to the alleged reorganization scheme, and pledged themselves to aid in securing a dismissal of the receivership proceeding. The motion was granted, and the assets of the bank turned over to it, upon which it proceeded to do business under a different name, but under the old charter. The scheme failed, and the bank again made an assignment. Upon the petition of some of its creditors it was again placed in the hands of a receiver. Its assets are not sufficient to pay all of its creditors. *Held*, that under the facts appearing in the record in the distribution of such assets depositors who were not parties to the agreement and the application for a surrender of the assets under the first receivership are entitled to priority over those who were.

(Syllabus by the Court.)

Error from Superior Court, Pike County; R. B. Russell, Judge.

In the matter of the insolvency of the People's Bank of Barnesville W. G. Tyus and W. M. Rice & Sons intervened. P. Rumble and others, receivers of the bank, demurred to the intervention, and from orders overruling the demurrer and requiring them to pay the claims of the interveners the receivers bring error. Affirmed.

The Barnesville Savings Bank, upon the petition of Rogers and others, as creditors, was placed in the hands of a receiver. While this case was pending the savings bank filed an application in the superior court in which the following allegations were, in substance, made: Since the bank was placed in the hands of a receiver, the bank has become solvent, and able to pay its debts. The bank has perfected plans for a reorganization, and its capital stock has been subscribed for anew by solvent persons, and the bank will be reorganized under its present charter as soon as the receiver is discharged. A list of subscribers and the amounts of their subscriptions were set forth. As soon as the bank is reorganized, debts due it, amounting to $69,000, will be paid to it. The depositors in the bank have agreed to take $20,000 of the preferred stock of the Barnesville Manufacturing Company, a corporation which was a debtor of the bank in a large amount, as a credit on their respective deposits. Unless the bank is reorganized, the debts due it above referred to will be lost. All of the depositors in the bank, except a few, whose deposits amount to about $6,000, have signed an agreement by which they agree to accept preferred stock as above indicated as a credit on their deposits, and then to take 10 per cent. of their deposits in cash and the remainder in two equal payments. The bank tenders a bond in the sum of $50,000, conditioned to pay the depositors the amount of their deposits in accordance with such agreement. The bank has arranged to discharge all other debts due other persons. It is to

the best interests of all parties concerned that the receiver be discharged by the court, and the bank turned over to its stockholders, so that it can be reorganized; for in this way the debts due the bank will be paid, a new capital stock will be paid in, and a bond in the sum of $50,000 given for the protection of the depositors who are parties to the agreement; whereas, if the reorganization is not allowed to take place, the creditors of the bank will probably not receive more than 20 cents on the dollar. The prayer was that the receiver be discharged, and ordered to turn over to the bank and its stockholders all its assets and effects in his hands. The agreement referred to in the application was exhibited to the court. In it certain depositors, through their representatives, agreed to the reorganization scheme set forth in the application of the bank, and pledged their efforts to secure a dismissal of receivership proceedings, as well as a similar proceeding against the Barnesville Manufacturing Company in the federal court, upon condition that the bank would give bond as set forth in the application. Upon consideration of the application and agreement, the court passed an order reciting that: "After hearing evidence and argument upon the foregoing motion, and considering the agreement of the depositors and creditors of said bank," it is ordered, "upon consent of all parties, that the motion be sustained, the receiver discharged, the case dismissed, and the assets and effects of the bank surrendered to it." Thereafter the bank received its assets and effects, undertook to put into operation the scheme set forth in its motion, and proceeded to do business under the name of the People's Bank of Barnesville, the charter having been amended as to the corporate name. The charter was subsequently amended so as to change the liability of the stockholders. The scheme failed, the bank made an assignment, and a second application for receiver was made by certain of the creditors of the bank. In this proceeding W. G. Tyus and W. M. Rice & Sons intervened, and asked to be made parties. They alleged that they were depositors of the Barnesville Savings Bank, set forth the facts in reference to the management of the bank's affairs and the receivership above set forth, averred that they were not parties to the application for a surrender of the assets of the bank under the original receivership, that they were not among the creditors of the bank who consented to that scheme, that the receivers had in their possession sufficient assets of the bank to pay the interveners' demands in full, and prayed that in the distribution of those assets they be allowed priority over those creditors who consented to the alleged scheme of reorganization. The receivers demurred to and answered the intervention. The court overruled the demurrer, and, the case having been submitted to the judge without the intervention of a jury, he granted an order requiring the receivers to pay in full the demands of the interveners before payment was made to other creditors who were parties to the agreement above set forth. It appeared from the evidence that the interveners were not parties in any way to the scheme of the bank, or the motion under which its assets were surrendered to it; that the averment in the motion that the bank was solvent, and able to pay its creditors, was untrue; and that there was in the hands of the receivers a sufficient amount of the assets of the bank to pay the claims of the interveners, though not enough to pay all the other creditors of the bank. The receivers excepted to the orders overruling the demurrer and requiring them to pay the claims of the interveners. The contest is between depositors of the bank who did not consent to the alleged reorganization scheme of the bank and creditors who were instrumental in securing an order releasing to the bank its assets.

W. W. Lambdin and J. F. Redding, for plaintiffs in error. Robt. L. Berner, for defendants in error.

COBB, J. The assets of the Barnesville Savings Bank were placed in the hands of a receiver under an equitable petition filed by some of its creditors. A copy of the petition is not in the record, but it is to be inferred that it was an equitable petition in the nature of a creditors' bill filed in behalf of all the creditors of the bank, and especially in behalf of depositors. While this case was pending, and the receiver was proceeding to gather in the assets and wind up the affairs of the bank, it filed an application to the court asking that its assets be returned to it, so that they might be used and appropriated in furtherance of a scheme to rehabilitate the bank, which is set forth in the motion. It was distinctly averred in the motion that there were depositors whose claims aggregated $6,000, who had not consented to the scheme proposed; and it was also stated in emphatic terms that at the time the motion was filed the bank was solvent. Upon this representation the court permitted the bank to take possession of its assets and use them for the purpose stated in the motion. It is inconceivable that the judge would have for a moment entertained the application except for the unequivocal statement that the bank was solvent, which could convey no other idea to the mind of any one to whom the representation was made than that the bank was able to meet all demands of every creditor, and was in a position where the rights of creditors would not at all be imperiled by the court releasing the assets from its custody. It is hardly necessary to state that under no circumstances would a judge of the superior court have granted such an application to embark the assets of an insolvent bank into the uncertain scheme set forth in the application ex-

cept for the positive statement that the bank was in a position where the rights of its creditors would not be imperiled if its assets were placed in its hands. It does not appear that the plaintiffs in the intervention were parties to the original receivership proceeding. Even in a creditors' bill filed in behalf of all the creditors of an insolvent the suit is between the actual parties thereto, and the actual plaintiffs have control of the case, and may dismiss it at any time, or the defendant may make satisfaction to them and compel a dismissal. McDougald v. Dougherty, 11 Ga. 570 (7, 8); Stinson v. Williams, 35 Ga. 172. Any one interested in such a suit not a party thereto must come in and be made a party before it is necessary that he should be consulted as to a dismissal of the case; but when in such a case the extraordinary powers of the court have been invoked, the assets of the insolvent seized by the court, and as a result an equitable lien attaches to the property in the custody of the court in favor of every creditor who sees fit to come in before decree, or even, under some circumstances, after decree, and claim his portion of such fund, while the plaintiffs have power to retire as litigants, and therefore dismiss the case, so far as their rights are concerned, the question as to what shall be done with the assets in the hands of the receiver is one addressed to the sound discretion of the judge, who may, on his own motion, give the matter such direction as the principles of equity require, either by imposing conditions in behalf of those interested in the fund, although not parties, or by holding possession of the fund for a reasonable time to allow others to come in and assert their rights. The judge evidently thought that the rights of all persons interested in the assets were fully protected, or, as said above, the order would never have been granted. The scheme of the bank was a failure. It now appears that the bank was not solvent; that it not only was not in a position where it could pay all the depositors, but was not even in a position where it could pay those depositors who consented to the use of the assets for the purpose of carrying out the scheme of rehabilitation. The failure of the scheme was followed by an assignment, and the assignment was followed by a second petition in the nature of a creditors' bill. What is left of the assets of the bank is again in the custody of a court of equity, and those depositors who did not consent to the scheme, which was allowed a trial simply because of the misinformation which the court had as to the condition of the bank, now come into court and ask that their rights be protected as against the bank and those depositors who saw fit to enter into what now appears to have been a visionary scheme to place the bank upon a firm footing. Those who have appealed to the court of equity in the present proceeding are depositors who entered with the bank into the scheme proposed in the motion which resulted in the assets of the bank being restored to it. It would seem there could be no question that in equity those depositors who had refused to consent to the scheme were entitled at least to be placed in the position where they were before the assets of the bank were turned over to it. Certainly they have this equity against those for whose benefit the assets of the bank have been used, and this equity must be accorded by those persons before they will be entitled to any of the equitable remedies which they invoke. But it may be said that it is impossible to now determine what amount would have been received by the nonassenting depositors under a final decree in the original case. This is undoubtedly true. But whose fault is it that the court cannot now restore the status as it existed at the time the assets were released to the bank? It is certainly not the fault of the interveners, for they have taken no part in the management of the bank's affairs, nor have they directly or indirectly caused any of them to be handled for their benefit. These assets, which are admitted to have been of large amount, have become commingled with other assets, and some have been entirely lost, though it is admitted that there is in the hands of the present receivers a sufficient amount of the original assets of the bank to more than discharge the claims of the interveners. How much these interveners would have received under a decree in the original case will never be known; but the reason that it cannot be known is due entirely to the bank and those who consented for it to enter into the scheme above referred to. Loss must fall on some one. Shall it fall upon those who are not in any way responsible for the misleading statement which caused the judge to release the hold of the court upon the assets of the bank? Or shall it fall upon those who made the misleading statement and those who have consented that the bank should use the assets thus obtained for their benefit? It seems to us there can be but one answer to this question. The loss should fall upon those who sought to benefit themselves by a proceeding which would never have been allowed but for the misleading statements, and this would be true even though they were not directly responsible for the statement, and even though they might have believed that it was true; it being now demonstrated that it was not true, and the officers of the bank, through whose conduct they hoped to be benefited, could certainly have ascertained the exact truth before the statement was made to the court. The case is, indeed, peculiar and exceptional, but it seems to be one where those who have been guilty of wrongdoing should not be permitted to be heard in regard to equities which they might have against others in reference to the assets now in the hands of the receiver until

they have allowed whatever equity and good conscience would require should be accorded to those creditors interested in the fund of the insolvent bank who were not parties to the misleading statement upon which the court acted, nor responsible for the condition of affairs which has brought about a tolling of the fund resulting from an assignment and a second receivership. If the court had been allowed to administer the fund under the first receivership, all creditors would have been paid pari passu, and each would have been compelled to receive his pro rata without a murmur; and, if it could be ascertained what would have been that pro rata, it may be that all would still be required to receive it. But certainly the creditors who took no part in the application to have the funds released by the court or in the subsequent transactions should not be charged with any expenses or losses incident to the management of the bank under the scheme, or the assignment, or the second receivership; and as the inability of the court now to find out what was the true interest of these nonassenting creditors in reference to the fund is due to the fault of those who are now clamoring for equitable relief, they will be allowed whatever equitable relief they may be entitled to as against those who have wronged them, provided they are willing to do full equity under the circumstances to those whom they have wronged. Under all of the circumstances of the case the only proper judgment that could have been rendered was that which required these nonassenting creditors who are now complaining to be paid in full their demands, allowing the court to distribute the balance of the fund for the benefit of those who were the victims of the unfortunate scheme which was made possible by a misrepresentation of a material fact at the time their representatives took charge of the assets of the bank.

The additional record which the judge caused to be transmitted to this court under an order was necessary in order to put the court in full possession of the case in all of its details, and therefore the motion to tax the costs of this additional record against the defendant in error will not be granted.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 327)

MATHEWS v. ROUNTREE.

(Supreme Court of Georgia. June 15, 1905.)

1. WIDOW'S SUPPORT — ALLOWANCE—CAVEAT —RIGHT TO FILE.

Not only heirs, legatees, and creditors of an estate, but also all other persons concerned in the legal administration of the assets thereof, including a co-surety of the decedent on a bond on which suit has been brought, may interpose a caveat to an application for a year's support.

2. APPEAL — REVIEW — INTERLOCUTORY INJUNCTION.

Until final judgment be rendered in the trial court, no interlocutory ruling which would not have finally disposed of the case if rendered in favor of the excepting party can be brought under review in this court.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 402–415.]

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Application of Hannah Mathews for a year's support. S. S. Rountree filed a caveat. From the judgment the widow brings error. Affirmed.

L. W. Branch, for plaintiff in error. J. W. Edmondson and W. H. Griffin, for defendant in error.

FISH, P. J. An application for a year's support was made to the court of ordinary of Brooks county by Mrs. Hannah Mathews. To the return of the appraisers, S. S. Rountree, in his capacity as executor of the estate of M. Brice, filed a caveat. The ordinary, upon the hearing of the issues presented by the caveat, made the return of the appraisers the judgment of the court, and the caveator thereupon entered an appeal to the superior court. When the case was called for a hearing in that court, he offered an amendment to his caveat, which was allowed over the objection of Mrs. Mathews. She then moved to dismiss the caveat on the ground that the caveator was not "an heir at law, legatee, or creditor of the estate" of her deceased husband, S. M. Mathews, and therefore had no right to object to the allowance of the year's support. The court overruled this motion to dismiss, and, at the instance of the caveator, continued the hearing of the case until there should be a final judgment in a suit upon a bond which had been signed by S. M. Mathews and M. Brice as sureties, to which suit Mrs. Mathews, as the executrix of her deceased husband, and Rountree, as executor of Brice, were parties. The present bill of exceptions was sued out by Mrs. Mathews, who complains of the rulings adverse to her, and also of the action of the court in continuing the case.

1. The interest which Rountree, as executor, had in contesting the right of Mrs. Mathews to receive the allowance set apart to her as a year's support, was that he had reason to apprehend that there might be a recovery on the bond signed by his testator as surety, in which event the estate of Mathews would also become liable because of the obligation which he had assumed as a co-surety. The caveator alleged that others who had become sureties on the bond were insolvent; that the amount claimed to be due on the bond was $8,483.41; that, in the event of a recovery on the bond, he would have to look to the estate of Mathews for contribution; and that the excessive allowance given to Mrs. Mathews for a year's support would render that estate insolvent.

It is therefore apparent that the caveator had a very vital concern in the matter of fixing the amount of money or property to be set aside as a year's support. Civ. Code 1895, § 3467, provides that upon the return of the appraisers the ordinary shall publish notice, and cite "all persons concerned" to show cause why the year's support should not be granted, and, if no objections be interposed, the application shall be granted as a matter of course. After the year's support is once set apart, no one is at liberty to go behind the judgment granting it, no matter what interest he may have in defeating the same. So we are very clearly of the opinion that it was the right of the caveator, as one of the "persons concerned" in the matter of granting the application of Mrs. Mathews for a year's support, to resist the application upon any ground which could properly be urged by any other person concerned as heir at law, legatee, creditor, or administrator.

The plaintiff in error calls attention to the fact that Civ. Code 1895, § 3394, which provides for giving notice of an application for letters of administration, declares that the ordinary shall issue a citation to "all concerned"; and, in this connection, several decisions of this court construing this section of the Code are cited and relied on as supporting the contention that the caveator had no right to object to the allowance of the year's support applied for. In the case of Augusta R. Co. v. Peacock, 56 Ga. 146 (2), it was remarked that, before one could be heard to object to the appointment of an administrator, it was incumbent upon him to "show that he has an interest in the choice of administrator, either as heir or creditor. Some interest on the part of the objector in the assets and their distribution must appear." The language used is not inconsistent with the idea that one having such an interest in an estate as Rountree, the caveator, shows, could object to the appointment of an unsuitable administrator. All that was definitely ruled was that the railroad, which had killed the person on whose estate Peacock had applied for letters of administration, could not be heard to object to his appointment simply because the company apprehended he might bring suit against it for the homicide of the person whom it had killed. In Williams v. Williams, 113 Ga. 1006, 39 S. E. 474, similar language was used, and the court held that one claiming the property sought to be administered could not object to the appointment of an administrator. It is evident that an administrator should be appointed in order to contest such a claim in behalf of the estate he represents. The only remaining case relied on is Towner v. Griffin, 115 Ga. 965, 42 S. E. 262, wherein it was ruled that "an application for letters of administration which fails to allege that the applicant is an heir at law of the decedent, or a creditor of the estate, or any other reason" entitling him to administer the estate, should be dismissed at the instance of persons interested in the estate as heirs at law. In a later case (not cited, by the way) this court expressly ruled that it was not necessary that one objecting to the appointment of an administrator should be either an heir or a creditor of the estate, provided he had some interest in having it properly administered, or disposed of without administration. Dierks v. Smith, 119 Ga. 859, 47 S. E. 203. The objecting party was one who had acquired by purchase the interest of an heir in the estate, and the objection made that there was no necessity for administration was held to be one which he could urge.

2. Had the court sustained the motion to dismiss the caveat, the ruling made would have brought about a final disposition of the case; and, this being so, it is the right of the plaintiff to have the judgment overruling the motion reviewed by this court, notwithstanding the case has not been finally disposed of in the court below. Civ. Code 1895, § 5526. But this court is without jurisdiction to also pass upon the exception taken to the allowance of the amendment to the caveat (Turner v. Camp, 110 Ga. 631, 36 S. E. 76), or to deal with the complaint touching the continuance of the case (Berryman v. Haden, 112 Ga. 752, 38 S. E. 53), since such interlocutory rulings cannot be brought under review till the trial court renders final judgment.

Judgment affirmed.

SIMMONS, C. J., absent.

(126 Ga. 220)

GEORGIA SOUTHERN & F. RY. CO. v. PRITCHARD.

(Supreme Court of Georgia. June 15, 1905.)

1. BILL OF EXCEPTIONS—TRANSCRIPT — VARIANCE.

When a bill of exceptions purports to contain an extract from the record in the case, and the same is at variance with what is contained in the transcript of the record duly certified by the clerk, the latter will control as to what is the true record in the case.

2. PROCESS—SUFFICIENCY.

A process issued by a named person as clerk, who is clerk of the superior court, bearing test in the name of the judge of that court, and requiring the defendant to appear "at the next ——— court to be held" for a given county, on a day when a regular term of the superior court of that county is required by law to be held, is a valid process of the superior court, and needs no amendment. This is true notwithstanding the person signing the process as clerk is also clerk of the county court of that county, and that court has a regular term beginning on the day when the defendant is required to appear.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by William Pritchard against the Georgia Southern & Florida Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Pritchard filed a petition against the Georgia Southern & Florida Railway Company in the office of the clerk of the superior court of Berrien county on February 19, 1904. At the March term, 1904, the defendant made a motion to dismiss the petition on the ground that no process had been issued by the clerk of that court. The motion was not heard at the March term, but was continued until the September term. The bill of exceptions recites that at the hearing during that term the defendant introduced a paper which purported to be a process attached to the petition, of which the following is a copy: "State of Georgia, Berrien County. To the Sheriff of Said County, or His Deputies, Greeting: William Pritchard vs. G. S. & F. Ry. Co. Complaint. The defendant, the G. S. & F. Ry. Co., [is] hereby required, personally or by attorney, to be and appear at the next County Court to be held in and for said county on the third Monday in March, 1904, next, then and there to answer plaintiff's demand in an action of complaint. Witness the Honorable Robert G. Mitchell, Judge of said Court, this the 19th day of February, 1904. [Signed] J. D. Lovett, Clerk." The defendant also introduced evidence showing that J. D. Lovett was the clerk of the superior court, and also clerk of the county court. It further appeared that both courts had a regular term beginning on the third Monday in March of each year. The bill of exceptions specified as the record to be transmitted the motion to dismiss, and the judgment of the court thereon. The clerk transmitted those portions of the record, and also transmitted a paper signed by counsel for the plaintiff and the judge of the superior court, which embodies a motion to insert the word "superior" before the word "court," so that the process, when amended, "will read to the superior court instead of to the court," and an order that the defendant be served with a copy of the amendment and of the order, together with a copy of the original petition and process, 20 days before the next term of the superior court, and that that term be considered the appearance term of the case. The defendant excepts to the allowance of the amendment, and to the overruling of the motion to dismiss. When the case was called in this court, counsel for the plaintiff filed a suggestion that the copy process set forth in the bill of exceptions was not correct, in that the process as issued by the clerk did not have the word "county" before the word "court." Under an order from this court the clerk transmitted a copy of the original process, duly certified, which is as follows: "State of Georgia, Berrien County. William Pritchard v. G. S. & F. Ry. Co. Complaint. To the sheriff of said county and his deputy, greeting: The defendant, G. S. & F. Ry. Co., is hereby required, personally or by attorney, to be and appear at the next ——— court, to be held in and for said county on the 3rd Monday in March next, then and there to answer the plaintiff's demand in an action of complaint. Witness the Honorable R. G. Mitchell, judge of said court, this 19th day of Feb., 1904. J. D. Lovett, Clerk."

John L. Hall, R. C. Jordan, and F. S. Harrell, for plaintiff in error. J. P. Knight, Bush & Bush, and T. S. Felder, for defendant in error.

COBB, J. 1. The clerk of a court of record is the custodian of its records and files, and the certificate of this officer as to what is contained in the record must always be looked to in preference to any other evidence. As to matters occurring during the progress of the trial, which are not of record or of file in the office of the clerk, the judge's certificate will control. But when a bill of exceptions purports to set forth a copy of what is of record or of file, and the recitals therein are at variance with what is contained in the record duly certified by the clerk, the certificate of the clerk will be looked to, rather than the recital in the bill of exceptions. See Southern Ry. Co. v. Flemister, 120 Ga. 526, 48 S. E. 160, and citations.

2. The copy certified by the clerk appears to be a process issued by one as clerk who is in fact clerk of the superior court, bears test in the name of the judge of that court, and requires the defendant to appear at the "next ——— court" to be held for a given county. The words "county court" do not appear at all in this copy, nor does the word "county" appear anywhere as a term descriptive of the court referred to. One upon whom such a process was served could not be misled. It was returnable at a time when a regular term of the superior court would begin. It was signed by a person as clerk who was the clerk of the superior court, and bore test in the name of the judge of that court, and no other court was mentioned or referred to therein. The next court to be held in that county on the day named could not have been understood by the defendant to be other than a court in which the clerk who signed the process, and the judge in whose name it bore test, were officers. The fact that the clerk was also clerk of the county court could not mislead, when there was no requirement that the defendant appear at the county court, and when the process bore test in the name of the judge of the superior court. It may be that the copy process which was used in preparing the bill of exceptions contained the word "county," but this does not appear from the record. What would be the result in the event this did appear, we do not determine. The case of Cochran v. Davis, 20 Ga. 581, apparently rules that defects in the copy are immaterial if the original is correct, but a critical examination of this case will show that what is said therein on this subject is obiter. If the original process had been as

set out in the bill of exceptions, the case of Lowrey v. Railroad Company, 83 Ga. 504, 10 S. E. 123, would have been in point.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 312)

WESLOSKY et al. v. QUARTERMAN et al.

(Supreme Court of Georgia. June 15, 1905.)

1. BANKS—INSOLVENCY — RIGHTS OF STOCKHOLDERS—ACTION AGAINST DIRECTORS.

A petition by minority stockholders of an insolvent corporation which has been placed in the hands of a receiver, brought 26 months after his appointment, with a view to obtaining leave to institute proceedings against the directors of the corporation, of whom he was one, for the purpose of calling them to account for alleged misconduct in conducting its business, is not premature for the reason that the affairs of the corporation have not been wound up and the extent of the liability of the directors ascertained; nor are the petitioners chargeable with laches in not sooner presenting their petition.

2. SAME—PARTIES.

The receiver not being himself competent to bring such a proceeding against himself and his fellow directors, it was within the discretionary power of the court to permit the complaining minority stockholders to maintain the action in behalf of themselves and others similarly situated, joining the receiver and the corporation as parties defendant.

3. SAME—VACATING PERMISSION TO SUE.

The petition filed in conformity to the order of court granting leave to institute suit was good as against a general demurrer, and, this being so, a motion to vacate the order was properly refused, irrespective of the question whether the plaintiffs' pleadings were or were not open to objections which could and ought to have been raised by special demurrer.

(Syllabus by the Court.)

Error from Superior Court, Dougherty County; W. N. Spence, Judge.

Action by S. J. Quarterman and others against Morris Weslosky and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

On January 17, 1902, the directors of the Commercial Bank of Albany filed a petition in the superior court of Dougherty county, alleging that the institution was financially embarrassed and unable to meet its obligations, and praying for a receiver to take charge of its assets and wind up its affairs. The court appointed one of the directors, Morris Weslosky, receiver, and he entered upon the discharge of his duty as such, and took possession of the assets of the bank. Some 26 months thereafter, on March 15, 1904, pending the receivership, S. J. Quarterman and other stockholders of the bank presented to the court a petition in which they set up the following facts: Some time prior to the suspension of the bank, its directors, in violation of the provisions of section 1914 of the Civil Code of 1895, made large loans to the officers of the bank without good security. Among the loans made was one to Carter & Woolfolk, a partnership composed of the president of the bank, who was also one of the members of its finance committee, and a director of the bank, amounting to the sum of $19,503.77; another loan of $2,318.21 to this director individually, and one of $5,851.89 to his wife; a loan of $5,250 to the wife of the bank's president; a loan of $1,579.04 to its cashier, who was a director and a member of the finance committee; and another of $4,279.07 to an insolvent corporation, the stock of which was mostly owned by him and another director; still another loan to Morris Weslosky, the vice president, a director, and a member of the finance committee, of $1,000, and one of $3,500 to him in the name of the Albany Grocery Company, under which name he conducted business; and yet another of $3,500 to a partnership composed of his father and another of the bank's directors, as well as a loan of $1,000 to a firm of which still another of the directors was a member. These loans amounted in the aggregate to more than 25 per cent. of the capital stock of the bank, and one of them to more than 10 per cent. thereof, as did also another loan mentioned. Other loans were made to certain relatives of the officers and directors of the bank, in violation of law, and also to numerous persons on scarcely any security, and sometimes without any security at all. Large overdrafts were also permitted, the greater part of which still remain uncollected. The affairs of the bank, as now ascertained, are such that it is probable the depositors and general creditors will be paid in full, but the stockholders will receive nothing, but will lose the entire value of their holdings. Gross misconduct and neglect in the management of the affairs of the bank was charged against its officers and directors, amounting not only to a breach of the duty they owed to its stockholders, but to a violation of the penal laws of this state. It was alleged that, as a result of such malfeasance and misfeasance, the directors were liable to account for the moneys lost and diverted by their misconduct; that the court's receiver, Morris Weslosky, who had been the vice president of the bank, one of its directors, and a member of its finance committee, was himself liable with his co-directors for the wrongs committed by them, and was not in a position either to sue himself or to prosecute with vigor against his fellow wrongdoers an action in behalf of the corporation; and that it was accordingly the right of petitioners, in behalf of themselves and other stockholders at interest, to proceed against the directors, and enforce against them the personal liability they had incurred to the corporation. Petitioners prayed that they be allowed to so proceed, any fund realized as a result of the action to be subject to the further order of the court. The court granted an ex parte order permitting petitioners to institute an equitable proceeding against the directors of the bank, including its receiver, Weslosky, as prayed, and to

join as a party thereto the corporation either as a plaintiff or as a defendant, in order that it might become bound by the final decree. After the filing of the suit so authorized, Morris Weslosky and John Mock, who were duly made defendants, appeared before the court and presented a written motion to vacate the ex parte order above referred to on the ground that it had been improvidently granted, in that petitioners were without right to legally or equitably maintain such an action. This motion was overruled, and movants excepted.

John D. Pope and Little & Battle, for plaintiffs in error. Hall & Wimberly, Crossland & Jones, and L. J. Hofmayer, for defendants in error.

FISH, P. J. (after stating the facts). 1. Among the reasons assigned why the refusal of the court to sustain the motion was erroneous are: (1) That the suit authorized to be instituted is premature, as the affairs of the corporation are still being liquidated. There is no certainty that the shares of its capital stock will be depreciated, or, if so, that they will become depreciated in any particular amount. And (2) because the petitioning stockholders have been guilty of laches in failing to institute their suit within a reasonable time. It would seem that the action, if prosecuted at all, should be commenced before the affairs of the bank are finally wound up. Petitioners distinctly allege that, while depositors and general creditors will probably be paid in full, the available assets of the corporation will be insufficient to meet the claims of its stockholders, and they will practically lose the entire value of their holdings. If they be unduly apprehensive, and the assets prove sufficient to meet their claims in whole or in part, the defendants will profit by their good fortune; and in no event will the defendants, if subjected to liability, be called upon to pay more than is sufficient to discharge the just demands of the petitioners. The court may be relied on to so frame its decree. As to the inconsistent charge of laches, we are of the opinion that the petitioners have moved in ample time to protect their rights. They are not chargeable with fault because they did not find out the alleged misconduct of the bank's governing officials before it was claimed to have been wrecked and placed by the directors in the hands of a receiver; and, even though they might then have ascertained the true condition of affairs, it was not unreasonable to wait 26 months, at which time it became apparent that the assets of the bank would be insufficient to meet the demands of its stockholders. The status was in no way changed by the delay, and the defendants are not in a position to complain thereof.

2. Unfaithful officials of a corporation are primarily liable to it for their misconduct. But where they are in control, and minority stockholders are unable to secure relief within the corporation, such stockholders may usually maintain an equitable proceeding, and thus call the managing officials to account for fraud or acts which are ultra vires. 3 Cook, Corp. (5th Ed.) § 735. To such a proceeding the corporation is a necessary party defendant, in order that the result may bind it, and bar any future action which it might bring for the same cause. Bethune v. Wells, 94 Ga. 486, 21 S. E. 230. Had not the bank been placed in the hands of a receiver, the right of petitioners to bring the present proceeding would not be open to question. It is insisted, however, that, after a receiver for the corporation has been appointed, all actions must proceed in his name, as he represents not only the corporation, but all persons concerned in the due winding up of its affairs. Ordinarily, it is undoubtedly true that the receiver is the proper party to bring suit against offending officials. But when, as in the present case, the receiver is himself charged with having been one of the officials guilty of the wrongdoing, an equitable proceeding may be maintained by the stockholders, the receiver and the corporation both being made parties to the action. 2 Morse, Banks & Banking (4th Ed.) § 718, p. 1151; Brinckenhoff v. Bostwick, 88 N. Y. 52. And it is unnecessary to allege any demand made upon the receiver to sue, since he could not be permitted to sue himself, nor would he be a proper person to prosecute a suit against his fellow wrongdoers. 3 Cook, Corp. (5th Ed.) § 741, and note on page 1911, citing Flynn v. Third Nat. Bank, 122 Mich. 642, 81 N. W. 572. The receiver must, however, be made a party defendant, that he may be given an opportunity to defend the action. 3 Cook, Corp. § 738, pp. 1898, 1899. To allow such a proceeding does not bring about a multiplicity of suits, as contended, for some one must prosecute a suit against the corporation's unfaithful officials in order to establish their liability and call upon them to account. Nor is there anything in the suggestion that the remedy of the complainants was to apply to the court to have another receiver appointed to take the place of Weslosky. To remove him from office on the ex parte application of the complainants would be manifestly unjust; whereas to inquire into the truth of the charges of misconduct brought against him on which they base their right to sue would involve a trial of the case made in their petition as a preliminary step towards granting their prayer to be allowed to maintain an action against him and his fellow directors. One trial of the controlling issue should suffice to settle it once and for all. Certainly it was within the discretion of the court to allow petitioners to maintain the action, notwithstanding the corporation had been placed in the hands of a receiver. Stephens v. Augusta Telephone Co., 120 Ga.

1062, 48 S. E. 433, and cases cited. It does not appear that the court abused its discretion.

3. Another assignment of error upon the refusal of the court to vacate its order allowing suit to be instituted is "because the petition on which the order was issued does not allege fraud, or the commission of any ultra vires acts on the part of the directors." In this connection Civ. Code 1895, § 1860, is cited, and plaintiffs in error insist that no ultra vires acts were shown, since the provisions of law the directors were charged with having violated did not apply to the Commercial Bank of Albany, but only to state banks which issue circulating notes, and that there is no charge against the directors of actual fraud. Of course, if the complaint of the stockholders were idle, and obviously without merit, this would have afforded ground for refusing to grant them permission to bring their suit. But is it so? It is somewhat amplified in the petition they were allowed to file against the defendants below, who sought to have the action stayed. In that petition the charge is made that a few weeks before the suspension of the bank, the directors declared a semiannual dividend of 3 per cent. on the capital stock of the bank, which dividend was not taken from the net profits arising from the business, and which crippled the bank by withdrawing cash assets, and led petitioners and others to believe that the bank was in a sound and solvent condition. There are other allegations indicating that the conduct of the directors in making loans to themselves and relatives and endeavoring to conceal the true state of the bank's affairs was fraudulent. Clearly, the petition was such as to withstand a general demurrer. The motion to vacate the order granting permission to sue cannot be said to supply the place of a special demurrer to the petition filed. That motion in the most general terms alleges that "as matter of law, under the allegations of the petition [for leave to institute suit], no legal right existed in the plaintiffs to exhibit said petition against any of the defendants named therein, nor to institute any action nor to recover any judgment or decree against the corporation nor any of its officers or directors, nor is it competent in law or equity to wind up the affairs of the bank, nor to fix the rights of stockholders in the proceeding which the plaintiffs have instituted." The most the court below was called on to determine in passing upon this motion was: (1) Were the complainants proper parties to institute such a proceeding? (2) Did they set forth a cause of action? (3) Was it expedient to allow them to maintain the suit in behalf of themselves and other stockholders similarly situated? Accordingly, we cannot undertake at this time to deal with the question whether or not the acts of the directors complained of amounted to a violation of the banking laws of the state, nor to pass upon any other question which can and should be raised by special demurrer to the petition. Suffice it to say the court below rightly held it was incumbent on the defendants to defend the proceeding in the usual and regular way by demurrer or answer, or both.

Judgment affirmed.

SIMMONS, C. J., absent.

(122 Ga. 330)

SOUTH GEORGIA RY. CO. v. RYALS.

(Supreme Court of Georgia. June 15, 1905.)

1. RAILROADS—KILLING STOCK—ACTION FOR DAMAGES—DECLARATION.

In a suit brought in a county court against a railway company for the negligent killing of stock, where the declaration alleged in general terms "that said damage was done by the running of the locomotive and cars of said defendant in said county in a careless and negligent manner by said defendant's employés," it was subject to a special demurrer on the ground that it failed to specify wherein the defendant was negligent, or to put it on notice of the tort complained of; and in the absence of amendment the declaration should have been dismissed.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1551, 1562.]

2. SAME—OWNERSHIP.

Where suit was brought for the negligent killing of stock by a railroad company, and the declaration failed to allege the ownership of such stock, it was subject to special demurrer on that ground.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Pleading, § 1539.]

3. SAME—ALLEGATIONS AS TO NEGLIGENCE.

If a declaration alleges with sufficient specification negligence on the part of the defendant and its agents or employés, and in what such negligence consisted, and where it occurred, it is not necessary to set out the names of the particular agents or employés alleged to have committed it.

4. TRIAL—PRACTICE.

The practice and modes of procedure in the county court are similar to those in the superior court.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by C. W. Ryals against the South Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

This case originated in the county court of Brooks county, and was appealed to the superior court. Ryals brought suit against the South Georgia Railway Company, alleging that the defendant had damaged him in the sum of $70, besides interest, by killing certain cattle and a hog which were described in an account attached to the declaration. The only allegation of negligence was "that said damage was done by the running of the locomotive and cars of said defendant in said county in a careless and negligent manner by said defendant's employés." The defendant demurred to the declaration generally, and also on the ground that it failed to specify wherein the defendant was negligent, or to put it on notice of the tort complained of; that

it failed to allege that the stock killed belonged to the plaintiff; that the petition was not arranged in orderly paragraphs, and that it failed to state any facts constituting negligence, or to state what agents or employés of the defendant were negligent. The demurrer was overruled, a recovery was had by the plaintiff, a motion for new trial was overruled, and the defendant excepted. Among other assignments of error was one based on the overruling of the demurrer, to which ruling a bill of exceptions pendente lite has been duly filed.

L. W. Branch, for plaintiff in error. S. S. Bennet, for defendant in error.

LUMPKIN, J. (after stating the above facts). A general allegation in a declaration that damage was done by the running of the locomotive and cars of a certain railroad company in a careless and negligent manner by its employés is subject to special demurrer. In the absence of amendment, a declaration based on such an allegation should be dismissed. Seaboard Air-Line Ry. v. Pierce, 120 Ga. 230, 47 S. E. 581; Macon R. Co. v. Stewart, 120 Ga. 890, 48 S. E. 354; Russell v. Central of Ga. Ry. Co., 119 Ga. 705, 46 S. E. 858. As to a suit in a justice's court, see Macon & Birmingham R. Co. v. Walton, 121 Ga. 275, 48 S. E. 940. Section 2321 of the Civil Code of 1895, under which, upon proof of injury from the operation of its locomotives, cars, and other machinery, a presumption of negligence arises against the railroad company, states a rule of evidence, and does not dispense with proper pleadings. In a suit against a railroad for the killing of stock a failure to allege ownership of the stock furnishes ground for special demurrer. Ga. Ry. & Electric Co. v. Knight (March term, 1905) 50 S. E. 124. If there is a sufficient allegation of negligence on the part of a railroad company in respect of time, place, and circumstance, it furnishes no ground for demurrer that the declaration does not give the name of the negligent agent. Pierce v. S. A. L. Ry., 122 Ga. 664, 50 S. E. 468. The practice and modes of procedure in the county court are similar to those in the superior court. Civ. Code 1895, §§ 4198, 4204. The court having erred in overruling the demurrer, all that occurred subsequently to that ruling was nugatory, and need not now be considered. Macon R. Co. v. Walton, 121 Ga. 276, 48 S. E. 940.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 181)

GEORGIA CO-OPERATIVE FIRE ASS'N v. BORCHARDT & CO.

(Supreme Court of Georgia. June 14, 1905.)

1. FIRE INSURANCE—ASSIGNMENT OF POLICY.
The assignment of a fire insurance policy without the consent of the insurer, after a loss has occurred thereunder, does not render the policy void, but the assignee has the right to bring an action thereon.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 475, 1483.]

2. SAME—VALIDITY.
Such assignment is valid without the consent of the insurer, although the written transfer of the policy purports, by its terms, to be subject to the consent of the insurer.

3. SAME—ACTION ON POLICIES.
Properly construed, the suit in the present case was upon the insurance policies, and not upon a written adjustment of the loss and a promise in writing by the defendant to pay the amount shown by the adjustment.

4. SAME—PETITION—CONSTRUCTION.
The name, "The Georgia Co-Operative Fire Association," by which the defendant was sued, taken in connection with the allegations in the petition that "the defendant insurance company or association [had] an agent and a place of doing business in the" county wherein the suit was brought, and on a named date issued "its certain policy of fire insurance whereby and by the terms of which it insured against loss by fire" certain property, imported a corporation, and it was not necessary, even as against a special demurrer, to allege the corporate existence of the defendant.

5. WRIT OF ERROR—ASSIGNMENTS OF ERROR—QUESTIONS PRESENTED.
An assignment of error, in exceptions pendente lite or in a motion for a new trial, that the court erred in refusing to sustain a motion to rule out the testimony of a named witness, does not properly present any question for determination by this court, when the testimony in question is not, either literally or substantially, set forth in connection with the assignment of error in such exceptions, or in the ground of the motion for new trial complaining of the ruling of the court, and no statement thereof is attached as an exhibit to the exceptions or to the motion.

6. INSURANCE—ACTION ON POLICY—ADJUSTMENT—CONCLUSIVENESS.
In a suit upon a fire insurance policy, brought by an assignee of such policy against the company which issued it, the defendant cannot be held bound by an adjustment of a loss sustained under the policy, made after the assignment, between the insurer and the assignor of the policy, unless in such adjustment the assignor acted as the authorized agent of the assignee.

(Syllabus by the Court.)

Error from City Court of Brunswick; A. D. Gale, Judge.

Action by Benjamin Borchardt & Co. against the Georgia Co-operative Fire Association. Judgment for plaintiffs, and defendant brings error. Reversed.

Ernest Dart, for plaintiff in error. C. P. Goodyear and Max Isaac, for defendants in error.

FISH, P. J. Benjamin Borchardt and Co., a firm composed of Benjamin Borchardt and Albert Fendig, brought an action in the city court of Brunswick against "The Georgia Co-operative Fire Association" on two fire insurance policies, alleging that "the defendant insurance company or association" had an agent or place of doing business in the county of Glynn. Both of the policies were alleged to have been issued by the defendant upon a certain stock of groceries and the store fixtures contained in a described build-

ing in the city of Brunswick, one of them having been issued on July 6, 1903, to H. H. Brady, and by him subsequently transferred, with the consent of the defendant, to L. Bordeaux, and the other having been issued by the defendant on August 17, 1903, to said Bordeaux. The first policy was alleged to have been issued "in consideration of a membership fee of eight cents and a monthly assessment of eighty cents," and the other "in consideration of a membership fee of forty cents and a monthly assessment of forty cents," the older policy being in the sum of $400, and the other in the sum of $200. It was alleged that the premiums on each policy had been paid for a full term of one year, and that on October 24, 1903, a fire occurred which totally destroyed the property insured, which then belonged to Bordeaux. It was further alleged that after the fire "an adjuster of said association came to Brunswick and adjusted said fire loss with the said L. Bordeaux, in writing, for the sum of" $333.14, "and agreed to pay it within a reasonable time," which sum the plaintiffs were entitled to receive by reason of an assignment, dated October 26, 1903, of each of said policies, of which assignment the said association had due notice. It was further alleged that the adjustment created this sum liquidated demand, and that the association had neglected and refused to pay the same to either Bordeaux or the plaintiffs. Copies of the material portions of the two policies were attached to the petition as exhibits, and the several assignments referred to were also attached. The defendant filed both general and special demurrers, and, subject thereto, answered. The court overruled the demurrers, and upon the trial there was a verdict for the plaintiffs. The defendant had duly filed exceptions pendente lite to the overruling of the demurrers, and also to certain other rulings made during the trial, and, after the verdict, made a motion for a new trial, which the court overruled. In the bill of exceptions error is assigned upon the exceptions pendente lite, and also upon the judgment refusing the new trial.

1. The petition was demurred to upon the ground that no cause of action was set forth therein in favor of anybody, and upon the further ground that the facts set forth therein showed that the plaintiffs had no legal right to institute and maintain the suit. It needs no argument to demonstrate that a cause of action was set out in the petition. The only ground urged here in support of the contention that the petition did not show a cause of action in favor of anybody is that the transfers of the policies to the plaintiffs, without the consent of the insurer, rendered them void, and section 2102 of the Civil Code is cited to support such contention. That section provides that "an alienation of the property, and a transfer of the policy, without the consent of the insurer, voids it"; but this section is not applicable after a loss occurs. "After the loss occurs, a sale of the property and transfer of the policy does not affect the liability of the insurer, but the assignee may recover." Section 2105.

2. The contention that the petition showed no right of recovery in the plaintiffs, because each of the written transfers to them was "subject to the consent of the Georgia Co-operative Fire Association," and such consent was not alleged, is without merit. As the section of the Civil Code last cited shows, no consent of the insurer was necessary to render valid assignments of the policies occurring after the loss. After the loss, the claim of the insured, like any other chose in action, could be assigned without in any way affecting the insurer's liability. Civ. Code 1895, § 2105; May, Ins. 468; Wood, Ins. 189. It has been held, rightly we think, that a condition in a policy of fire insurance prohibiting an assignment or transfer of the same after loss, without the consent of the insurer, is null and void, as inconsistent with the covenant of indemnity and contrary to public policy. Joyce, Ins. §§ 904, 2322; Roger Williams Ins. Co. v. Carrington, 43 Mich. 252, 5 N. W. 303; Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91; Goit v. Ins. Co., 25 Barb. (N. Y.) 189; Courtney v. Ins. Co., 28 Barb. 116; West Branch Ins. Co. v. Helfenstein, 40 Pa. 289, 80 Am. Dec. 573. The policies of insurance having been assigned after loss, the assignee simply stood in the shoes of the assignor, and any valid defense which the insurer might have had against the insured could be set up against the assignee. No right of the insurer being affected by the assignments of the policies, it would be a mere act of caprice or bad faith for it to take advantage of the stipulation that the transfers were subject to its consent, by withholding such consent, in order to defeat the claim of the assignee. The assignments being perfectly valid without the consent of the insurer, and its rights being in no way affected thereby, the condition in question was superfluous, and the law will not tolerate its enforcement against the assignee. The words "subject to the consent of the Georgia Co-operative Fire Association" are to be treated as mere surplusage. Doubtless the assignor, by mere inadvertence or mistake, merely filled out a blank form on the back of the policy for an assignment before loss, or followed the wording of the previous assignment of one of the policies before loss, to himself.

3. One ground of the special demurrer was that the petition declared upon a written adjustment of the loss, and a special promise in writing by the defendant to pay the amount of such adjustment, and that no copy of the adjustment or of such written promise was attached to the petition, and therefore the suit should be dismissed. We agree with the view taken by the defendant in other grounds of its demurrers; that is,

that this was a suit upon the insurance policies, and not upon a written promise to pay the specific amount shown by the written adjustment of the loss. In the first place, the petition did not allege that the defendant or its adjuster promised in writing to pay the amount of the adjustment, or any other amount. The allegation was that the adjuster of the defendant had "adjusted said fire loss with the said Bordeaux in writing for the sum of three hundred and thirty-three" dollars and fourteen cents, "and had agreed to pay it within a reasonable time." From this it appeared that the adjustment was in writing, but whether the agreement to pay the amount thereof was in writing did not appear. There was no allegation that anything had been assigned to the plaintiffs except the policies, nor did it even appear whether the assignments of the policies occurred before or after the adjustment; and the right of the plaintiffs to receive the amount fixed by the adjustment was alleged to be "by reason of an assignment of each of said policies, * * * of which assignment the said association had due notice." It is true that in one paragraph of the petition it was alleged "that, although said association had promised to pay said sum of three hundred and thirty-three dollars and fourteen cents aforesaid within a reasonable time as the satisfaction of said loss, said company or association has wholly neglected and refused to pay same to this date, or any part thereof, to either the said Bordeaux or these petitioners; and petitioners further show that the said adjustment created this a liquidated demand"; and this allegation as to the amount sued for, being a liquidated demand, is relied on in support of the ground of the demurrer now under consideration. But this does not show that the plaintiffs were not suing on the contracts contained in the policies. We understand a liquidated demand to be one "where by agreement or otherwise the sum to be paid is fixed or certain." Civ. Code 1895, § 2884. So the mere allegation that the adjustment created this a liquidated demand, without more, simply amounts to an averment that the amount of the liability of the insurer upon the policies had, by reason of the adjustment, become fixed and certain. The amount of the insurer's liability might well have been liquidated without in any wise interfering with the right of the insured, or of one to whom the policy had been assigned after a loss, to bring an action upon the breach of the covenants contained in the policies.

4. There was a special demurrer upon the ground that it was not alleged in the petition whether the defendant was a corporation, partnership, or natural person. In Mattox v. State, 115 Ga. 212, 41 S. E. 709, the accused was indicted for the offense of simple larceny, the indictment alleging that the owner of the property alleged to have been stolen was the Acme Brewing Company. A demurrer was filed upon the ground that the indictment was defective, for the reason that it did not set forth the ownership of the property, as the term "Acme Brewing Company" was not the name of an individual, and did not import either a partnership or a corporation. The demurrer was overruled, and the accused was tried and convicted. This court held that the name "Acme Brewing Company" imported a corporation, and that "where, in an indictment for larceny, the ownership of the goods alleged to have been stolen is laid in a name which imports a corporation, the presumption is that it is the name of a corporation, and it is not necessary, even as against a special demurrer, to allege the fact of incorporation." In Holcomb v. Cable Company, 119 Ga. 466, 46 S. E. 671, it was held that the name, "The Cable Company," imports a corporation, and that, "when the name of a party to a suit is such as to import that the party is a corporation, there is a presumption to this effect, which prevails until the contrary is shown." This ruling was likewise made upon a special demurrer. So if the name, "The Georgia Co-operative Fire Association," imports a corporation, or does so when considered in connection with allegations in the petition, it is clear from these decisions, one rendered in a criminal case and the other in a civil case, that, even as against a special demurrer, it was not necessary to allege whether the defendant was a corporation, partnership, or natural person. It is perfectly evident that the name is not that of an individual. It is also evident that this name, when taken in connection with the allegation that "the defendant insurance company or association has an agent and place of doing business in [Glynn] county," and on named dates issued "its certain [policies] of fire insurance whereby and by the terms of which it insured," etc., imports either a firm or a corporation, as an entity not an individual, engaged in carrying on business, must be the one or the other. The name itself is more appropriate to a corporation than to a partnership, for the name of no individual is disclosed therein. It is clear, from previous decisions of this court, that, if the defendant had been engaged in carrying on a regular business under the name "The Georgia Co-operative Fire Company," the name thus used would have imported a corporation. Wilson v. Sprague Mowing Machine Co., 55 Ga. 672; Cribb v. Waycross Lumber Co., 82 Ga. 597, 9 S. E. 426; Smith v. Columbia Jewelry Co., 114 Ga. 698, 40 S. E. 735; Mattox v. State, supra; Perkins Company v. Shewmake, 119 Ga. 617, 46 S. E. 832; Holcomb v. Cable Co., supra; Turners Chapel A. M. E. Church v. Lord Lumber Co., 121 Ga. 376, 49 S. E. 272. In each of those cases the name ended with the word "company," which was not pre-

ceded by the conjunction "and," as is usual in partnership names. We can see no reason for making a distinction between the words "company" and "association" when they are respectively used to designate an entity engaged in carrying on business and making contracts. Each of the words is used in defining the other. One of the meanings of the word "company" is "an association of persons for the purpose of carrying on some enterprise or business," and one of the meanings of the word "association" is a "union of persons in a company or society for some particular purpose." Webst. Dict. So the word "association," when used with descriptive adjectives as the name of a business entity, is as much indicative of a corporation as the word "company" when so used. Other courts, in determining whether a particular name imported a corporation, have made no distinction between these two words. Stein v. Indianapolis Building Association, 18 Ind. 237, 81 Am. Dec. 353; Odd Fellows' Building Association v. Hogan, 28 Ark. 261. We are of opinion that the name by which the defendant was sued, when considered in the light of the allegations of the petition, imported a corporation, and there was therefore no error in overruling the special demurrer in question.

5. In the exceptions pendente lite, and in one ground of the motion for a new trial, error is assigned upon the refusal of the court, upon motion of the defendant, to rule out all of the testimony of a named witness for the plaintiffs. What the testimony of this witness was neither appears in connection with the assignment of error in the exceptions pendente lite, nor in the ground of the motion for a new trial complaining of this ruling of the court, and no statement of such testimony is attached to the exceptions, or to the motion as an exhibit. Under numerous rulings of this court, therefore, this assignment of error cannot be considered.

6. One ground of the motion was "that the court erred in ruling that the assignment of the policy was sufficient, valid, and legal, and that the sole issue in the case was whether there had been an adjustment of the loss and a promise to pay a specific amount in settlement thereof." One assignment of error upon this charge is that there were other issues raised by the defendant's plea besides the question as to whether there had been an adjustment of the loss. Another ground was that the court erred in charging that "if the defendant company, through its agent, Mr. Wilcox, agreed with Bordeaux that his loss sustained amounted to the sum of $333.14, and agreed to pay that amount in settlement thereof, then the plaintiffs in this case, B. Borchardt & Co., the transferees of these two policies from L. Bordeaux, would be entitled to recover that amount, and would be entitled to recover interest on such amount from the date of the agreement or adjustment until the same was paid, at the rate of 7 per cent. per annum." One assignment of error upon this instruction is that the plaintiffs "could not recover under an agreement with Bordeaux to pay Bordeaux, unless the agreement to pay was itself transferred to Borchardt & Co." Another ground was that the court erred in charging that if the jury believed that the plaintiffs had, by a preponderance of the evidence, established that the defendant agreed with Bordeaux that the amount of the loss sustained by him under the terms of the policies was $333.14, and agreed to pay that amount in settlement of the same, it would be the duty of the jury to find in favor of the plaintiffs the full amount of $333.14, with interest from the date of the adjustment. Error is assigned upon this instruction, because "the evidence disclosed no legal right of Borchardt & Co. to recover a sum agreed to be paid to Bordeau," and because the charge "placed upon the plaintiffs no burden whatever of showing any connection between Bordeaux and themselves in order to recover, although the evidence showed no contract or other relation existed between the plaintiffs and the defendant." It is evident from these instructions that the court tried the case upon the theory presented in the plaintiffs' petition; that is, that if there was an adjustment of the loss between an authorized agent of the insurer and Bordeaux, the insured, such adjustment was conclusive upon the insurer, as to its liability and the amount thereof, in a suit upon the policies, not by Bordeaux, but by Borchardt & Co., to whom the policies had been transferred, before the adjustment, by Bordeaux. Whatever effect the adjustment might have had if it had been made between Borchardt & Co. and the insurance company, it seems to us very clear that, in a suit by Borchardt & Co. against the insurer, an adjustment of the loss by an agent of the latter with Bordeaux, occurring after he had assigned all his interest in the policies to the plaintiffs, could not be conclusive upon the defendant upon the question of its liability and the amount of the same. Possibly it might in such a suit be used as evidence in the nature of an admission of liability by the insurer, but it could rise to no higher dignity than that. In order for the adjustment, when made, to be binding upon the insurance company, it had to be also binding upon the then legal owner of the policies. It could not bind one of these parties unless it bound the other. The evidence showed that the general manager and adjuster of the insurer, when he went to Brunswick to adjust the loss, refused to recognise the validity of the assignments of the policies to Borchardt & Co., and hence declined to have any dealings with a member of that firm in connection with the adjustment of the loss. All

his dealings in this respect were with Bordeaux, who was not shown by the evidence to have had any authority to represent and bind the firm to which he had previously assigned the policies. Indeed it was not shown that he even assumed to act as the agent of Borchardt & Co. Under the evidence, an adjustment of the loss between the insurance company and Bordeaux was not equivalent to an adjustment between the insurer and the assignees of the policies, and a promise by the insurer to Bordeaux was not a promise to Borchardt & Co. Besides, the charges complained of assumed that in this suit the defendant company would be bound by an adjustment of the loss by the insurer with Bordeaux, whether he was acting as agent of the plaintiffs or not, and, upon this assumption, the jury were instructed to find for the plaintiffs the full amount sued for, if they believed, from the evidence, that the loss had been adjusted at this sum by the defendant with Bordeaux.

The following cases are authority, if any can be needed, for the proposition that Borchardt & Co. were not bound by the adjustment between Bordeaux and the defendant company. Fire Association of London v. Blum, 63 Tex. 282; American Central Ins. Co. v. Sweetser, 116 Ind. 370, 19 N. E. 159; Brown v. Roger Williams Ins. Co., 5 R. I. 394; Hall v. Fire Association, 64 N. H. 405, 13 Atl. 648; Harrington v. Fitchburg Fire Co., 124 Mass. 126. In the Indiana case it was held: "The assignee of a policy of insurance is not bound by any agreement which the assignor may make with the insurance company, subsequent to the assignment, as to the amount which shall be accepted as a satisfaction of its liability." In the Texas case, as in the present one, the policy had been assigned after the loss occurred, and there was, after the assignment, an adjustment of the loss between the insured and the insurance company, which the court held not to be binding on the assignee. In the other cases cited, the same principle was applied where the policy was made payable, in case of loss, to a creditor of the insured. The claim of the plaintiffs against the defendant was, under the evidence, an unliquidated demand; the charges of the court excepted to were erroneous, and a new trial must be granted.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness, and LUMPKIN, J., not presiding.

(123 Ga. 480)

TUGGLE v. ENTERPRISE LUMBER CO.

(Supreme Court of Georgia. June 17, 1905.)

CORPORATIONS—ACTION FOR TRESPASS—VENUE.

A private business corporation created under the laws of this state, with its principal office in a given county, cannot be sued in another county for a trespass committed therein, when it has no agent, agency, or place of business in the latter county.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

Action by W. R. Tuggle against the Enterprise Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Ellis, Wimbish & Ellis, for plaintiff in error. W. S. Florence and McDonald & Quincey, for defendant in error.

FISH, P. J. W. R. Tuggle, as administrator de bonis non of the estate of Robert Tuggle, deceased, brought an action for damages in the superior court of Irwin county against the Enterprise Lumber Company for alleged cutting by the defendant company of timber on land in that county belonging to the estate of plaintiff's intestate. The petition alleged the defendant company to be a corporation of this state, with its principal office in Fulton county. Service was made by serving copy of second original issued from the superior court of Irwin county on the vice president and general manager of the defendant company at its place of business, in Fulton county. The defendant demurred to the petition on the ground that it showed on its face that the court had no jurisdiction of the defendant or of the cause of action, as it was alleged that the defendant was a domestic corporation, with its principal place of business in the county of Fulton, and that the petition failed to allege that at the time the timber was alleged to have been cut, or at the time suit was filed, or at any time, it had an office and transacted business in Irwin county, or at any time had an agent or place of business in that county. The demurrer was sustained and the case dismissed. Plaintiff excepted to this ruling.

The single question presented for decision is one of law, which may be stated as follows: Can a private business corporation created under the laws of this state, with its principal office in Fulton county, be sued in Irwin county for a trespass committed in the latter county, when it does not appear that the corporation sued has ever had an agent or agency or place of business therein? The solution of the question depends upon the proper construction of section 1900 of the Civil Code of 1895, which provides: "Any corporation, mining or joint-stock company, chartered by authority of this state, may be sued on contracts in that county in which the contract sought to be enforced was made, or is to be performed, if it has an office and transacts business there. Suits for damages, because of torts, wrong or injury done, may be brought in the county where the cause of action originated. Service of such suits may be effected by leaving a copy of the writ with the agent of the defendant, or if there be no agent in the county, then at the agency or place of business." It is clear that an action

against a domestic corporation, mining or joint-stock company, on a contract, cannot, under this section, be brought in a county unless the defendant has an office and transacts business therein. As to suits for damages because of torts, wrong or injury done, the section declares they may be brought in the county where the cause of action originated. If the section went no further, the meaning would be plain that such suits might be brought in the county where the cause of action originated, whether the defendant at the time the suit was instituted had an office and transacted business in that county or not. The section, however, proceeds to say that "service of such suits may be effected by leaving a copy of the suit with the agent of the defendant, or if there be no agent in the county, then at the agency or place of business." "Such suits" evidently refer to "suits for damages because of torts, wrong or injury done," and it is clear that if the defendant has an agent in the county where the tort, wrong, or injury was done, then service may be effected by leaving a copy of the writ with him; but, in the event there be no agent in the county, then the section provides that service may be perfected by leaving a copy of the writ "at the agency or place of business." "The agency or place of business," we think, refer to the same place; that is, "the agency" and the "place of business" are synonymous. At what "agency or place of business," then, may the copy of the writ be left? At the principal place of business? We do not think the statute means this, because it cannot be said that a corporation, mining or joint-stock company has an agency in its home office or principal place of business; and, moreover, if this were the intention, it seems that the statute would have so declared. Nor do we think it means that such a defendant may be served by leaving a copy of the writ at any agency or place of business in any county in the state where it may happen to have an agency or place of business. What reason could there be for allowing such defendant to be sued in a county in the extreme southern portion of the state, where the cause of action originated, and service of the suit to be effected by leaving a copy of the writ at an agency or place of business of the defendant in a county in the extreme northern section of the state? Considering the whole section, we think its purpose is to permit suits against domestic corporations, mining or joint-stock companies, because of torts, wrong or injury done, to be brought in the county where the cause of action originated, provided the defendant has an agent, agency, or place of business in such county, and, if the agent be in the county, service is to be perfected by leaving a copy of the writ with him, but if he, for any reason, is not there, then a copy of the writ is to be left at the agency or place of business in that county. It follows from this interpretation of the section in question that the court properly sustained the demurrer to the petition. In Gillis v. Hilton & Dodge Lumber Co., 113 Ga. 622, 38 S. E. 940, relied on by counsel for plaintiff in error, it appeared that the Hilton & Dodge Lumber Company had at the time the suit was instituted an agent and an office in the county wherein the action was brought, and transacted business at its office in that county.

Judgment affirmed.

(122 Ga. 282)

RIGGINS v. JOSEPH D. BOYD MFG. CO.

(Supreme Court of Georgia. June 14, 1905.)

ACTION ON NOTE—DEFENSES—EVIDENCE.

The trial judge committed no error requiring a reversal of the judgment below in ruling out the evidence introduced by the defendant.

(Syllabus by the Court.)

Error from Superior Court, Pike County; R. B. Russell, Judge.

Action by the Joseph D. Boyd Manufacturing Company against A. D. Riggins. Judgment for plaintiff, and defendant brings error. Affirmed.

Joseph D. Boyd Manufacturing Company sued A. D. Riggins, as trustee for his wife, M. S. Riggins, on a promissory note for $210.87 principal, given by the defendant, as trustee for M. S. Riggins, to the plaintiff, dated February 25, 1901, and due October 15th after date. The petition alleged that the consideration of the note was fertilizers furnished by the plaintiff to the defendant, as trustee, which were used by the defendant, as trustee, on certain lands belonging to the trust estate; and that they were articles of necessity for which the trust estate was liable. A copy of the deed creating the trust and describing the lands of the trust estate was attached to the petition, as well as a copy of an order of the judge of the superior court appointing defendant trustee in lieu of a former trustee. The petition asked for a special judgment on the lands of the trust estate described therein. The defendant, in his answer, admitted that he was trustee as alleged, and pleaded payment. The plea alleged that the defendant, as trustee, in the year 1900 bought of the plaintiff designated quantities and kinds of fertilizers of the aggregate value of $367.75; that in the fall of the same year he paid the plaintiff a stated quantity of lint cotton of the value of $462, which overpaid the amount of his indebtedness to the plaintiff $94.25. On the trial the plaintiff put in evidence the note sued on, and introduced a witness, who testified that the consideration of this note was fertilizers bought by the defendant, as trustee, for M. S. Riggins, and that the trust estate got the benefit of such fertilizers by reason of their use upon the lands of the estate. The plaintiff also introduced in evidence a trust deed dated April 13, 1857, whereby a trust in certain lands, negroes, etc., was created for the benefit of Mary Susan Neal, now Mrs. M.

S. Riggins. The defendant put in evidence a note signed by him as trustee for M. S. Riggins, payable to the plaintiff, for the sum of $670.50, dated May 29, 1900, and due October 15th after date, the consideration of the note being 13 tons and 8 sacks of guano and 5 sacks of acid, with credits thereon of 4,362 pounds of lint cotton. The defendant testified: "That the note sued on was a renewal note for the balance of the $670.50 note given May 29, 1900; that he bought a part of the guano for the trust estate, and a part of it he bought for sale, and did sell a part of it, and used a part of it on the trust estate; that he signed the note as trustee because they asked him to do that; that at the time the guano was bought nothing was said about his buying it as trustee, but he did use on the trust estate ten tons and eight sacks of the guano, and that he used the seven and one-half tons of acid; that the market value of the guano at the time he bought it was $20 per ton, and the market value of the acid at the time he bought it was $17.50 per ton, the total amounting in the aggregate to $347.-25; that he, as trustee, paid from the crops of the trust estate upon the guano debt the amount of 4,362 pounds of middling lint cotton, as appeared from the credits upon the note introduced in evidence, dated May 29, 1900, for the sum of $670.50; that the trust estate had not bought or in any way received anything else from the plaintiff, nor [did] he or the trust estate owe the plaintiff anything else; * * * that his wife, M. S. Riggins, had then living eight children; that the cotton he had delivered to plaintiff from the trust estate was worth at the time he made the delivery 9½ cents per pound, and making the aggregate amount thus paid $414.39, which more than paid off all that the trust estate actually owed the plaintiff upon said note." Upon motion of the plaintiff, the court ruled out the note put in evidence by the defendant and all of the defendant's testimony except that Mrs. Riggins had eight children then living. The court then directed a verdict for the plaintiff. The defendant sued out a bill of exceptions, in which the only error assigned is the ruling out of the evidence offered by the defendant as above set forth.

G. D. Dominick and E. C. Armistead, for plaintiff in error. E. F. Dupree, for defendant in error.

FISH, P. J. The trust involved in this case was construed in Riggins v. Adair, 105 Ga. 727, 31 S. E. 743, where it was held that the trust created is executory, at least during the lifetime of Mrs. Riggins, and that the property of the trust estate is liable for debts created by the trustee for the benefit of such estate. In that case the trust estate was held to be bound for a debt contracted for fertilizers bought for its use. The evidence for the plaintiff in the present case made out a clear case of liability on the part of the trust estate for the amount represented by the note sued on, and, unanswered, demanded a verdict in favor of the plaintiff for the full amount. The defendant sought to meet this by evidence which the court ruled out, and the sole question which we are to decide is whether the court committed a reversible error in ruling out this evidence, for there is no exception to the direction of a verdict by the court or to the particular verdict which was directed. Whether the court was right or wrong in the ruling complained of is, in the view which we take of the case, immaterial. If this evidence had remained in, the jury could not have lawfully found in favor of the defendant generally, nor reduced the amount of the plaintiff's proven claim. From the evidence in question it appeared "that the note sued upon was a renewal note for the balance of the $670.50 note given May 29, 1900." This last-mentioned note showed that it was given by the defendant as trustee, which fact he neither denied in his answer nor by his testimony. He did testify that at the time he bought the fertilizers for which this note was given nothing was said about his buying them as trustee. But, on the other hand, he failed to state that anything was said about his buying them, or any part of them, individually. How, then, did he buy them? Presumably, from the way he signed the note, he purchased them as trustee. He testified that he signed the original note as trustee because "they" asked him to do that, a request which was both natural and proper if he bought the fertilizers for the trust estate, and which, when made, in the absence of anything to contrary, put him upon notice that the intention of the seller was to sell the goods to him in his capacity as trustee. He said nothing to the seller to indicate that he was not purchasing all of the fertilizers for the trust estate, and when he was asked to sign the note as trustee he did so without explanation or objection. If he did not intend to contract in his capacity as trustee for the whole of the fertilizers which he purchased, the time for him to have made this known was when he was asked to do so. As we have already intimated, when he bought the fertilizers for the purchase price of which the original note was given, and signed such note in his capacity as trustee, the presumption was that he purchased the goods in his representative, and not in his individual, capacity. This presumption was not overcome by the mere statement "that at the time the guano was bought nothing was said about his buying it as trustee." When he signed the note in his representative capacity, something was said, or rather declared, in writing, as to the capacity in which he purchased the fertilizers. His statement that he did this because the seller asked him to do it is perfectly consistent with the idea that he bought the whole of the goods as trustee, while the manner in which he signed the note is inconsistent with the idea

that he did not so purchase them at all. He gave no explanation whatever as to why he signed the renewal note as trustee, after having, as he testified, paid all that the estate owed for the fertilizers. He testified "that he bought a part of the guano for the trust estate, and part of it he bought for sale," but he did not testify that this was understood between him and the seller, or that the latter knew that such was the fact; and he failed to state what part he bought for the trust estate, or how much he purchased for himself, nor did he state what the contract price of the guano or the contract price of the acid was. How, then, was it possible for a jury to find, either wholly or partially, in favor of his plea? Granting that it was permissible for him, after signing both the original and the renewal note as trustee, to show that at the time of the purchase his undisclosed intention was to buy a part of the goods for the trust estate and a part for himself individually, it was still incumbent upon him, in order to overcome, either in whole or in part, the case made by the evidence for the plaintiff, to show what he bought for the trust estate and what he purchased for himself, and what the contract price was. This he utterly failed to do. He did testify that he used 10 tons and 8 sacks of the guano on the trust estate, and used the 7½ tons of acid, and sold 3 tons of the guano; but this did not show that the 3 tons of guano which he sold were not bought for the trust estate, and the seller was not bound to follow him up, and see that he used all of the fertilizers for the trust estate. Even if he had shown what part of the fertilizers he purchased for the trust estate and what part he bought for himself, there was no way of fixing the amount to be deducted from the plaintiff's proven claim against him as trustee, for the reason that he failed to show what the contract price of the guano or the contract price of the acid was. The testimony in reference to the market value of the fertilizers and the market value of the cotton paid on the original note was wholly irrelevant and immaterial. The plaintiff was not suing upon a quantum meruit, but for the balance due under a contract of sale, and the price of the fertilizers was fixed by the contract between the parties, and could not be altered by proof of their market value at the time of purchase. This would be true even if the sale had been for cash, to which "market value" presumably refers, whereas the sale in question was upon a credit. The defendant could not go behind the renewal note for the purpose of showing the market value of the cotton which he, as trustee, had delivered to the plaintiff in payment of the original note; for clearly the aggregate amount paid in cotton on the old note must have been agreed upon by the parties when the new note was given for the balance due. The giving of the renewal note was a distinct and clear recognition of the amount still due after the cotton payments had been made on the old note, and, in the absence of any proof as to fraud, accident, or mistake in the settlement evidenced by this note, no evidence as to value of the cotton paid on the note was relevant. As the evidence for the plaintiff demanded a verdict in its favor for the full amount of the note sued on, and the evidence offered by the defendant would not have authorized the jury to find any other verdict, the court committed no error requiring a reversal of the judgment below in the ruling complained of.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 201)

WELLMAKER v. WHEATLEY.

(Supreme Court of Georgia. June 14, 1905.)

1. LEASE—CONSTRUCTION — OPTION TO PURCHASE.

A paper recited that A. had rented to B. a farm for a given year, "with the refusal of buying it next fall for the sum of six dollars per acre," and provided that, if B. "does not take the place," any buildings which he is compelled to have shall be paid for by A. at a reasonable price, if they "do not trade." *Held*, that the legal effect of the paper was to rent the farm to B., and to give him the option of purchasing it at the time and price stated.

2. CONTRACT — CONSIDERATION — PAROL EVIDENCE.

In a writing which carries on its face mutual promises, terms and conditions expressed on one side may be the consideration for terms and conditions expressed on the other; and in such a case proof of a consideration different from that expressed in the writing might alter its terms and conditions, and, when it would have this effect, parol proof would be inadmissible to change or alter the consideration, or to show that it was not applicable to the promise to which, on the face of the contract, it appeared to apply.

3. SAME.

In the absence of proper pleadings asking for a reformation of a written contract, parol evidence is inadmissible to show that the contract does not set forth the real undertaking entered into by the parties.

4. SPECIFIC PERFORMANCE—SALE OF LAND—PETITION.

In a suit by the vendee to compel the specific performance of a contract for the sale of land, it is not necessary that the petition should allege that the vendee has tendered a deed for execution by the vendor, unless, under the terms of the contract, the preparation of the deed devolved upon the vendee.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 279.]

5. PAROL EVIDENCE.

A contract recited that A. had rented B.'s place, which is not otherwise described, and provided that A. should have an option to purchase the place at a stated amount. *Held*, that parol evidence could be admitted to identify the place referred to in the contract.

6. SPECIFIC PERFORMANCE—PLEADING.

There was no error in overruling the demurrer to the petition, nor in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Lincoln County; H. M. Holden, Judge.

Action by C. W. Wheatley against Lowe Wellmaker. Judgment for plaintiff, and defendant brings error. Affirmed.

T. H. Remsen and Jno. T. West, for plaintiff in error. J. M. Pitner and F. H. Colley, for defendant in error.

COBB, J. Wheatley brought an action for the specific performance of an alleged contract for the purchase of land. The petition alleged the making of the contract, a tender of the purchase money, and the refusal of the defendant to accept the same and make the plaintiff a deed. The defendant demurred to the petition on the grounds that no cause of action is set forth, the contract is unilateral, the petition fails to allege that the contract was in writing, and there is no allegation that the plaintiff prepared and tendered a deed to the defendant. The petition was amended, and a writing of which the following is a copy was set forth as the contract relied on:

"September 19th, 1902. This is to certify that C. W. Wheatley has rented Miss Lowe Wellmaker's place for one thousand pounds of lint cotton for the year 1903, with the refusal of buying it next fall for the sum of six dollars per acre. Said place is to be controlled and protected by said C. W. Wheatley just the same as if it belonged to him. The said C. W. Wheatley agrees to take care of the lands, clear what he can free of charge. If he does not take the place, what buildings he is compelled to have, if any, are to be paid for by Miss Lowe Wellmaker at a reasonable price, if we do not trade. [Signed] C. W. Wheatley. Lowe Wellmaker."

The defendant renewed her demurrer, and, the same being overruled, excepted pendente lite. In her answer she admitted the execution of the paper, but denied that it constituted an enforceable contract; averring that it was unilateral and without consideration. A verdict was returned in favor of the plaintiff, and, the defendant's motion for a new trial being overruled, she excepted.

1. The proper construction of the paper relied on by the plaintiff as a contract is that the defendant rented the land to the plaintiff for the year 1903, and gave him an option to purchase. It has been held that an agreement by a lessor to give a lessee at the end of the term the "refusal" of the premises for another definite term was merely an expression of preference for the lessee over others, and did not bind the lessor to renew the lease. Aransas Pass Land Co. v. Hanaford, 4 Tex. Civ. App. 286, 23 S. W. 566. A similar construction of the word was given in a case where one person promised to give another "the refusal [of land] when he sold." Deere v. Nelson, 73 Iowa, 188, 34 N. W. 809. On the other hand, it has been expressly held that an agreement in a lease to give the lessee "the refusal" for another term bound the lessor to rent to the lessee for that term upon the same terms and conditions as the first term. Steen v. Scheel, 46 Neb. 252, 64 N. W. 957; McAdoo v. Callum, 86 N. C. 419; Tracy v. Albany Ex. Co., 57 Am. Dec. 538. "The refusal of buying [the land] next fall for the sum of six dollars per acre," and the agreement that the defendant is to pay for certain buildings "if [the plaintiff] does not take the place," shows the intention of the parties to have been that the plaintiff was to have the option of buying at a fixed price and at a specified time. The expression "if we do not trade" evidently means the same thing as "if he does not take the place." The payment by the defendant for certain buildings is made to depend both upon the plaintiff's taking the place and upon the parties trading. These expressions were intended to convey the same idea and to mean the same thing as "if the plaintiff does not exercise the option."

2. As a general rule, the consideration of a contract is open to inquiry as between the original parties, and even the consideration of a deed may be inquired into when the principles of justice require it. Finney v. Cadwallader, 55 Ga. 78; Civ. Code 1895, § 3599. But this rule is applicable only where the statement as to the consideration in the contract is merely by way of recital. The consideration may be so referred to in the contract as to make it one of its terms and conditions. When this is true, parol evidence is not admissible to vary the term, although the term relates to the consideration. The rule is thus stated in 6 American & English Enc. Law, p. 775: "When, however, the statement of the consideration leaves the field of mere recital and enters that of contract, thereby creating and attesting rights, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction by extrinsic evidence." See, also, Browne on Parol Ev. § 31, p. 44. In a written contract which carries on its face mutual promises, terms and conditions expressed on one side may be the consideration for terms and conditions expressed on the other. In such a case proof of a consideration different from that expressed in the written instrument might alter its terms and conditions, and, if it would, it is inadmissible. Burke v. Napier, 106 Ga. 329, 32 S. E. 134. The contract under consideration in the present case contains on its face mutual promises. There was a promise on the part of Wheatley to pay 1,000 pounds of cotton, and there was a promise on the part of Miss Wellmaker to give to Wheatley the use of the farm for a year, and the right to purchase it at a given sum per acre in the event he saw fit to do so during the fall of that year. It was on its face really a contract for a stated consideration to sell two things—one year's use of the farm, and the right to buy the same upon given conditions. The subject-matter of the sale was double. It is proposed now to show by parol that the contract was not for the sale of two things, but for only one; that is, that the consideration stat-

ed in the contract applied only to one of the subject-matters of the contract. A writing which on its face shows a contract to sell two things is certainly altered in its terms by parol evidence that there was a contract to sell only one thing. There was no error in excluding the parol evidence to show that the consideration as stated in the contract was applicable only to the agreement to rent.

3. There was no plea alleging that that portion of the contract in reference to the option was inserted as a result of fraud, accident, or mistake, and no prayer for a reformation of the contract, and therefore the evidence offered to show that the writing did not constitute the real undertaking of the parties was properly excluded.

4. When a vendor brings an action to compel the specific performance of a contract to buy land, it is incumbent upon him to show an offer of performance on his part by the tender of sufficient title deeds, or by offering to execute such a deed when its preparation does not, by the terms of the agreement, devolve upon the vendee. But in an application for specific performance by the vendee it is not necessary to show that he presented a deed for execution, unless under the terms of the agreement the preparation of the deed devolved upon him. See Emery v. Atlanta Exchange, 88 Ga. 327, 14 S. E. 556.

5. Parol evidence is admissible to identify land which is the subject-matter of a contract, and which is described in the contract merely in general terms, provided the general description is such as, in the light of parol evidence, to clearly identify the property. Johnson v. McKay, 119 Ga. 196, 45 S. E. 992, 100 Am. St. Rep. 166. The contract in the present case referred to the land as "Miss Lowe Wellmaker's place." If this had been the only description of the land, parol evidence would have been admissible to identify the land to which this description applied; but, taking the contract as a whole, the description is even more definite than this, for it, in effect, describes the land as Miss Lowe Wellmaker's place which she rented to C. W. Wheatley, and by parol evidence it can be definitely determined what is the place which is the subject-matter of the contract.

6. Applying the principles above laid down, there was no error in overruling the demurrer to the petition, nor in refusing to grant a new trial.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 237)

STEELE v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. June 14, 1905.)

1. EVIDENCE—WEIGHT AND SUFFICIENCY.

"The testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him when it is self-contradictory, vague, or equivocal;" and unless there is other evidence tending to establish his right to recover he "is not entitled to a finding in his favor if that version of his testimony the most unfavorable to him shows that the verdict should be against him." Southern Ry. Co. v. Hobbs, 49 S. E. 294, 121 Ga. 428.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2438.]

2. RAILROAD—BRIDGE OVER HIGHWAY — INJURY TO TRAVELER.

Under the plaintiff's testimony, and other evidence introduced by him in this case, he was not entitled to recover for an injury received while attempting to pass under a bridge over a highway driving a wagon loaded with cotton, and a nonsuit was proper. Barfield v. Southern Ry. Co., 45 S. E. 282, 118 Ga. 256; W. & A. R. Co. v. Ferguson, 39 S. E. 306, 113 Ga. 712, 54 L. R. A. 802, and citations; Bridger v. Gresham, 35 S. E. 677, 111 Ga. 814; City of Columbus v. Griggs, Adm'r, 38 S. E. 953, 113 Ga. 597, 84 Am. St. Rep. 257; Ray v. Green et al., 39 S. E. 470, 113 Ga. 920; Farmer, Adm'r, v. Davenport, 45 S. E. 244, 118 Ga. 289.

3. SAME.

This case does not fall within the ruling in Samples v. City of Atlanta, 22 S. E. 135, 95 Ga. 110.

4. APPEAL—HARMLESS ERROR.

Whether or not there was error in respect to permitting a question to be asked of a witness for the plaintiff on cross-examination, the ruling would not cause a reversal where the exclusion of the evidence could not affect the decision in regard to the grant of a nonsuit.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Action by W. S. Steele against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Steele sued the Central of Georgia Railway Company, alleging that he had received an injury while endeavoring to pass under a bridge of that company extending over a public highway in the city of Griffin. According to his testimony, he went to Griffin driving a wagon loaded with cotton, two bales being placed on the wagon and a third on top of them, he being seated on the top bale. He intended to cross the railway track at a certain street crossing, but found it blocked by a train, and went further up the railroad. There were several streets at which he could have crossed on a level with the track, but they were somewhat more distant. Nearer by there was a street which passed under the railroad track, and he determined to utilize it. He went along a street which was parallel with the railroad track, and then turned at a point about 100 yards distant from it, into the street which passed under it. The place where he turned toward the railroad was on a somewhat higher grade than the track. He then testified: "Where I started to go under the railroad track it was not more than thirty feet from the railroad. When I turned to go under the bridge I was sitting on the top bale, on the edge of it, with my feet on the bottom bale. When I started down the little hill, and got half way down, I saw the danger, and slided down on the bottom bale below.

and was pushing back with my left hand on the cotton, and had the reins in my right hand, trying to stop the mules. My hand was caught between the beam of the bridge and the cotton. I had the reins in my right hand. In coming down that little hill I threw my hand up on the bale of cotton. When I got my hand upon the cotton I was not more than twenty feet from the railroad track, half way down the little hill. I got down off of the top bale of cotton to get out of the way of the timbers of the bridge. I saw I was not going under, and tried to stop the mules. I did not stop them soon enough. When I got under the railroad track it knocked me off. My hand got caught between the beams of the trestle and the cotton." He was a contractor, had built bridges, and had lived in the neighborhood of Griffin for 15 years. In his testimony also occurred the following statements: "During that time Griffin has been my market. I am familiar with the streets of Griffin. * * * There is a street right up there that crosses the railroad track on a grade. * * * The tunnel route was the nearest, nearer than the crossing above here by some one hundred or two hundred yards. * * * I had only been under that subway one time. I walked under it several years ago, when it was first built, but I did not pay any attention to the height of it. I have rode by the bridge several times. I don't know how many times. I had not passed through there any other time. I come Second street. I had seen the bridge, and knew it was there. * * * I had seen the bridge frequently, and was familiar with the building of county bridges. * * * I could not see that bridge good until I got in thirty feet of it, because it is down in a cut. It was below me. I was up above it. I was going above it until I got within thirty or forty feet. When I got up there I did not know whether it was high enough or low enough, and started down. I saw it just as I started down, and could not stop. I do not know that the bridge is in sight fifty or seventy-five yards up that road. It might be. I did not look to see. I would not swear a man could not get on the top of three bales of cotton and see the subway that distance. It was in the bright open daylight, 10 o'clock in the morning. * * * If I had remained seated on the top bale of cotton the beam would have struck me about the middle of the breast. * * * If I had had my hand in a natural position, instead of up against the bale of cotton, it would not have struck it then. I don't know that it entirely cleared the top bale. I think a little cotton was left on the trestle. I am not right certain about that. I do not know that two bales of cotton with one bale on top of them would clear that thing a foot or more. It will not clear it more than three or four inches. It cleared my head three or four inches. * * * The left hand was the one was hurt by the trestle. I don't know whether I had it above the bale of cotton or not. I only know I was trying to get down." A witness introduced by the plaintiff testified that he thought a person sitting on top of a bale of cotton which rested on two others could see the subway 100 yards before reaching it; that from his knowledge of the place he thought an ordinary wagon with three bales of cotton, two lying down and one on top of them, would clear the bridge about 10 inches; that the subway had been in its present condition for about 14 years, and no one had previously been injured by going under it; that the subway from top to bottom was in plain view of a person walking on the ground for 200 yards before reaching it, following the direction which the plaintiff pursued; and that it would be obvious to the witness for 200 yards before reaching the subway, with two bales of cotton on a wagon, that it would be dangerous to go under it. He also testified that: "I think, as a matter of fact, it would be apparent to an ordinarily prudent man coming down the street on top of two bales of cotton that it was dangerous to undertake to go under that subway. It would be apparent to a man of ordinary observance." This last statement was admitted over objection. On the close of the evidence for the plaintiff the court granted a nonsuit, and the plaintiff excepted.

M. W. Beck and R. T. Daniel, for plaintiff in error. R. L. Berner and Hall & Cleveland, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 336)

HOSCH LUMBER CO. v. WEEKS.

(Supreme Court of Georgia. June 15, 1905.)

1. TESTAMENTARY TRUST—EXECUTION.

Where several executors of a will have qualified, the joint act of all of them is necessary to execute a special trust created by the will.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 346.]

2. EXECUTORS — EXECUTION OF DEED—JOINDER OF EXECUTORS.

Where one of several coexecutors executes a deed which depends for its validity upon the signature of all, the heirs of the estate will not be held to have acquiesced in his unauthorized act, where there is no evidence that actual notice of the execution of the deed was ever brought home to them, and the deed is not recorded until after the execution and record of a later deed by an administrator de bonis non of the estate.

3. DEPOSITIONS — NOTICE — FAILURE TO APPEAR.

A party who gives notice to his adversary that the depositions of a named witness will be taken at a given time and place is under no legal obligation to appear at the place and time stated and take the depositions. If the opposite party, after complying with the notice, desires the evidence of the witness for himself, he must on his own part give notice to his adversary as required by the law relating to the taking of depositions. He may not cross-ex-

amine a witness who has never been examined in chief, and introduce in evidence the depositions so taken.

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by the Hosch Lumber Company against J. S. Weeks. Judgment for defendant, and plaintiff brings error. Reversed.

A. G. Powell, C. J. Haden, W. S. Humphreys, Y. L. Watson, and E. L. Bryan, for plaintiff in error. Shipp & Kline, for defendant in error.

CANDLER, J. This was a common-law action of ejectment, brought to recover a lot of land in Colquitt county. Several demises were laid, as will hereafter more fully appear. The plaintiff and the defendant claimed under a common source of title, viz., the estate of James Davison, of Greene county, who held under a grant from the state, and who died in 1882, leaving a will in which it was provided that the testator's wild lands, which included the lot now in dispute, "be sold at such time and place as may be to the best interest of my estate, at the discretion of my executors and the ordinary of this [Greene] county." The testator's wife, Ella M. Davison, was made executrix, and W. F. Davant and W. A. Overton executors, of the will. In 1884 Davant and Overton, by consent of the executrix, resigned as executors, and were duly discharged from their trust by the ordinary of Greene county. In 1894 Robert E. Davison filed a petition in the court of ordinary of Greene county, reciting that the duly nominated executors of the estate of James Davison were no longer qualified to act, and that the estate was not fully administered, and praying that he be appointed administrator de bonis non cum testamento annexo of the estate of James Davison. The petition was granted, and letters of administration issued to Robert E. Davison. In 1897, for the purpose of administering the estate of James Davison, and for distribution among the heirs of the estate, the administrator applied for and received from the ordinary of Greene county permission to sell all the wild lands of the estate of James Davison at public or private sale, by tracts or as a whole, citation and notice having first been made and published; and on June 8, 1897, the lot in dispute, with others, was conveyed by the administrator to Charles J. Haden. This deed was recorded in the office of the clerk of the superior court of Colquitt county on May 6, 1898. On April 6, 1903, the administrator made a deed in which it was recited that "the estate of James Davison, deceased, late of Greene county, Ga., has been fully administered, pursuant to the terms of the will of said deceased, James Davison, and all of the debts of said estate have been fully paid," and conveying to the devisees named in the will (four in number) "all the right, title and interest in the real property of said estate that may yet remain in said estate"; designating certain lots, including the one now in suit. In 1899 C. J. Haden conveyed the land in dispute to the Hosch Lumber Company, the plaintiff below, and in 1903 the devisees under the will of James Davison made a like conveyance to the plaintiff.

The foregoing is an outline of the claim of title set up by the plaintiff. The defendant introduced a quitclaim deed made by W. F. Davant, who, as will have been seen, was one of the executors of the will of James Davison to J. B. Norman, dated March 7, 1882, and recorded September 12, 1898, covering the lot in dispute, and a warranty deed from Norman to the defendant, dated November 10, 1883, and recorded in 1899. The defendant also introduced in evidence, over the objection of counsel for the plaintiff, what purported to be the depositions of W. F. Davant, in which he testified that he was executor of the will of James Davison, and had the entire management of the estate; that the other executor, Overton, and the executrix, Mrs. Ella M. Davison, gave the management of the estate entirely to him; that he executed and delivered the deed dated March 7, 1882, to James Davison, "as the virtually sole executor, and for the benefit of the estate"; that the transaction was bona fide, and done in the interest of the estate; that the other executor and the executrix did not sign the deed because the entire matter was left to him; and that in making the deed he acted as sole executor by request of the other executor and the executrix. The defendant also introduced a certified copy of a petition to the court of ordinary of Greene county by Davant, Overton, and Mrs. Davison, executors of the estate of James Davison, reciting that it was to the interest of the estate, and in accordance with the will of their testator, that "all the wild and scattered lands belonging to said estate be sold"; designating, among others, the lot in controversy, and praying for an order granting leave to sell such lands at private sale. In pursuance of this petition it was ordered "that such executors have leave to sell such wild lands at private sale if they think it is to the interest of said James Davison's estate to sell the same." The quitclaim deed made by Davant to Norman by virtue of this order, to which we have already referred, contained no recital of the authority under which it was executed, and was signed, "Wm. F. Davant, Executor of James Davison, Deceased."

At the conclusion of the evidence the court directed a verdict for the defendant, and the plaintiff excepted.

1. It will be seen that the plaintiff put in evidence without objection a chain of title apparently complete, originating in a grant from the state to James Davison. The defendant's title sprang from the same source, and the question arises, who has the better title? The parting of the ways came with the quitclaim deed by Davant to Norman in

1882. The decision of this case turns in large measure upon the construction of this deed, for, if it conveyed title, the subsequent deed from the administrator de bonis non was nugatory, and the court was right in directing a verdict for the defendant, while, if it did not pass title, the defendant must yield to the superior claim of the plaintiff. The deed from Davant to Norman was executed by virtue of a provision in the will of James Davison that the wild lands of the testator's estate be sold at such time and place as might be to the interest of the estate, at the discretion of his executors (three in number) and the ordinary of Greene county. The vital question at issue is whether or not Davant, a single executor, had authority to execute a deed which would pass title; his coexecutors having qualified, but failing to join with him in the deed. There seems to be no doubt that in ordinary acts of administration of an estate the act of one executor is the act of all, and is binding upon the estate. Hall v. Carter, 8 Ga. 388; Wilkerson v. Wootten, 28 Ga. 568; Willson v. Whitfield, 38 Ga. 270. The sale of the wild lands of the estate of James Davison, however, was a special trust created by the will, and the concurrent discretion of the three executors and the ordinary of Greene county was required to execute it; and it is well settled that, to execute a special trust, all the executors must join. This distinction was clearly drawn in the Code of 1882, § 2449, which was in force at the time the deed from Davant to Norman was executed, and is still the law of this state. See Civ. Code 1895, § 3317, where it is provided that, "if more than one [executor] qualifies, each is authorized to discharge the usual functions of an executor, but all must join in executing special trusts." See, also, Willson v. Whitfield, supra; 5 Enc. Dig. Ga. Rep. 845.

2. It is claimed, however, by counsel for the defendant that the heirs of James Davison and those claiming under them are estopped by long acquiescence in the deed from Davant to Norman. A complete reply to this contention is that there is no evidence whatever in the record of actual notice to the heirs of the deed, while that instrument was not recorded until September 12, 1898, more than 16 years after its execution, and several months after the record of the deed from Davison, administrator, to Haden. It was not shown that any part of the purchase price received by Davant from Norman was paid to the heirs, or that they knew at any time that the conveyance had been made. It was not claimed that the defendant or his predecessors in title had acquired any prescriptive title to the land in controversy.

3. It was sought to show by the depositions of Davant that he had authority from the coexecutors to execute the deed to Norman, and to manage the affairs of the estate generally. From the bill of exceptions it appears that there was no evidence that these depositions were taken upon notice; "that they were not accompanied by any notice to take the same, nor was there any service or evidence of service thereon; that they were not dated, neither was it shown that they were taken in any lawful manner or by any lawful authority, being unaccompanied by any caption or return. The deposition began in the following language: 'Hosch Lumber Co. vs. J. S. Weeks et al. In the Superior Court of Colquitt County, Georgia, Greene County. Deposition of W. F. Davant, Being Duly Sworn on Cross-Examination by the Defendant.' Then follows the deposition signed by W. F. Davant, and following the signature of W. F. Davant was the following: 'The foregoing depositions were taken before me, as stated in the caption and answers reduced to writing by me; and I certify that I am not interested in the cause, nor of kin or counsel to either of the parties. George A. Merret, Commissioner.' There was attached an order from John C. Hart, judge of the superior court, appointing George A. Merret as a commissioner to take depositions in the county of Greene, and a statement of Merret that he accepted the appointment. There was no notice to take the deposition, and no evidence of any notice, nor any waiver thereof." It appeared further that counsel for the defendant "stated that he had been served with a notice by the plaintiff to take this witness' testimony, but that the plaintiff failed to attend at the hearing, and that the defendant proceeded to cross-examine the witness and to have his testimony taken." The depositions were admitted over the objections of the plaintiff, and this is assigned as error. Clearly the evidence was inadmissible. There was barely a semblance of compliance with the provisions of Civ. Code 1895, §§ 5315-5317, relating to the formal requisites of depositions to be used as evidence. The mere statement of counsel in the courtroom cannot supply the deficiency of these vital requisites. Conceding everything that he stated, the depositions were still inadmissible. They purported to have been the "cross-examination" of the witness Davant. A cross-examination where there has been no examination in chief is a paradox. If, after having been notified by the plaintiff that the depositions of the witness would be taken, and having complied with the notice, and the plaintiff having failed to put in an appearance at the time specified, the defendant desired the testimony of the witness in his own behalf, he should, on his part, have given the plaintiff notice that the witness would be examined as his witness. The plaintiff was under no legal obligation to examine the witness after having given notice that his depositions would be taken, and, if he was to be examined as a witness for the other party, the

plaintiff had the right to be notified, so as to be present and cross-examine him.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(71 S. C. 451)

BROOKSHIRE v. FARMERS' ALLIANCE EXCHANGE OF SOUTH CAROLINA, Limited, et al.

(Supreme Court of South Carolina. April 18, 1905.)

1. REFERENCE—AUTHORITY TO MAKE.
Where calendar No. 2 is being called at intervals during the trial of cases on calendar No. 1, on motion in open court after trial of a case on calendar No. 1 an order of reference may be made in a case on calendar No. 2, without further notice, one counsel of record being in court, and the other not being present, and having no notice of the motion.

2. CORPORATIONS — RECEIVER — PROOF OF CLAIMS.
In a suit by a stockholder against a corporation, an order of reference was made to ascertain if the conditions of the corporation required the appointment of a receiver. On the coming in of the master's report a receiver was appointed. *Held*, that an order calling in creditors and stockholders to prove their claims was not appealable.

Appeal from Common Pleas Circuit Court of Richland County; Gary, Judge.

Action by H. E. Brookshire against the Farmers' Alliance Exchange of South Carolina, Limited, and others. From an order of reference calling in creditors, defendants appeal. Dismissed.

Hunt, Hunt & Hunter and Lyles & McMahan, for appellants. Jas. S. Verner and Bellinger, Townsend & Haskell, for respondent.

JONES, J. The appeal in this case is from the following order of reference: "On motion of plaintiff's attorneys, after hearing counsel in opposition thereto, it is ordered that the master do forthwith advertise once in each week for three weeks for all creditors and stockholders of the defendants the Farmers' Alliance Exchange of South Carolina to come in and prove their claims before him, and that he take testimony offered before him as to said claims, and report thereon to this court with all convenient speed." From this order defendants appeal upon two grounds: (1) That the order could not be granted without notice to defendant when said cause had not been reached upon any call of the calendar. (2) Because the order granted relief to the plaintiff which was in its nature final and appropriate only after the determination of the issues joined by the pleadings. Respondent has made motion to dismiss the appeal upon the ground that the order is not appealable.

An order of reference to take testimony is ordinarily addressed to the discretion of the circuit court, and the appeal therefrom will not be entertained unless the order is assailed on jurisdictional grounds (Simms v. Phillips, 46 S. C. 149, 24 S. E. 97; Barnwell v. Marion, 56 S. C. 54, 33 S. E. 719), or operates to deny to litigant a mode of trial to which he is entitled by law (Alston v. Limehouse, 61 S. C. 4, 39 S. E. 192; Muckenfuss v. Fishburne, 65 S. C. 574, 44 S. E. 77). Assuming, for the present, that the order is appealable under the first exception, which assails it for want of notice, we do not think the exception can be sustained. The facts in this connection stated in the "case" are as follows: "At the spring term, 1904, court of common pleas for Richland county, the case stood on calendar 2 for trial as No. 131. On the 22d day of April, 1904, the court was engaged in the trial of causes on calendar 1, and had been so continuously since the opening of court, except that cases of calendar 2 had been called up at intervals. On the said 22d day of April, 1904, Messrs. Lyles & McMahan, two of the attorneys for the defendant, being present in court, having, after a motion, obtained an order for a nonsuit in a case which had been tried before the court and jury, Mr. James S. Verner, of the counsel for the plaintiff, arose, and addressed the court, asking for an order in this cause. Objection was made by Mr. Lyles upon the ground that the defendant had received no notice of any such application; that the said cause had not been reached in any call of calendar 2; that Messrs. Hunt, Hunt & Hunter, the leading counsel for the defendants, were not present in the court, and had no intimation of the purpose of counsel for plaintiff to apply for said order." From this it appears that the case was on calendar 2 for trial, and subject to be called at intervals during the progress of the court. It was therefore not necessary to give any further notice of the application for order of reference. Ferguson v. Harrison, 34 S. C. 172, 13 S. E. 332.

In connection with the second exception, we consider the appealability of the order, as both questions involve a consideration of the present status of the case. The contention of the appellant is that the order appealed from is, in its nature, a final order, and appropriate only after the issues are determined; while the contention of the respondent is that the order is a mere administrative order, made after the determination of the issues as to the appointment of a receiver. A brief history of the case is therefore necessary in order to determine its present status. The object of the action was to wind up the affairs of the Farmers' Alliance Exchange. On March 7, 1903, a rule to show cause why a receiver should not be appointed was made by Judge Ernest Gary, and an order issued in the meantime restraining the defendant from disposing of the funds of the said exchange. On March 21, 1903, the same judge made an order, referring the cause to the master of Richland county to take testimony as to the allegations of the pleadings and report the same,

with his conclusions of fact, in order that the court may be fully advised as to the conduct of affairs of said corporation before deciding as to the necessity of the appointment of a receiver, and continued the hearing of the motion to appoint a receiver. It was agreed by counsel on both sides that the testimony taken by the master be construed as taken on the merits of the case, as well as for the purpose of the motion for a receiver. The master filed his report on June 27, 1903, to which exceptions were taken by defendants. After the filing of the master's report, the consideration of the matter of appointing a receiver was resumed on July 21, 1903, and Judge Gary, from the pleadings, the report of the master, which he confirmed, and the admitted fact that the capital of the exchange had been used and invested other than as authorized by the charter, adjudged that plaintiff was entitled to an order appointing a receiver, and accordingly he made an order appointing J. Q. Marshall receiver, "unless the said corporation shall within ten days from the date of the filing of this order, give a bond in the penal sum of $33,000, being double the value of said property, with sufficient surety, to be approved by the clerk of this court, conditioned to fully account for and deliver over, whenever hereafter required by any final adjudication in the above-entitled cause, the assets and property of said Farmers' Alliance Exchange of South Carolina, Limited, and to satisfy any decree, judgment, or order that may be made in the case." The order further continued the temporary injunction until the further order of the court. From this order, an appeal was taken to this court, which resulted in the following order: "The order of Judge Gary, made at chambers, from which this appeal was taken, provided for the appointment of a receiver unless the defendant corporation entered into a bond in the penal sum of $33,000, with sufficient surety. It is agreed by counsel on both sides that the bond provided for in the order of Judge Gary (pursuant to section 265, subd. 8, of the Code of Civil Procedure) has been given by the defendant corporation and approved by the clerk of the court of common pleas for Richland county within the time required. It is therefore the opinion of this court that a hearing of this appeal is unnecessary, as the entering into the bond on the part of the appellant vacated an order of Judge Gary in so far as the appointment of a receiver is concerned. It is therefore, upon motion of appellants' attorney, ordered that the appeal herein be dismissed. [Signed] Y. J. Pope, Chief Justice. January 8, 1904."

This was the status of the case when Judge Gary passed the order appealed herein. When an appeal from an order is dismissed, all questions made thereunder are, as a rule, deemed to be finally determined. Muckenfuss v. Fishburne, 68 S. C. 41, 46 S. E. 537. In this particular case, however, the effect of the above order of this court would not operate as a confirmation of the report of the master and overruling all exceptions thereto, as if the circuit court had considered the whole case on its merits, because Judge Gary, at chambers, was not trying the case on its merits, but was only hearing a preliminary motion for a receiver before judgment on the merits. Judge Gary's confirmation of the master's report is to be construed as his accepting the facts reported by the master as a basis for his action on the motion for a receiver. This court, by this order, expressly declared that a hearing of the appeal therein was unnecessary, because, in the opinion of the court, the giving of the bond vacated the order in so far as the appointment of a receiver is concerned. The effect of the bond is to prevent a receivership preliminary to a hearing on the merits, and to preserve the property in the meantime. The case was pending for such a hearing at the time of Judge Gary's last order. The master made a report, with testimony, which counsel have agreed shall be considered as given upon the merits of the case. In this report the master says: "The testimony of Mr. J. L. Keitt, one of the directors, taken by me, is to the effect that the corporation owes no debts, but the attorney for the defendants, M. L. Donaldson and J. C. Coitt, took the position that he was not called upon either by the said order of reference or the agreement herein to prove at this reference their claims, and I so ruled against the contention of the attorneys for the corporation." In this situation of affairs it was perfectly competent for Judge Gary to issue the order in question as an administrative order, calling in creditors and stockholders to establish their demands. Such information would enable the court on a final hearing to determine the solvency or insolvency of defendant corporation, the necessity for the appointment of a receiver after a hearing on the merits, and to make final disposition of the assets of the defendant corporation in the event the court should finally determine to take control of and administer the same. The order is not assailable on jurisdictional grounds, and does not deny to the defendant corporation a mode of trial to which it is entitled by law. It is therefore not appealable.

The appeal herein is dismissed.

(72 S. C. 1)

THOMASSON v. SOUTHERN RY.*

(Supreme Court of South Carolina. May 20, 1905.)

1. RAILROADS—ACCIDENT AT CROSSING—EVIDENCE.

In an action for personal injuries at a street crossing which had been blocked for a longer time than permitted by the ordinance of the town, evidence was admissible to show that plaintiff and others were laborers, who had

*Rehearing denied May 29, 1905.

gone home for dinner, and had only a few minutes to return to their work, and that plaintiff's foot was crushed while attempting to pass between the standing cars.

2. TRIAL — INSTRUCTIONS — QUESTION FOR JURY.
It is not error, where an ordinance has been duly proved, and its terms are plain, for the court to charge the jury to determine what the ordinance is, and whether it has been violated.

3. SAME—EXPRESSION OF OPINION.
Where the court refuses to charge that there is no evidence that the acts in question were willful, it is not an expression of opinion for him to say that there is some evidence of such acts, if there be such evidence.

4. RAILROADS—ACCIDENT AT CROSSING—NEGLIGENCE—INSTRUCTIONS.
In an action against a railroad for injuries at a crossing, an instruction that gross negligence is sometimes defined as entire absence of care, and willful negligence as such conduct as shows an intentional disregard of the precautions which a prudent person would exercise, and that a person may be careless intentionally, may be grossly careless intentionally, and may be willfully disregardful of the care he ought to exercise, did not put on defendant a greater burden of proof than the law required.

5. SAME—PUNITIVE DAMAGES.
On evidence of a willful, wanton, or reckless act, done with a reckless design, or utter disregard of the rights of others, punitive damages may be awarded, without proof of malice towards the person injured.

Appeal from Common Pleas Circuit Court of Spartanburg County; Benet, Special Judge.

Action by Claude Thomasson against the Southern Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

C. P. Sanders, for appellant. Stanyarne Wilson and C. P. Sims, for respondent.

POPE, C. J. This was an action brought to recover $15,000 for personal injuries received by the plaintiff on the 25th day of March, 1902, for having his foot crushed between the bumpers of two of the cars of the defendant company near the depot of the defendant in the town of Gaffney, S. C. The complaint alleges that the train of the defendant was standing across one of the streets of the town of Gaffney, blocking the same, for over 20 minutes, in violation of one of the ordinances, which prohibited any train from blocking any street for more than 5 minutes; that the plaintiff was compelled to pass between two of the defendant's cars which were standing across said street in order to go to his work, which was in the cotton mill; that while so attempting to pass between said cars the servants of the defendant who were in charge of said train, without any warning of their intention, either by sounding the whistle or ringing the bell, moved said cars willfully, wantonly, carelessly, and negligently, and, in utter disregard of the rights of the plaintiff, caused the cars to be moved, crushing plaintiff's foot between the bumpers, and mashing it so badly that it had to be amputated. The answer of the defendant denied all of the material allegations of the complaint which alleged any negligence, willfulness, or wantonness on its part, and it set up the affirmative defense that the plaintiff was guilty of contributory negligence. Both parties introduced testimony going to show that this was a freight train. The plaintiff alleged that said train occupied the street for more than 20 minutes, while the defendant's testimony was that only for 4 or 5 minutes at one time did its train occupy said street. There was testimony going to show that it was almost impossible for the defendant to transact its business in said town of Gaffney without occupying the street more than 5 minutes; that an engine was hitched to said train with steam, ready to move at any time, and that the plaintiff undertook to cross the track when the said train of cars was moving or shifting; that just at the moment it came to a standstill, and before reversing its motion, plaintiff undertook to pass over the bumpers of the cars, and that, in undertaking to climb between the cars, he took the risk of being injured; that by walking 100 yards plaintiff could have easily gone around the train; that none of the employés of the defendant had any knowledge whatever of the fact that either the plaintiff or any one else was attempting to cross over the bumpers of the cars at the time they undertook to cross the train, or that any one was in the slightest danger of being injured. The evidence was conflicting as to the following facts: As to whether this train was standing across this street for more than five minutes, and as to whether it moved without sounding the whistle or ringing the bell. Several witnesses were allowed to testify, against the objection of the defendant, that others had crossed between these cars on the day named and at other times, and to give their reasons why they passed between them. This evidence was objected to on the ground that it was incompetent, irrelevant—being the act of an independent third party, not connected with this suit—and not responsive to any of the allegations in the complaint. His honor allowed the evidence to go in. The defendant requested his honor to instruct the jury that there was no evidence of willfulness or wantonness, and that no vindictive or punitive damages could be given. His honor refused the request, stating that there was some evidence tending to prove an intentional and willful act. The defendant requested the court to charge as follows: "A town or city has no right to pass an ordinance which is unreasonable, and, if it does pass an unreasonable ordinance, then such ordinance cannot be enforced." His honor refused this request, and instructed the jury that an ordinance could be enforced, even though it was unreasonable, and that it would be unlawful to disregard it. In reference to the defense of contributory negligence on the part of the plaintiff, under the statutes, his honor charged the jury that

gross negligence was an entire absence of care, and also that gross negligence was an intentional act. After hearing the testimony and the charge of his honor, the jury returned a verdict of $7,500. A motion was made for a new trial on the minutes of the court, which was refused. From the judgment entered upon the verdict the defendant has appealed; challenging the correctness of his honor's ruling in admitting the evidence excepted to, as well as the correctness of his charge in the matters herein referred to.

We will first consider the exceptions from 1 to 10, inclusive, which are as follows:

"(1) In allowing the following question to be asked the witness Gaston, to wit: 'State whether or not you crossed over the train at any crossing that day?' And in allowing the witness to answer the same. The error being that this question was incompetent and irrelevant; it being the act of an independent third party, not connected with this suit, and there being no allegations in the complaint in reference to any such act.

"(2) In allowing the following question to be asked the witness Gaston, to wit: 'How did you cross the track?' And in allowing him to answer the same. The error being that this was incompetent and irrelevant; it being the act of an independent third person; there being no allegations in the complaint in reference to it.

"(3) In allowing the following question to be asked the witness, Gaston, to wit: 'Why did you cross between the cars?' And allowing him to answer this question; the same being incompetent and irrelevant, being the act of a third person, and being speculative, and there being no allegations in the complaint in reference to it.

"(4) In allowing the following questions to be asked the witness, Gaston: 'Well, state whether or not other people did the same thing?' 'Did you cross over the train again?' And in allowing the witness to answer the same. The error being that these questions were incompetent and irrelevant, being as to the act of other people not connected with this suit, and there being no allegations in the complaint in reference to the same.

"(5) In allowing the following question to be asked the witness Gaston: 'Mr. Gaston, if you had heard the whistle blow or the bell ring, would you have tried to cross?' And in allowing the witness to answer the same. The error being that this was incompetent and speculative, in that it allowed this witness to give his opinion as to his act; he being a third person, not connected with this suit, and there being no allegations in the complaint in reference to it.

"(6) In allowing the following questions to be asked the witness Gaston, to wit: 'How did people get across the street when it was blocked that way?' 'What did the majority do?' And in allowing the witness to answer the same. The error being that these questions were incompetent and irrelevant, in that they referred to the acts of people who were third parties, not connected with this suit, and tended to prove the custom of other people, and there being no allegations of the complaint in reference to the same.

"(7) In allowing the following question to be asked the witness J. D. Belch: 'Do you cross over this crossing going to dinner?' And in allowing the witness to answer the same. The error being that this was incompetent and irrelevant, in that it referred to the act of a third person; there being no allegations in the complaint in reference thereto.

"(8) In allowing the following questions to be asked the witness W. C. McAbee: 'Did you see other people crossing there at that time ahead of Mr. Thomasson?' 'How many did you see?' And in allowing him to answer the same. The error being that this was incompetent and irrelevant, it being in reference to the acts of third persons, not connected with this suit, and there being no allegations in the complaint in reference thereto.

"(9) In allowing the following questions to be asked the plaintiff: 'Why didn't you wait until the train moved off across the crossing?' 'Why were you compelled to go on?' And in allowing him to answer the same. The error being, that this was incompetent and irrelevant and speculative; there being no evidence of any force used by defendant, and no evidence that the plaintiff was in danger, and did this act under any apprehension of personal injury.

"(10) In allowing the following question to be asked the plaintiff: 'Did individuals cross ahead of you?' And in allowing him to answer the same. The error being that this question was incompetent and irrelevant; it being as to the act of third persons not connected with this suit, and about which the complaint contained no allegations."

An examination of the testimony here referred to, involving the questions and answers, is somewhat perplexing. Usually it is the case that the testimony as to the acts of third persons not connected with the case is objectionable, but in this case, which involves the conduct of the railroad company as to its train blocking streets, preventing persons from attending to their work, where time is very important to them, as laborers, such testimony as is objected to goes to show what were the conditions confronting the plaintiff on the day of his injury. And also it goes to show the conduct of persons blocked from their daily labor by a train of the defendant being allowed to shut up streets used by them, which streets were shut up by the train for more than five minutes; and, in this view, we cannot say that the testimony should have been shut out. The circuit judge is clothed with a great deal of responsibility in regard to trials, and he admitted this testimony, endeavoring to keep the witnesses within limit in their answers. All in all, we think the testimony was admissible, and

therefore these exceptions must be overruled.

The eleventh exception is as follows: "Because his honor erred in charging the jury as follows: 'With reference to the blocking of the street as alleged in the complaint—that it was in violation of the town ordinance of the town of Gaffney. You will have to determine from the testimony what was the town ordinance, and whether it was violated by the action of the railway company.' The error being that by this charge his honor has left as a fact to be determined by the jury what the town ordinance was. Whereas, it is respectfully submitted, this was a question of law for the court." As to this exception, we do not see that the circuit judge erred as herein attempted to be pointed out. The ordinance was proved by the clerk of the council of Gaffney, its phraseology was direct, and really needed no construction by the judge, for it simply forbade the railroad company to obstruct the streets for more than five minutes at a time. And his honor, in the charge referred to, simply said: "You will have to determine from the testimony what was the town ordinance, and whether it was violated by the action of the railroad company." Under this view of the case, there was no error. This exception is therefore overruled.

We will next consider the twelfth exception: "Because his honor erred in not charging the defendant's tenth request to charge, to wit: 'A city or town has no right to pass an ordinance which is unreasonable, and, if it does pass an unreasonable ordinance, then such ordinance cannot be enforced.' And in charging in connection therewith as follows: 'I cannot charge you that, because it is conceivable that a city or town might pass an unreasonable ordinance, and it might enforce it very successfully. It might be a hardship on the public, but it can be enforced so long as it is an ordinance, and it is unlawful to disregard it; and, if the public desire to have it repealed, the proper plan is not to violate it, but to take proper steps to have it repealed. I cannot say, because an ordinance of a city may be unreasonable, it cannot be enforced, and I therefore have to refuse the tenth request.' The error being, as it is respectfully submitted, that an unreasonable ordinance is a void ordinance, and his honor erred in not charging the jury as requested by the defendant, and in substantially instructing the jury that, even if this ordinance was an unreasonable ordinance, the violation of it would be a violation of law on the part of the defendant as long as it was unrepealed, and that it would be an act of negligence on the part of the defendant to violate it, even though it was unreasonable." A municipal ordinance within the constitutional grant of the Legislature cannot be impeached in court for mere unreasonableness. Darlington v. Ward, 48 S. C. 583, 26 S. E. 906, 38 L. R. A. 326, and cases therein cited. But if attacked on constitutional grounds, the unreasonableness of an ordinance may be considered as a circumstance, with a view to ascertaining if it really violates some constitutional provision. State v. Earle, 66 S. C. 203, 44 S. E. 781, wherein it was held that it was competent to show that an ordinance is so unreasonable in its operation as really to be spoliation or confiscation of property under the guise of legal forms, in violation of the federal Constitution. The ordinance under consideration being questioned for mere unreasonableness in the request to charge, and not because in violation of the Constitution or as void for want of power, a judicial question was not presented, and there was no error in refusing to charge that the ordinance was void because unreasonable.

We will now consider the thirteenth exception: "Because his honor erred in instructing the jury that an unreasonable ordinance could be enforced as long as it was unrepealed, and that it would be an unlawful act to disregard an unreasonable ordinance, thereby leading the jury to believe that, even if the ordinance of the town of Gaffney was unreasonable, that the defendant would be liable to the plaintiff if it violated it, and plaintiff was injured. The error being that an unreasonable ordinance is void, and not binding upon the citizens of the town or state, and his honor erred in not so instructing the jury." This exception, involving as it does the circuit judge's action as referred to in the twelfth ground of appeal, renders it unnecessary for us to consider this thirteenth exception. This exception is therefore overruled.

We will next consider the fourteenth and fifteenth exceptions: "(14) Because his honor erred in not charging the defendant's twelfth request, to wit: 'No vindictive or punitive or exemplary damages can be allowed in this case, as there is no evidence showing any intentional or willful or wanton act of the defendant, causing the injury complained of.' And in connection therewith in charging the jury 'that there is in the case evidence tending to prove that the defendant was guilty of a willful, intentional, or wanton act.' (a) The error being that there is a total failure on the part of the plaintiff to prove any intentional, willful, or wanton act, such as would warrant a verdict for vindictive or punitive damages, and it was error of law on the part of his honor the presiding judge to refuse the defendant's request. (b) That the refusing of this request, and his honor's charge in connection therewith, was a charge upon the facts, and an instruction to the jury that there was evidence tending to prove the contention of plaintiff upon a material point which was in dispute, thereby violating the provisions of the Constitution which prohibits a circuit judge from charging upon the facts of the case.

"(15) Because his honor, in connection with defendant's twelfth request, erred in

instructing the jury as follows: 'If I could clearly see there was no evidence showing any intentional or willful or wanton act on the part of the railway company, I would so charge you; but, without saying how much evidence there is, or what its effect should be, or whether it proves satisfactorily that the railroad company is guilty of intentional or willful or wanton negligence, I am bound to say that there is in the case evidence tending to prove that. * * * I am bound, and I hold there is some evidence in the case tending to show that.' (a) The error being, as it is respectfully submitted, that his honor, in so charging, was charging in respect to matters of fact, in violation of the constitutional inhibition in that regard, and was instructing the jury that there was evidence tending to prove the contention of plaintiff upon a disputed question of fact, in violation of the inhibition contained in section 26, art. 5, of the Constitution of this state, which prohibits 'that judges shall not charge juries in respect to matters of fact, but shall declare the law.' (b) The error being that by this charge his honor stated the testimony, contrary to section 26, art. 4, of the Constitution, and expressed his opinion that there was evidence on a disputed question of fact."

While the writer of this opinion thinks that the circuit judge, as complained in this exception, expressed an opinion in regard to the weight of the evidence, and in so doing transgressed article 5, § 26, of the Constitution of 1895, the majority of the court are of the opinion that the exception should be overruled, for these reasons: "The remarks of the judge were directly responsive to the appellant's request to charge, and appellant cannot complain, for, as matter of fact, there was some evidence tending to show a recklessness or wanton injury. The court expressed no opinion as to the weight or sufficiency of the evidence, and was careful to so state. It was the duty of the court to refuse the request if there was some evidence on that issue. It would doubtless be the best practice for the trial court to simply decline such a request, without making reference to the testimony, if, in his view, the charge could not be properly made; but still, in legal effect, the mere refusal of such a request is tantamount to a holding that there is some testimony to be submitted to the jury. Often, in refusing a nonsuit or motion to direct a verdict, a court is called upon to say whether there is any testimony to be submitted to the jury, and, although such a ruling may be in the hearing of the jury, it is not deemed to be a charge on the facts. In all such cases, as also in refusing to grant a new trial, whether there is any testimony tending to show a particular issue is rather a question of law than a question of fact. An examination of the record satisfies this court that there was some testimony tending to show a wanton or reckless injury to plaintiff, and in such case the refusal to charge as requested was proper and was not a charge in respect to matters of fact."

We will next examine exception 16, which is as follows: "Because his honor erred in charging the jury in respect to matters of fact, in contravention of section 26, art. 5, of the Constitution of this state, when he instructed and charged them: 'And there was in this case evidence tending to prove that the railroad company was guilty of an intentional or willful or wanton act, and in instructing them that there was evidence upon which the jury could find a verdict for vindictive or punitive damages.' " This is but a renewal of the alleged errors of the circuit judge as set out in the fourteenth and fifteenth exceptions.

Exception 17: "Because his honor erred in instructing the jury in reference to gross negligence and willful negligence, as follows: 'Gross negligence is sometimes defined as the entire absence of care. Willful negligence is such conduct as shows an intentional disregard of those precautions which a prudent person would exercise. Now, a person may be careless intentionally; may be grossly careless intentionally. On the other hand, he may be willfully disregardful of the care he ought to exercise.' The error being: (1) By this charge his honor put upon the defendant a greater burden of proof than the law does, and by this charge the jury were instructed substantially that, in order to prove gross negligence on the part of the plaintiff, it was necessary to show an entire absence of care on his part. Whereas it is respectfully submitted that it is only necessary to show an absence of slight care, and led the jury to infer that the defense of gross negligence on the part of the plaintiff could not be established except upon proof of the entire absence of care on his part. (2) That by this charge his honor instructed the jury that willfulness was an intentional disregard of those precautions which a prudent person should exercise, whereas it is respectfully submitted that negligence and willfulness are the opposites of each other, and under his honor's charge the jury were bound to find that the plaintiff intended to commit the act, before they could find that his carelessness, if it existed, contributed to the injury, even though such carelessness may have been gross; thus putting upon the defendant a greater burden than the law places upon it." We have reproduced the entire exception, including not only what the presiding judge did say, but what the appellant thinks he might have had in his mind. Certainly an examination of the language used by the presiding judge shows it is free from error. This exception is overruled.

Exception 18: "Because his honor erred in charging in reference to the gross carelessness of the plaintiff as follows: 'Now, a person may be careless intentionally, may be grossly careless intentionally, and, etc.' The

error being that by this charge his honor the circuit judge placed upon the defendant a greater burden than the law places upon it, and substantially instructed the jury that before the defense of gross negligence could be sustained, it was necessary to show that the plaintiff's act was an intentional one." How in the world the language of the circuit judge as quoted, to wit: "Now, a person may be careless intentionally, may be grossly careless intentionally, and, etc.," could injure the defendant, we cannot see. If the appellant imagined that we would hunt up the language of the circuit judge as covered by "etc.," he was in error. This exception is overruled.

Exception 19: "Because his honor erred in charging as follows: '(1) But there are cases in which the law allows a party to assess what are called "punitive damages"—damages intended to punish a defendant for an intentional, willful, unlawful, and reckless wrongdoing. (2) And he must satisfy you by the preponderance of the testimony that the railroad company was guilty of such conduct as described, that the negligence was unlawful, reckless, wanton, etc., before you can find punitive damages. (3) That kind of negligence which would justify giving punitive damages is not simply carelessness or heedlessness, but it implies the person has acted intentionally has some evil purpose or reckless design, or utter disregard of the rights of others, has done what he intended to do to injure another person, or acted in such a way as would likely injure another person, regardless of his rights, implying an act of the mind—an intention to do so—not an intention to injure, but to do an act which resulted in injury. (4) But if he succeeds still further in satisfying you that the railroad company's negligence was willful, wanton, or reckless, then he would be entitled to punitive damages.' The error being, as it is respectfully submitted, that his honor by this charge led the jury to believe (a) that the mere reckless doing of an act, without the intention to injure, would warrant a verdict for vindictive or punitive damages. (b) That by this charge his honor led the jury to believe that the willful doing of an act, even if done without the intention to injure, but the mere intention to do the act, would warrant the jury in rendering a verdict for vindictive or punitive damages. (c) That his honor's charge in this respect was calculated to lead the jury to believe that the mere doing of a willful or intentional act by the defendant was sufficient to warrant a verdict for vindictive or punitive damages, even though the defendant might not have known or did not know that injury would result to the plaintiff. (d) That this charge was calculated to lead the jury to believe that the plaintiff could recover vindictive or punitive damages from the defendant in this case if it appeared that the defendant acted in a willful or intentional manner, even though there was no malice on the part of the defendant against the plaintiff, and no intent on its part to injure him. (e) That his honor, in so charging, made the word 'reckless' equivalent to 'willfulness' or 'wantonness,' and put into it a broader and deeper meaning than such as the law implies." (a) We have held that the use of the word "reckless," in characterizing the conduct of a defendant to one injured by it, is sufficient to support punitive damages. Pickett v. R. Co., 69 S. C. 445, 48 S. E. 466. (b) We do not see that the circuit judge, by the language he used, justified this inference of the appellant. (c) The language of the appellant in this subdivision of the nineteenth exception is not supported by the words used by the circuit judge. (d and e) These subdivisions are not responsive to the language actually used by the circuit judge. Therefore the nineteenth ground of appeal is overruled.

Exception 20: "Because his honor erred in not granting a motion for a new trial on the grounds, it is respectfully submitted: (a) That there was no evidence to sustain the allegations of willfulness, wantonness, or intentional wrongdoing on the part of the defendant. There being no evidence of any intention on the part of the defendant to injure the plaintiff, and no evidence of malice towards him, and no evidence of any knowledge on its part that plaintiff was in a place of danger, or that he intended to cross the railway track at the time he did." (a) We do not think there was error in the circuit judge in refusing to grant a new trial. There was testimony tending to show that defendant's conduct to plaintiff warranted the jury in finding vindictive damages. This exception is therefore overruled.

Exception 21: "Because his honor, having erred in charging the jury in respect to matters of fact, and in charging them on material facts of the case which were in dispute, when he charged them that there was evidence of willfulness, wantonness, and intentional wrongdoing on the part of the defendant, erred in not granting the motion for a new trial on this ground." This ground of appeal has been practically disposed of by what has been already said. The exception is therefore overruled.

The judgment of this court is that the judgment of the circuit court be affirmed.

(104 Va. 273)

POCAHONTAS COLLIERIES CO. v. RUKAS' ADM'R.

(Supreme Court of Appeals of Virginia. June 28, 1905.)

1. NEGLIGENCE — DECLARATION — RIGHT TO DEMAND SPECIFIC STATEMENT.

A declaration charging various grounds of negligence, and averring that each was the proximate cause of the injury complained of, is not demurrable because it leaves defendant ignorant of the particular act of negligence relied on, but defendant, under the express provisions of Va. Code 1904, § 3249, may demand a more specific statement of the ground of complaint.

2. DEATH BY WRONGFUL ACT — RESIDENT ALIEN—RIGHT TO RECOVER.

Va. Code 1904, § 2902, providing that when the death of a person shall be caused by the wrongful act of another, and the act is such as would, if death had not ensued, have entitled the injured person to sue therefor, the person guilty of the wrongful act shall be liable to an action for damages, and section 2904, providing that the amount recovered shall be paid to decedent's personal representative, and distributed to the wife, etc., of decedent, authorize an action for the wrongful death of a resident alien, for the benefit of his resident alien widow and children, residing in another state.

3. MASTER AND SERVANT — DEATH OF EMPLOYÉ—NEGLIGENCE—EVIDENCE.

Evidence in an action against an employer for the death of an employé employed in a coal mine examined, and *held* to support a finding that the employer was guilty of actionable negligence for failing to warn the employé of the danger in entering the mine because of noxious gases therein.

Error to Circuit Court, Tazewell County.

Action by Anton Rukas' administrator against the Pocahontas Collieries Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

Rucker, Anderson & Hughes and J. H. Fulton, for plaintiff in error. Chapman & Gillespie, James H. Stuart, and A. S. Higginbothan, for defendant in error.

WHITTLE, J. This action was brought to recover damages for the death of plaintiff's intestate, Anton Rukas, which is imputed to the negligence of the defendant.

On the morning of November 14, 1901, Rukas, while at work as a collier in the service of the defendant, in one of its mines located near the town of Pocahontas, was overcome and suffocated by smoke and gases generated from fire in an adjoining mine, and conveyed into the mine in which he was employed through connecting galleries.

There was a verdict and judgment for plaintiff, and the defendant brings error.

The first assignment of error relates to the action of the court in overruling the demurrer to the declaration; the objection being that it charges various grounds of negligence, to each of which the accident is proximately ascribed, thus leaving the defendant unaprised of the particular act of negligence which it is called upon to answer.

This objection affords no sufficient ground for demurrer. It is permissible under the practice in this jurisdiction for the plaintiff to allege any number of distinct acts of negligence, and the defendant may guard against surprise by resort to the provisions of section 3249 of Va. Code 1904, which, in a proper case, entitles him to demand a more specific statement of the real ground of complaint. City of Richmond v. Leaker, 99 Va. 1, 37 S. E. 348; Wood v. Am. Nat. Bank, 100 Va. 306, 40 S. E. 931.

The second assignment of error involves the ruling of the court in sustaining the motion of the plaintiff to reject a plea of the defendant which denies the right of the personal representative of a nonresident alien to maintain an action for his death under section 2902 of the Code.

At common law an alien domiciled in a country is entitled to the protection of its laws, and in return therefor owes temporary allegiance to the country of his adoption during the period of his residence. He is subject to the law, as well as entitled to its protection, and is liable to be tried and punished for crime, and may sue and be impleaded in the proper courts to the same extent as a citizen. The general doctrine is stated thus: "While the rights of aliens depend entirely upon the municipal law of the state or nation, or the rights which are given aliens by international law, in the United States, except as to certain political and municipal rights to which citizens only are entitled, resident alien friends have practically all and the same rights and privileges as citizens. These rights and privileges include both personal rights, such as the right to dwell safely in the country, and the right of protection to person, reputation and other relative rights, and property rights." 2 Cyc. 89, and authorities cited.

In the same volume, at page 108, it is said: "So, also, it has been held that an alien might maintain an action for statutory damages or penalty for death by wrongful act." Many of the cases bearing on that question are there referred to.

Alien friends are included in our statute of descents, and by section 43 of the Code are permitted to acquire by purchase or descent, and hold and transmit, real estate, in the same manner and to the same extent as a citizen. These statutes indicate an intention on the part of the Legislature to extend rather than abridge the liberal policy of the common law with respect to aliens.

An examination of the authorities relied on to sustain the overruled plea shows that the decisions are controlled by the status of the parties entitled to the recovery in an action for death by wrongful act, rather than by that of the decedent in his lifetime. The distinction is sharply drawn between the rights of nonresident and of resident relations of the deceased.

Thus, in the leading case of McMillan v. Spider Lake, etc., Co., 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947, it is held that nonresident alien relations of the

deceased are not entitled to the benefits of the Wisconsin statute giving a right of action in such case. This case reviews the authorities, English and American, on the subject, and in all of them the above-mentioned distinction seems to be observed.

So, also, in the case of Deni v. Pennsylvania R. Co., 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676—a case much relied on by the defendant—it is said that "a nonresident alien mother has no standing to maintain an action against a citizen of Pennsylvania to recover damages for the death of her son." The opinion proceeds: "Our statute was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the provisions of it. While it is possible that the language of the statute may admit of a construction which would include nonresident alien husbands, widows, children, and parents of the deceased, it is a construction so obviously opposed to the spirit of the statute that we cannot adopt it."

The weight of authority in this country, however, maintains the right even of nonresident alien relatives of the deceased to receive the benefit of these statutes.

In the case of Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309, Holmes, C. J., in delivering the opinion of the court, observes: "One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon nonresident aliens, Deni v. Pennsylvania R. Co., 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676; Brannigan v. Union Gold Mine Co. (C. C.) 93 Fed. 164. But compare Knight v. West Jersey R. Co., 108 Pa. 250, 56 Am. Rep. 200. On the other hand, in several states the right of the nonresident to sue is treated as too clear to need extended argument. Philpott v. Missouri Pac. R. Co., 85 Mo. 164; Chesapeake, etc., R. Co. v. Higgins, 85 Tenn. 620, 4 S. W. 47; Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Luke v. Calhoun County, 52 Ala. 115. * * * In all cases the statute has the interest of the employés in mind. It is on their account that an action is given to the widow or next of kin. * * * We cannot think that workmen were intended to be less protected if their mothers happen to live abroad. * * * In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in." See, to the same effect, Kellyville Coal Co. v. Petraytis, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191.

None of these cases question the right of resident aliens (by which is meant aliens domiciled in the United States, in contradistinction to those residing in foreign countries) to the benefit of these statutes.

In this case, if the averments of the plea were sufficient to present the issue intended to be raised, the evidence shows that the widow and one of the children of the deceased reside in the state of West Virginia. The question, therefore, of the right of a nonresident alien to maintain this action, does not arise, and upon that question no opinion need be expressed. But the right of a resident alien to the benefits and remedies afforded by sections 2902 and 2904 of Va. Code 1904 is sustained by authority, and is in accordance with sound policy and justice, and this court has no hesitancy in upholding it in the present case.

The third assignment of error is in respect to the rule of the court in giving the four instructions asked for by the plaintiff.

These instructions enunciate no new principles, they correctly propound the plaintiff's theory of the case, and there was evidence tending to sustain them. Upon familiar principles, therefore, they were properly given.

With regard to the instruction as to what constitute proper elements of damage in this class of cases, it is conceded that the instruction conforms to the decisions of this court; but a different rule is invoked, as being, it is alleged, more in harmony with the weight of authority in other states.

It is sufficient to say that the court has recently had occasion to consider that question, and no sufficient reason is perceived to justify a departure from its own precedents. Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850.

The instructions given by the court, as a whole, correctly and fairly submitted the law of the case to the jury, and a more detailed notice of them would be unprofitable.

The gravamen of the charge in the third count of the declaration—the one that presents the controlling issue in this case—was the negligent failure of the defendant, on the morning of the accident, to notify plaintiff's intestate that connecting mines with the one in which he was accustomed to work were on fire, and of the consequent danger of entering that mine. The significance of that allegation will be appreciated in considering the fourth and last assignment of error, namely, the action of the court in overruling the motion of the defendant to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence.

The salient facts, which for the purposes of this appeal must be taken as true, are as follows: In November, 1901, and for a number of years prior thereto, the defendant operated extensive coal mines in the vicinity of Pocahontas. The mines particularly referred to in the record are the New Baby mine, the Old Baby mine, and the West mine, lying parallel and contiguous to each other, and in the order named. The territory occupied by these mines is three miles in length and a mile and a half in width, and embraces a surface area of 3,000 acres. The

map exhibited with the record discloses a perplexing labyrinth of entries, cross-entries, air courses, and traveling ways, some of which are several miles in length, and extend entirely through the mountain. These passages are ventilated by two suction fans, located respectively near the mouths of the fan entries of the New Baby mine and the West mine. The New Baby mine is located about a half a mile from the town of Pocahontas, and the distance from the drift mouth of that mine to the drift mouth of the West mine is between a half and three-quarters of a mile. The Old Baby mine had been abandoned, and its main passageway, for the distance of 900 feet, is used as the approach to the New Baby mine. The passageway to the former near the junction of the two mines was closed with a wooden brattice, which separated the old mine from the new.

On November 14, 1901, at 3 o'clock in the morning, a fire was discovered in the fan of the New Baby mine, which was extinguished in about one hour, but the fan was disabled and not operated again that day. About 4 o'clock a large fire was discovered in a pile of coal at the junction of the Old Baby mine and the New Baby mine, and three other fires were also found burning in the courses leading to the burnt fan. At 5 o'clock there was an explosion in the burning mine, which destroyed the brattice referred to, and afforded an outlet for gases and smoke into the Old Baby mine, whence they were carried through crosscuts to the higher levels of the West mine. The origin of these fires is unknown, nor is it material, in the view which the court takes of the case.

It was a rule of the company to issue checks to its employés every morning from a check office located near the Baby mine. These checks were slips of paper with which the miners tagged loaded coal cars, so that each might receive credit for the number of car loads of coal to which he was entitled.

On the morning of the accident, plaintiff's intestate, with his brother and a miner named Sprengoski, set out from their home, in Pocahontas, to go to their place of work, at about 20 minutes to six o'clock; and, having received their checks, at the usual hour—about 6:15 o'clock—entered the West Mine at the main entrance. After proceeding some distance in the mine, they discovered smoke, but Sprengoski, who was an experienced miner, was unable to determine whether it came from the loca—a small steam engine used in hauling coal cars in and out of the mine—or from the adjoining mine.

Shortly after these men had gone in to their work, one of the company's mining engineers, who had been ordered by the superintendent to ascertain the condition of the West mine, met and turned back 20 or 30 men, miners and mule drivers, who had entered the mine, and it was not until after that occurrence that a man was stationed at the drift mouth to warn people of the danger.

Plaintiff's intestate had no knowledge of these fires. He had only been in the service of the company three or four months, and his work had been confined to a section of the mine known as "Gray Heading," 2¼ miles from the drift mouth of the main entry. Sprengoski worked at Ft. Wayne, which is a shorter distance from the drift mouth than Gray heading, and the Rukas brothers parted with him at that point. When that part of the mine began to fill with gas and smoke, he escaped through an opening near his place of work, with which he was familiar, while the Rukases sought safety in flight along the route by which they had entered—the only one known to them—but were overcome before reaching the outside, and perished.

As observed, the officials of the company learned of the condition of affairs at the mines soon after the first fire was discovered; and, after extinguishing the fire at the fan, they had been in vain attempting to control the fire in the Baby mine for some two hours before plaintiff's intestate and his companions entered the West mine. They knew that several hundred men composed the day shift in that mine, and that their hours of labor commenced between 6 and 7 o'clock. They also knew, or in the exercise of ordinary care ought to have known, of the dangerous consequences likely to result from an uncontrollable fire in a gaseous coal mine to an adjoining mine on a higher level, and connected by crosscuts with the burning mine. Such conditions imperatively demanded prompt measures for the safety of employés.

The duty of the defendant to warn plaintiff's intestate of the changed conditions and the certain peril to which he would be exposed by continuing to work in the mine is corollary to the primary duty of exercising ordinary care to furnish him a reasonably safe place in which to work in the first instance. The main principle has repeatedly received the sanction of this court, and the subordinate proposition seems also to be well settled.

The doctrine is stated as follows by Shearman & Redfield: "The master must therefore give warning to his servants of all perils to which they will be exposed, of which he is or ought to be aware, other than such as they should, in the exercise of ordinary care, have foreseen as necessarily incidental to the business, in the natural and ordinary course of affairs, though more than this is not required of him." 1 Shearman & Red. on Neg. (5th Ed.) § 203.

In note 5 to that section it is said: "An employer is bound to give notice of latent dangers among which the employé is required to work, and of which the employer has knowledge."

See, also, 1 Labatt on Master & Servant, § 240; Galveston, etc., R. v. Garrett (Tex.

Sup.) 13 S. W. 62, 15 Am. St. Rep. 781; Parkhurst v. Johnson (Mich.) 15 N. W. 107, 45 Am. Rep. 28; Smith v. Peninsular Carworks (Mich.) 27 N. W. 662, 1 Am. St. Rep. 542; McDonald v. Chicago, etc., R. Co. (Minn.) 43 N. W. 380, 16 Am. St. Rep. 711; Johnson v. First Nat. Bank (Wis.) 48 N. W. 712, 24 Am. St. Rep. 722.

In Michael v. Roanoke Mach. Wks., 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927, this court says: "Accordingly the servant has a right to assume, when placed in a situation of danger, where engrossing duties are required of him, that the master will not, without proper warning, subject him to other perils unknown to him, and from which the work exacted necessarily distracts his attention."

The questions of negligence and contributory negligence were submitted to the jury upon correct instructions, and, viewing the case from the standpoint of a demurrer to the evidence, the evidence is quite sufficient to establish the fact that the negligence of the defendant was the proximate and efficient cause of the death of plaintiff's intestate.

The judgment of the circuit court is without error, and must be affirmed.

(104 Va. 113)

SEABOARD & R. R. CO. v. VAUGHAN'S ADM'X.

(Supreme Court of Appeals of Virginia. June 15, 1905.)

1. RAILROADS—CROSSING ACCIDENT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad company for injuries to a bicycle rider at a crossing, *held*, that plaintiff was guilty of contributory negligence.

2. RAILROADS—PERSONS NEAR TRACK—CARE REQUIRED.

Where one riding a bicycle, on reaching a railroad crossing, turned his wheel, and rode in the open space, 10 or 12 feet wide, between the tracks, where persons did and could ride with safety, it was not a circumstance which showed that he was in peril, or made it the duty of the operatives of an approaching train to stop the train to avoid injuring him, because he might possibly fall or be thrown upon the track.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1080-1083.]

3. TRIAL—INSTRUCTIONS.

Where the instructions given, or which the court has determined to give, are sufficient to submit the case fairly to the jury, it is under no obligation to give additional requested ones, though they be correct.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

4. RAILROADS—TRESPASSERS—CARE REQUIRED.

A trespasser on a railroad right of way is not entitled to more than ordinary care on the part of the operatives of a train not to injure him.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1238.]

Error to Circuit Court, Norfolk County.

Action by Rosa A. Vaughan, as administratrix of the estate of Benjamin F. Vaughan, deceased, against the Seaboard & Roanoke Railroad Company and another. Judgment in favor of plaintiff, and defendant the Seaboard & Roanoke Railroad Company brings error. Reversed.

G. Hatton, for plaintiff in error. R. Randolph Hicks, for defendant in error.

BUCHANAN, J. Rosa A. Vaughan, administratrix of Benjamin F. Vaughan, deceased, brought this action against the Seaboard Air Line Railway and the Seaboard & Roanoke Railroad Company for negligently causing the death of her decedent at a highway crossing. The action was dismissed as to the former company, and upon the third trial a judgment was rendered against the other defendant. From that judgment this writ of error was awarded.

The first error assigned is to the action of the court in overruling the defendant company's demurrer to the fourth count of the declaration.

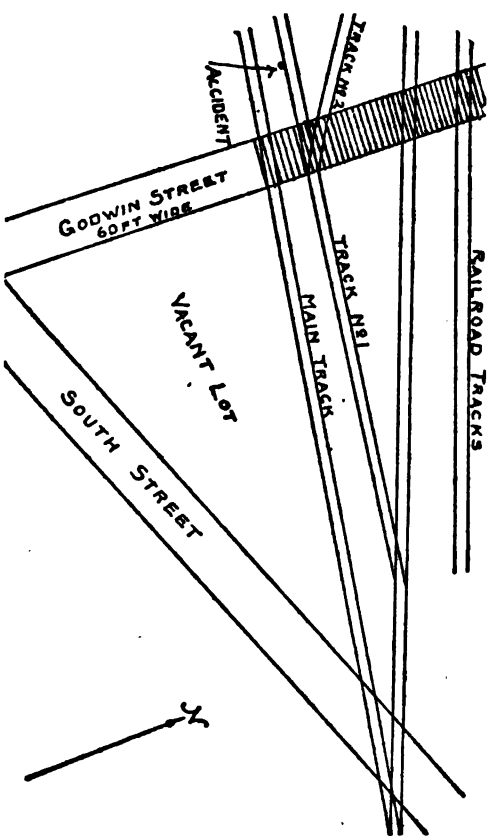
The material allegations of that count are that the plaintiff's decedent was returning home along a common highway in Norfolk county, known as "Godwin Street," which crosses the defendant company's tracks; that as he was approaching the crossing on a bicycle, at a rapid rate of speed, one of the defendant's trains was backing slowly down the railroad tracks towards the crossing, so that he and the train reached the crossing at the same time; that the plaintiff's intestate, realizing his peril, turned his bicycle down the side of the railroad tracks in order to avoid a collision with the freight train, whereupon it became the duty of the defendant to use reasonable care so that the freight train should not be negligently and recklessly run upon the plaintiff's intestate, yet the said defendant, not regarding its duty in that behalf, did not use reasonable care to avoid the collision, but carelessly and recklessly conducted itself so that the rear car of the freight train was run upon and over the plaintiff's intestate, by means whereof he was killed.

The case made by the count shows that the plaintiff's intestate was guilty of negligence in approaching the crossing as he did. There is no charge that the defendant company was guilty of negligence in the management of its train, as it approached the crossing, which misled or put the plaintiff's intestate in peril, nor is there any averment that after the defendant knew, or by the exercise of ordinary care could have known, of his peril, it could have avoided the injury. The count did not aver a state of facts which showed that the defendant was guilty of negligence, and the court erred in not sustaining the demurrer to it. Hortenstein v. Va. Car. R. Co., 102 Va. 914, 47 S. E. 996; N. & W. Ry. Co. v. Wood, 99 Va. 156, 37 S. E. 846.

Upon the first trial there was a verdict in favor of the plaintiff, which was set aside upon the motion of the defendant company. The plaintiff insists, under rule 9 (45 S. E. vi), that the action of the trial court in setting aside that verdict was erroneous, and that this court should so hold, and enter judgment thereon under the provisions of section 3486 of the Code of 1904.

The motion for a new trial was because the verdict was contrary to the law and the evidence, and for after-discovered testimony.

The evidence was substantially the same on the first and last trials. The scene of the accident was in the county of Norfolk, outside of the limits of the city of Portsmouth, where Godwin street crosses the tracks of the defendant's road. At that point the street runs north and south, and the railroad tracks nearly east and west. The street is 60 feet wide, but only about one-half of it is used at the crossing, which half is covered with plank, leaving a space of about 13 feet east of the plank to the outer edge of the street, and about 17 feet from the plank to the western limit of the street. About 170 feet south of the crossing Godwin street intersects with South street, which runs northeast and southwest, and crosses the railroad some 800 feet east of Godwin street crossing. The diagram below shows generally the location of the railroad tracks, Godwin street, and South street, with reference to each other, at and near the scene of the accident.



The plaintiff's theory of the case was that her intestate, who was going home on his bicycle, traveled along South street from where it crosses the railroad tracks to Godwin street, and thence along that street until he reached the railroad tracks, when he discovered that the rear car of a backing train had blocked the crossing, and to avoid a collision therewith he turned his bicycle, which was going rapidly, into the open space between the main line and switch No. 1, on which the train was backing, and, after going from 25 to 40 feet, he was thrown from his bicycle, his head falling on the southern rail of switch No. 1, and was crushed by the rear wheel of the rear car. The plaintiff claims that the defendant was negligent in failing to give notice that its train was going to back, and in not avoiding the injury after it discovered her intestate's peril.

The defendant's theory of the case is that the plaintiff did not approach the crossing over Godwin street from South street, but left South street where it crosses the railroad tracks, and traveled on the defendant company's right of way on the south side of its main line until he reached Godwin street, when, finding that the rear car of the backing train was passing over the street, he crossed over the main track of the defendant and continued his course between that track and the track upon which the train was moving, and, after having gone from 25 to 40 feet, either in his effort to get off his bicycle, or because it struck the ties of the track upon which the train was moving, he fell or was thrown upon the rail, his head falling between the wheels of the rear truck of the rear car.

The only one of the plaintiff's witnesses that testified that her intestate approached the crossing by way of Godwin street from South street was a young lady, who was on the western side of Godwin street north of the railroad tracks. She stated that she was on her way to visit a friend, and as she neared the crossing she heard a train and stopped near an office (some 80 or 100 feet from where the accident occurred), and waited to see if the train would come in sight, and, while standing there, she noticed Mr. Vaughan come around some billboards (which were situated east of Godwin street and north of South street where they intersect, 120 feet or more from the crossing); that he seemed to be riding rapidly, and, as he rode, they (that is, the train and himself) seemed to be racing to the crossing, and they both got there at the same time; that Mr. Vaughan turned his wheel and rode down beside the track; that she watched him, and saw that he was in danger; that he went down the track a short distance, when his feet seemed to go over

his head; that his head struck the rail, and was almost cut from his body by the wheel or wheels of the rear truck; that the whole car did not go over his body, and that it was stopped suddenly; that it looked to her like he was trying to stop after he turned, but when he came to the track he seemed to be coming very rapidly; that she was on the opposite of the car from Mr. Vaughan, but could see under the car without difficulty his wheel as it went along, and half of his body; that when she first saw the train it was moving in sight at Gordon street crossing; that there was a coal house or shed between her and the train, which prevented her from seeing it until it reached the street; that there was a man with a flag at the crossing, but she did not see him make any motion to stop the train, nor did she hear any bell ring; that Mr. Vaughan, in coming from South street toward the crossing, could have seen the train if he had looked.

Another witness of the plaintiff testified that Mr. Vaughan and the train reached the crossing at the same time, and when he saw the train was going to cut him off he turned his wheel, and, after going about 40 feet, was run over by the first wheel of the rear car; that when witness first saw Mr. Vaughan he was about 12 feet from the crossing, going at a pretty good speed.

The engineer, who was put upon the stand by the plaintiff, proved that his train of 13 cars was backing very slowly; that he was moving by signals, and was on the lookout; that he did not see Mr. Vaughan, and saw nothing of the accident, except the bicycle fly up and the signal to stop, when he put on his brakes, reversed the engine, and stopped the train as soon as possible, and within five feet, he thinks, the track being level, or without grade, where the train was moving.

Several witnesses of the defendant testified that Mr. Vaughan rode his bicycle on the defendant's right of way south of the main line, from South street crossing to Godwin street, parallel to the backing train; that when he reached Godwin street, finding that the rear car had reached and blocked the crossing there, he crossed the main line track diagonally, and continued his way rapidly between that track and switch No. 1, on which the train was slowly backing; and that when he had thus gone from 25 to 40 feet he fell or was thrown from his bicycle, and his head fell upon the south rail of the track of switch No. 1, and was run over by one wheel of the rear truck of the rear car. They further testified positively that the bell was ringing, and that there was nothing whatever to prevent Mr. Vaughan from seeing the train. The conductor of the train testified that he and one of his brakemen at the time of the accident were at Godwin street crossing to signal the train; that he saw Mr. Vaughan when he crossed the main track at that crossing, and turned down between that track and switch No. 1 on the space between the two, which was some 12 feet wide, level and smooth, and sometimes traveled by bicycles, though there was a sign near there warning trespassers to keep off the premises of the defendant; that there was ample room to ride between the two tracks without danger of falling on switch track No. 1, and that he did not think about Mr. Vaughan being in danger until he fell, when he at once signaled, and the train was stopped before the front trucks of the rear car reached his body.

Considered as on a demurrer to the evidence, it clearly appears that Mr. Vaughan was guilty of negligence. The railroad track was a proclamation of danger, and the backing train was in full view, and its bell was ringing. It does not appear that the defendant omitted to do anything that it ought to have done in the management of its train as it approached the crossing, or after it was aware of Mr. Vaughan's peril. As soon as he fell or was thrown from his bicycle, it did all that was possible to avoid the injury, and it does not appear that any of the defendant's servants knew, or ought to have known, that he was in peril, if, indeed, he was in peril before that time. The mere fact that Mr. Vaughan, who was in the apparent possession of his faculties, as he was shown to have been, when he reached the crossing turned his bicycle and rode in the open space 10 or 12 feet wide between the tracks where persons did ride and could ride with safety, was not a circumstance which showed that he was in peril or made it the duty of the defendant to stop its train to avoid injury to him because he might possibly fall or be thrown upon the track.

We are of opinion, therefore, that the evidence was not sufficient, either upon the first or the last trial, to sustain a verdict in favor of the plaintiff, and that the court did not err in setting aside the first verdict, but did err in not setting aside the verdict in the last trial.

There are a number of assignments of error to the action of the court in giving, modifying, and refusing instructions. The questions of law involved in the case were few, yet the court, on the last trial, was asked to give 25 instructions, and did give 20, as originally offered or as modified.

The practice of asking for a great number of instructions in cases which involve few law questions has grown up in recent years, and, instead of aiding juries in reaching right conclusions, tends to mislead and confuse them, and imposes a heavy and unnecessary burden upon trial courts. The general rule, that a party who asks for an instruction which properly states the law and is

applicable to the facts of the case has the right to have it given, is not without limitations. Where the instructions given, or which the court has determined to give, are sufficient to submit the case fairly to the jury, the court is under no obligation to give additional instructions, for they are unnecessary, cannot aid, and from their very number may mislead and confuse the jury.

Several of the instructions given were objected to, because they submitted to the jury the question whether or not, after the defendant knew or ought to have known of Mr. Vaughan's peril, it exercised due care to avoid injuring him, when there was no evidence upon which to base them.

As we have seen in considering the facts of the case, it was not shown that the defendant knew or ought to have known that the plaintiff's intestate was in peril before he fell or was thrown from his bicycle, or that anything more could have been done after his fall than was done to avoid the accident. No instruction ought therefore to have been given submitting that question to the jury.

Instruction No. 5 was objected to, and the objection ought to have been sustained, because the instruction is ambiguous, and, if construed to mean that the defendant owed the plaintiff's intestate, as a trespasser, any higher degree of duty under the facts of the case than to exercise ordinary care not to injure him after it knew of his peril, it is erroneous.

There are other assignments of error, but as they are not likely to arise upon the next trial, if there should be another trial, it will be unnecessary to consider them.

The judgment to which this writ of error was awarded must be reversed, the verdict of the jury set aside, and a new trial awarded, to be had not in conflict with the views expressed in this opinion.

(71 S. C. 544)

STATE v. VIRGINIA-CAROLINA CHEMICAL CO. et al.

(Supreme Court of South Carolina. May 22, 1905.)

1. CONSTITUTIONAL LAW — POLICE POWER—CONTROL OF TRUSTS.

Civ. Code 1902, § 2845, prohibiting trusts or combinations with a view to lessen or which tend to lessen full and free competition, is an exercise of a police power in defining, limiting, governing, or destroying trusts and monopolies, and not in violation of Const. U. S. art. 14, § 1.

2. FOREIGN CORPORATIONS—POWERS AND LIABILITIES—CONTROL BY LEGISLATURE.

Under Rev. St. 1893, § 1471, providing that foreign corporations carrying on business in the state shall be subject to the law governing domestic corporations, and section 1499, Rev. St. 1893, providing that all charters shall be subject to amendment, a foreign corporation accepting these conditions makes the statute laws of the state a part of its charter, and cannot complain of a law affecting its right to do business in the state because such business is a monopoly and in restraint of trade.

3. CONSTITUTIONAL LAW—INTERSTATE COMMERCE.

So much of Civ. Code 1902, § 2845, as prohibits the importation into and sale of articles in the state with a view to lessen or which tend to lessen full and free competition is an attempt to regulate interstate commerce, and cannot be sustained under the police power.

4. MONOPOLIES—SUIT BY STATE—PLEADING—CAUSE OF ACTION.

In a suit by a state against certain corporations for violation of Civ. Code 1902, § 2845, in entering into certain trusts and combinations therein declared to be against public policy and void, certain allegations that one defendant has had transferred to it all the other defendant corporations that were independently engaged in the manufacture and sale of fertilizers in the state, and has acquired all others except four, and a large proportion of the phosphate lands of the state, and controls a majority of the stock in a large manufacturer of fertilizer ingredients, and that covenants were entered into between it and some of the other defendants not to engage in the manufacture and sale of fertilizers for a certain period within the state, state a cause of action under such section.

Appeal from Common Pleas Circuit Court of Richland County; Gary, Judge.

Action by the state against the Virginia-Carolina Chemical Company and others. Demurrer to complaint overruled, and the Virginia-Carolina Chemical Company appeals. Affirmed.

The following is the complaint in this action:

"The plaintiff, by G. Duncan Bellinger, Esq., its duly qualified Attorney General, complaining of the defendants above named, alleges:

"First. That on the 13th day of February, A. D. 1900, the General Assembly of South Carolina adopted the following joint resolution: 'Section 1. Be it enacted by the General Assembly of the state of South Carolina, that the Attorney General of the state of South Carolina be, and he is hereby, instructed and required to forthwith institute an investigation to determine by what authority the Virginia-Carolina Chemical Company is doing business in this state, whether said company and all other foreign corporations have complied with the laws of this state, regulating foreign corporations, and whether said company, or any person or corporation who may be engaged in any business within this state, has violated or is violating the provisions of the laws of this state prohibiting trusts and combinations, and that he institute such proceedings, civil or criminal, as may be necessary to prevent and punish the violations of such laws against trusts and combinations.'

"Second. That the Virginia-Carolina Chemical Company is a corporation created under and by virtue of the laws of the state of New Jersey, and by its certificate of incorporation, dated 12th day of September, 1895, the purpose and object of said corporation, as

set forth in said charter, are as follows: 'The objects for which the company is formed are to carry on the business of buying, manufacturing and selling chemicals, paints, varnishes, drugs, fertilizers and all materials or articles used or capable of use in the manufacture, preservation, packing and transportation of each, any and all of said products, and of purchasing, leasing or otherwise acquiring and using, operating, caring for and disposing of any such business or businesses, now established or hereafter established, and the property and good will connected therewith, and also any mines, manufactories, plants, machinery, appliances, tools, supplies, materials, patents, trademarks, copyrights, brands, formulas and any other real or personal property, rights and privileges of any nature whatsoever, suitable, convenient or necessary for any of the purposes aforesaid, or hereinafter stated, or which can lawfully be used in connection therewith, and of establishing agencies and warehouses for the storage, sale and distribution of the company's products and similar products of other manufacturers and dealers, and of transporting or causing the transportation of such products as articles of commerce, and the doing of any other similar or different business and things incidental to, or which may lawfully and conveniently be done in conjunction with any of the matters aforesaid. The portion of the business of said company which is to be carried on out of this state, and in the states and countries above mentioned, is to carry on the business of buying, manufacturing and selling chemicals, paints, varnishes, drugs, fertilizers and all materials or articles used, or capable of use, in the manufacture, preservation, packing and transportation of each, any and all of said products, and of purchasing, leasing or otherwise acquiring and using, operating, caring for and disposing of, any such business or businesses, now established or hereafter established, and the property and good will connected therewith, and also any mines, manufactories, plants, machinery, appliances, tools, supplies, materials, patents, trade-marks, copyrights, brands, formulas and any other real or personal property, rights and privileges of any nature whatsoever, suitable, convenient or necessary for any of the purposes aforesaid, or hereinafter stated, or which can lawfully be used in connection therewith, and of establishing agencies and warehouses for the storage, sale and distribution of the company's products and similar products of other manufacturers and dealers, and of transporting, or causing the transportation of such products as articles of commerce, and the doing of any other similar or different business and things incidental to, or which may lawfully and conveniently be done in connection with any of the matters aforesaid, to the extent that all the above mentioned matters must necessarily, or can conveniently or advantageously to the company, be transacted out of the state of New Jersey.' That the capital stock of said corporation, as appears by said certificate, is $6,500,000, divided into 65,000 shares, of the par value of $100 each, of which said stock $4,000,000 was general or common stock, and $2,500,000 was preferred stock. That it appears by a certificate of increase of capital stock, dated 21st day of July, A. D. 1898, and filed in the Secretary of State's office of New Jersey, that the common stock of said corporation was increased to $6,000,000, and the preferred stock to $6,000,000, making the total amount of capital stock $12,000,000. That it appears by a certificate of increase of capital stock, dated 20th day of July, A. D. 1899, and filed in the Secretary of State's office of New Jersey, the common stock of said corporation was increased to the amount of $12,000,000, and the amount of preferred stock to $12,000,000, making the total capital stock of said corporation $24,000,000; and plaintiff is informed and believes the capital stock has since been increased to $50,000,000. That on the 22d day of January, 1900, the charter of said company and amendments thereof was filed in the office of the Secretary of State of South Carolina, and it received authority to do business in this state under and in accordance with sections 1465–1471, inclusive, of the Revised Statutes of South Carolina of 1893, and has since been doing business and acquiring property in this state, and continues to do so, and owns property and does business in the county of Richland, as well as in nearly all of the counties of this state.

"Third. That the Imperial Fertilizer Company is a corporation created under the laws of the state of South Carolina, and incorporated to manufacture and sell commercial fertilizers.

"Fourth. That the Standard Fertilizer Manufacturing Company is a corporation created under the laws of the state of South Carolina, and incorporated to manufacture and sell commercial fertilizers.

"Fifth. That the Chicora Fertilizer Company is a corporation created under the laws of the state of South Carolina, and incorporated to manufacture and sell commercial fertilizers.

"Sixth. That the Berkeley Chemical Company is a corporation created under the laws of the state of South Carolina, and incorporated to manufacture and sell commercial fertilizers.

"Seventh. That the Greenville Fertilizer Company is a corporation created under the laws of the state of South Carolina, and incorporated to manufacture and sell commercial fertilizers.

"Eighth. That the Carolina Sulphuric Acid Manufacturing Company, Blacksburg, Cherokee county, is a corporation created under

the laws of the state of South Carolina, and incorporated to manufacture sulphuric acid essentially used in the manufacture of commercial fertilizers.

"Ninth. The Columbia Phosphate Company is a corporation created under the laws of South Carolina, and incorporated to manufacture and sell commercial fertilizers.

"Tenth. That on the 25th day of February, 1897, the General Assembly of South Carolina passed an act entitled 'An act to prohibit trusts and combinations and to provide penalties' (22 St. at Large, p. 434), which said act was by the General Assembly amended on the 19th day of February, 1898 (22 St. at Large, p. 782). The first section of the last-named act is as follows: 'Section 1. Be it enacted by the General Assembly of the state of South Carolina, that from and after the passage of this act all arrangements, contracts, agreements, trusts or combinations between two or more persons as individuals, firms or corporations made with a view to lessen, or which tends to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth, or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations, designed or which tend to advance, reduce or control the price or cost to the producer or to the consumer of any such product or article, and all arrangements, contracts, trusts, syndicates, associations or combinations between two or more persons as individuals, firms, corporations, syndicates or associations, that may lessen or affect in any manner the full and free competition in any tariff, rates, tolls, premiums or prices, or seeks to control in any way or manner such tariffs, rates, tolls, premiums or prices in any branch of trade, business or commerce, are hereby declared to be against public policy, unlawful and void.'

"Eleventh. That all the defendants hereto except the Virginia-Carolina Chemical Company were at the times hereinafter specified independently engaged in the manufacture and sale of fertilizers in South Carolina, and which had become necessary to and was universally used by the farmers of said state in the cultivation and production of their crops.

"Twelfth. That the Virginia-Carolina Chemical Company was organized by a combination of capitalists and other persons, under the guise of a comprehensive charter, for the purpose of monopolizing the manufacture and sale of commercial fertilizers in the state of South Carolina and adjoining states, and its capital stock increased from time to time to enable it to accomplish this purpose and suppress full and free competition therein, to the great injury of the people of this state.

"Thirteenth. That the said Virginia-Carolina Chemical Company, in pursuance of the unlawful scheme and purpose for which its corporation was procured, and which it has pursued, in order that it might obtain practically complete control of the prices of fertilizers manufactured in the state of South Carolina, and practically to lessen or with a view to lessen full and free competition therein, entered into an unlawful and oppressive scheme to purchase the plants, property, good will, and brands of the other defendants hereto, agreeing to pay therefor either in cash or in stock of the said Virginia-Carolina Chemical Company for the stock and property as aforesaid, or either or both of them of said other defendants; the method pursued by the said Virginia-Carolina Chemical Company being in some cases to acquire a controlling interest in the stock of the other defendants hereto, then electing its own officers or employés as officers of such corporations, and either conduct the business under an agreement or arrangement by which the said Virginia-Carolina Chemical Company controlled and dictated the prices of the products of such other companies until such time as the Virginia-Carolina Chemical Company should choose to direct conveyances of the property, plants, trade-marks, brands, and good will of such other companies, and in other cases direct at once such conveyances to it. That in pursuance of said unlawful scheme and purpose to acquire substantial control of the prices of fertilizers in this state, and substantially lessen or with a view to lessen full and free competition against it in the manufacture and sale of fertilizers within the state, the said Virginia-Carolina Chemical Company caused to be conveyed to it the property of the several other defendants hereto, as follows: (1) On the 5th day of September, 1900, property and plant of the Imperial Fertilizer Company in consideration of $225,000. (2) On the 5th day of September, 1900, the property and plant of the Standard Fertilizer Manufacturing Company in consideration of $300,000. (3) On the 19th day of November, 1898, the property, plant and good will of the Chicora Fertilizer Company in consideration of $400,000, and also the good will, brands, formulas, trade-marks, signs, labels of said Chicora Fertilizer Company, and used by it in connection with, or acquired for, the purposes of its business as aforesaid. (4) On the 20th day of August, 1898, the property and plant and good will of the Berkeley Chemical Company, in consideration, as set forth in said conveyance, of $37,325; on the same day said Berkeley Chemical Company conveying, by its president, W. B. Chisolm, to the Virginia-Carolina Chemical Company, several tracts of land, among which is enumerated the works and property of the Stono Phosphate Company, together with brands and good will of the business carried on by said company; and

further on the same day the said Berkeley Chemical Company, by its president, W. B. Chisolm, conveyed to the Virginia-Carolina Chemical Company all the property of the Wappoo Mills and the franchises of the said Wappoo Mills, the aggregate consideration for the last two being $184,930. (5) That on the 9th day of August, 1899, the Greenville Fertilizer Company conveyed, in consideration of the sum of $130,000, to W. G. Crenshaw, Jr., Baltimore, Md., all the property, including brands, trade-marks, and the good will of the business of said company, and the said W. G. Crenshaw, Jr., on the 7th day of September, 1899, conveyed said property to the Virginia-Carolina Chemical Company in consideration of the sum of $10 and other valuable consideration, together with all brands, trade-marks, and good will of the business of the Greenville Fertilizer Company. (6) That on the 15th of April, 1897, Louis H. Comstock, trustee, conveyed to the Virginia-Carolina Chemical Company the property of the Carolina Sulphuric Acid Manufacturing Company, Blacksburg, Cherokee county, in consideration of $8,500, and the further consideration caused by an agreement signed March 26, 1897, by Louis H. Comstock, trustee, and S. T. Morgan, president of the Virginia-Carolina Chemical Company. (7) That on the 21st day of September, 1899, the Columbia Phosphate Company conveyed to the Virginia-Carolina Chemical Company its entire plant, together with the good will, trade-marks, and brands, for the consideration of the sum of $85,000, to be paid by the said Virginia-Carolina Chemical Company to the said Columbia Phosphate Company in cash or in a like amount of the capital stock of the said Virginia-Carolina Chemical Company.

"Fourteenth. That, in addition to the control and purchase by the said Virginia-Carolina Chemical Company of the stock and property or either or both of its codefendants herein, the said Virginia-Carolina Chemical Company, with a view to lessen the full and free competition in the manufacture and sale of fertilizers in this state, and to lessen full and free competition in the manufacture and sale of domestic raw material, the product of this state, and to advance, reduce, or control the price thereof to the consumer thereof in this state, has, as appears from state returns for assessment and taxation, acquired the stock or property or both of all the corporations engaged in this state in the manufacture and sale of fertilizers, except four, whose output constitute but a very small percentage of the fertilizers manufactured and sold in South Carolina.

"Fifteenth. That, in furtherance of its oppressive and unlawful scheme and combination to monopolize the business of manufacturing and selling fertilizers in South Carolina, the said Virginia-Carolina Chemical Company has acquired a very large proportion, as plaintiff is informed and believes, of the available supply of land phosphate territory in this state, either by purchase or lease, and controls the majority of the stock of the Southern Cotton Oil Company, a gigantic corporation created under the laws of the state of New Jersey, and engaged in the manufacture of cotton seed into meal and other products, which said cotton meal is extensively employed as a fertilizer.

"Sixteenth. That, in addition to the controlling interest of almost the entire fertilizer industry in this state, the said Virginia-Carolina Chemical Company, by reason of its enormous capital as aforesaid, owns and controls, as plaintiff is informed and believes, a majority of the corporations engaged in the manufacture of fertilizers in the states of Georgia, North Carolina, and Virginia, and has thus practically secured itself against competition from outside of the state of South Carolina in its control of fertilizers therein.

"Seventeenth. That, to secure itself against future competition by the erection of factories in the state of South Carolina for the manufacture and sale of fertilizers, the said Virginia-Carolina Chemical Company, its officers and stockholders, procured to be executed by the directors and stockholders of the other defendants hereto, or some of them, agreements not to engage thereafter in the manufacture and sale of fertilizers for a greater or less period within the state of South Carolina; and the plaintiff is informed and believes, and so charges, that such covenants and agreements were procured from and executed by the officers, directors, and stockholders, or some of them, of the Imperial Fertilizer Company, the Standard Fertilizer Manufacturing Company, and the Chicora Fertilizer Company, defendants herein. That the several conveyances, sales, and transfers of the stock and property, or either or both of them, as aforesaid, and the covenants and agreements in restraint of trade as aforesaid, were made and entered into by its several codefendants with the knowledge that the said Virginia-Carolina Chemical Company was and is engaged in the unlawful and oppressive scheme to acquire control of the fertilizer industry in South Carolina, and were made and entered into with a view to lessen, and tend to lessen, full and free competition in the manufacture and sale of fertilizers, the product of domestic raw material of this state, and were designed to control the prices thereof to the consumers of such product in this state, and to lessen or affect full and free competition in the prices of fertilizers in this state, and to control said prices in this state. That said conveyances, sales, and transfers as aforesaid and said covenants and agreements in restraint of trade were made and entered into with the intent to evade the provision of the act of the General Assembly of South Carolina ap-

proved the 25th day of February, A. D. 1897, and the amendment thereto approved the 19th day of February, A. D. 1898, and are in violation of the public policy of the state of South Carolina, as declared in and by the said act and the amendments thereto, and the said conveyances, sales, and transfers as aforesaid, and the said covenants and agreements, and either or all of them, are contrary to public policy, unlawful, and void.

"Wherefore plaintiff prays judgment: (1) That all and each of said unlawful conveyances, sales, and transfers shall be delivered up and canceled and declared to be void, and the said Virginia-Carolina Chemical Company be ordered to reconvey to its several codefendants herein the property conveyed and transferred to it as aforesaid, and that the said the other defendants hereto be directed to return to the Virginia-Carolina Chemical Company the consideration paid or agreed to be paid to each of them, respectively, for the said conveyances and transfers, or the same be made a charge upon the property so decreed to be reconveyed. (2) That a receiver be appointed of the property of the defendants, the Imperial Fertilizer Company, Standard Fertilizer Manufacturing Company, Chicora Fertilizer Company, Berkeley Chemical Company, the Greenville Fertilizer Company, the Columbia Phosphate Company, and the Carolina Sulphuric Acid Manufacturing Company, Blacksburg, Cherokee county. (3) That all agreements entered into by and between the Virginia-Carolina Chemical Company and the other defendants herein, or any of them, or with the directors of the other defendants herein, or stockholders, in restraint of trade, and in violation of the act of the General Assembly of South Carolina as aforesaid, be set aside and declared null and void. (4) That the said Virginia-Carolina Chemical Company be adjudged and decreed to have violated the terms and conditions on which it was licensed to do business in this state, and that said license be adjudged and decreed to be forfeited, and the said Virginia-Carolina Chemical Company be enjoined from doing business in this state. (5) That the said Virginia-Carolina Chemical Company be adjudged and decreed to have forfeited its right to recognition as a corporation in the courts of this state."

Thereafter, on 5th January, 1904, the following stipulation was entered into by the attorneys: "It is hereby stipulated and agreed that the Virginia-Carolina Chemical Company will demur orally to the complaint herein, as not stating facts sufficient to constitute a cause of action, so that the argument upon such demurrer to test the constitutionality of the statute set up and relied on in said complaint and by said demurrer, and on the argument of the same, said demurrer shall not be construed to admit any intent as charged in the complaint further than as any such intent can be inferred by the court from the substantive facts alleged and stated in said complaint." In pursuance of this stipulation, a demurrer was filed on the ground set out in the first three exceptions to the circuit judgment. The circuit judgment on the demurrer is as follows:

"This is an action instituted by the Attorney General, in the name of the state, against the Virginia-Carolina Chemical Company, a corporation created under the laws of New Jersey, and seven other defendant corporations created under the laws of South Carolina, charging a violation of the statutes commonly known as the 'Anti-Trust Law,' approved the 25th day of February, 1897, and amended on the 19th day of February, 1898, the first section of which reads as follows: 'Section 1. Be it enacted by the General Assembly of the state of South Carolina, that from and after the passage of this act, all arrangements, contracts, agreements, trusts or combinations between two or more persons as individuals, firms or corporations, made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such product or article, and all arrangements, contracts, trusts, syndicates, associations or combinations between two or more persons as individuals, firms, corporations, syndicates or associations, that may lessen or affect in any manner the full and free competition in any tariff, rates, tolls, premiums or prices, or seek to control in any way or manner such tariffs, rates, tolls, premiums or prices in any branch of trade, business or commerce, are hereby declared to be against public policy, unlawful and void.' The complaint alleges that all the defendants except the Virginia-Carolina Chemical Company were independently engaged in the manufacture and sale of fertilizers in this state, which product had become necessary to and was universally used by the farmers of the state in the production of their crops, and that the Virginia-Carolina Chemical Company, which filed its charter and amendments thereto in the office of the Secretary of State on the 22d of January, 1900, with a capital stock of twenty-four million dollars, 'and plaintiff is informed and believes that the capital stock has since been increased to fifty million dollars,' and (paragraph 13) 'entered into an unlawful and oppressive scheme to purchase the plants, property, good will, and brands of the other defendants hereto, agreeing to pay therefor in cash or in stock of the said Virginia-Carolina Chemical Company for the stock and property as aforesaid, or either or both of them, of said

other defendants; the method pursued by the said Virginia-Carolina Chemical Company being in some cases to acquire a controlling interest in the stock of the other defendants hereto, then electing its own officers or employés as officers of such corporations, and either conduct the business under an agreement or an arrangement by which the said Virginia-Carolina Chemical Company controlled and dictated the prices of the products of such other companies until such time as the Virginia-Carolina Chemical Company should choose to direct conveyance of the property, plants, trade-marks, brands, and good will of such other companies, and in other cases direct at once such conveyances to it.' The complaint alleges further that the said Virginia-Carolina Chemical Company, on the dates mentioned, caused to be conveyed to it the property of the several other defendants, and, in the fourteenth paragraph, 'as appears from state returns for assessment and taxation, acquired the stock or property, or both, of all the corporations engaged in this state in the manufacture and sale of fertilizers, except four, whose output constitutes but a very small percentage of the fertilizers manufactured and sold in South Carolina.' In paragraph 15 it is charged that 'the Virginia-Carolina Chemical Company has acquired a very large proportion, as plaintiff is informed and believes, of the available supply of land phosphate territory in this state, either by purchase or lease, and controls a majority of the stock of the Southern Cotton Oil Company, a gigantic corporation created under the laws of the state of New Jersey, and engaged in the manufacture of cotton seed into meal, which said cotton seed meal is extensively employed as a fertilizer.' In paragraph 16 it is alleged 'that, in addition to the controlling interest of almost the entire fertilizer industry in this state, the said Virginia-Carolina Chemical Company, by reason of its enormous capital as aforesaid, owns and controls, as plaintiff is informed and believes, a majority of the corporations engaged in the manufacture of fertilizers in the states of Georgia, North Carolina, and Virginia, and has thus practically secured itself against competition from outside of the state of South Carolina in its control of fertilizers therein.' Paragraph 17 sets forth that 'the said Virginia-Carolina Chemical Company, its officers and stockholders, procured to be executed by the directors and stockholders of the other defendants hereto, or some of them, agreements not to engage thereafter in the manufacture and sale of fertilizers for a greater or less period within the state of South Carolina, and the plaintiff is informed and believes, and so charges, that such covenants and agreements were procured from and executed by the officers, directors, and stockholders, or some of them, of the Imperial Fertilizer Company, the Standard Fertilizer Manufacturing Company, and the Chicora Fertilizer Company, defendants herein,' and further alleges 'that said covenants, sales, and transfers as aforesaid, and said covenants and agreements in restraint of trade, were made and entered into with the intent to evade the provision of the act of the General Assembly of South Carolina approved the 25th day of February, A. D. 1897, and the amendments thereto approved the 19th day of February, A. D. 1898, and are in violation of the public policy of the state of South Carolina, as declared in and by the said act and the amendments thereto, and the said conveyances, sales, and transfers as aforesaid, and the said covenants and agreements, and either or all of them, are contrary to public policy, unlawful, and void.'

"Under a stipulation that a demurrer should not be construed to admit any intent as charged in the complaint, further than as such intent can be inferred by the court from the substantive facts alleged and stated in the complaint, the defendant interposed an oral demurrer to the complaint upon several constitutional grounds, alleging that the acts of the General Assembly above cited, under which this action was brought, are unconstitutional, and upon other grounds to be hereafter considered.

"One objection is that the above acts are in contravention of section 1, art. 14, in amendment of the Constitution of the United States, which enjoins any state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, directs that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. This constitutional objection cannot avail the defendant. It is well settled that the fourteenth amendment does not interfere with the exercise of the police power of a state. As was stated by our Supreme Court in State v. Aiken, 42 S. C. 249, 20 S. E. 231, 26 L. R. A. 845, citing from Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923: 'In short, it is not to be doubted that the power to make ordinary regulations of police remains with the individual states, and cannot be assumed by the national government, and that in this respect it is not interfered with by the fourteenth amendment.' And it is likewise well settled that the police power can be invoked in defining, limiting, governing, or destroying trusts, monopolies, combinations in restraint of trade, etc. The exact terms of the South Carolina act were passed upon by the Supreme Court of Tennessee (State v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941), and declared constitutional as a police measure. Statutes of like nature and same purpose have been declared constitutional in the carefully considered cases of Waters-Pierce Oil Co. v. State, 19 Tex.

Civ. App. 1, 44 S. W. 936; State v. Buckeye Pipe Line Co., 61 Ohio St. 520, 56 N. E. 464; State ex inf. Crow v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363. And see 20 Am. & Eng. Encyc. Law, p. 852. It is very obvious, therefore, that as the acts in question are police regulations, and that police regulations are not governed by the fourteenth amendment, and that no discrimination or class legislation is suggested, this ground of demurrer must be overruled.

"Another objection is that these acts are in contravention of the state and federal Constitutions, enjoining that no state shall pass any law impairing the obligations of a contract. The contention is that this state having invited and permitted the Virginia-Caroline Chemical Company, a New Jersey corporation, to do business in this state, and having accepted its New Jersey charter, that the terms of that charter must be respected as a contract assumed by this state. As already indicated, corporations are subject to the police power of the state. No suggestion is made that the state has attempted to surrender such power, for I presume it will not be seriously contended that the state could barter away such power, the same being an inherent right of sovereignty. Conceding that corporate charters are vested rights, it cannot be questioned that defendant corporation came into this state, and could only come upon such terms as this state saw fit to impose. Now, one of the conditions imposed by chapter 45 of the Revised Statutes of 1893, which permitted defendant to do business in this state, is contained in section 1471 of that chapter, providing every foreign corporation carrying on business or owning property in this state shall be subject to laws as domestic corporations; and section 1499, Rev. St. 1893, provides that all charters shall be subject to amendment. That is statutory reservation general throughout the country. It follows, then, that, defendant being advised of these conditions and accepting them, the statute laws of this state became a part of its charter privileges and limitations, and it cannot complain of the law as found in the statutes. This objection is overruled.

"The demurrer objects further that the acts in question are in violation of the federal Constitution, which invests Congress with authority to regulate interstate commerce, because section 1 of said act attempts to prevent 'contracts,' etc. '* * * between two or more persons as individuals,' etc. '* * * made with a view to lessen, or which tends to lessen, full and free competition in the importation or sale of articles imported into this state,' etc. It strikes me that this clause is an attempt by the state to exercise a prerogative of Congress to regulate interstate commerce. No act of Congress has invested the state with authority to interfere with this subject of commerce, and the police power cannot be invoked for that purpose. The state has no power over importations of articles of commerce. See recent case, Smith v. La Far (S. C.) 46 S. E. 332. To the extent of this clause the demurrer must be sustained. But it is contended by the Attorney General that the section contains other provisions which constitute a cause of action under this complaint. It is a rule that a statute is not rendered unconstitutional by the presence therein of provisions which are unconstitutional when they can be eliminated without affecting the rest of the statute. I am satisfied, as the complaint herein has no reference to the violation of the importation clause, that a cause of action exists under the statute eliminated of its defective features, as above intimated. State v. Potterfield, 47 S. C. 75, 25 S. E. 39; Supervisors v. Stanly, 105 U. S. 305, 26 L. Ed. 1044; Powell v. State, 69 Ala. 10. So far as defendant is concerned, the question is merely speculative. Hill v. City Council, 59 S. C. 415, 38 S. E. 11. This objection to the demurrer is overruled.

"Other constitutional objections are urged, but they merely involve the same terms and principles.

"Two other objections are offered, but, as the section numbered 'Third' is general in its terms, it cannot be considered, especially as all objections urged by counsel have been considered, or will be in the next and only remaining objection, which alleges that it nowhere appears upon the face of the complaint, under the terms of said acts, that any act of defendants has had the effect of lessening full and free competition in the manufacture or sale of articles of domestic growth or domestic raw material, or has had the effect of having tended either to advance, reduce, or control the price or cost to the producer or consumer of any such product or article, or has lessened or affected in any manner the rates, tariffs, tolls, premiums, or prices in any branch of trade, business, or commerce. Under the rules of pleading, a demurrer admits all facts well pleaded, and under the stipulation in this case the substantive facts only can be considered. Now, the complaint alleges the following admitted substantive facts: That the Virginia-Carolina Chemical Company has had transferred to it all the other defendant corporations that were independently engaged in the manufacture and sale of fertilizers, and has acquired all other corporations engaged in the manufacture of fertilizers, except four, of small output; that the corporation has acquired a very large proportion, as plaintiff is informed and believes, of the land phosphate territory in this state, controls a majority of the stock of the Southern Cotton Oil Company, a manufacturer of a fertilizer ingredient, owns and controls a majority of the corporations engaged in the manufacture of fertilizers in the states of Georgia, North

Carolina, and Virginia, and has secured itself against competition from outside of this state of its control of fertilizers therein; that covenants were entered into by the Virginia-Carolina Chemical Company, its officers and stockholders, with the other defendants, or some of them, not to engage thereafter in the manufacture and sale of fertilizers for a greater or less period within the state of South Carolina. From these admitted facts the conclusion is irresistible that the complaint states facts which fall clearly within the purview of both the spirit and letter of the acts above cited, for, in the language of the act, the result of such a condition 'may lessen or affect in any manner the full and free competition in any tariff, rates, tolls, premiums and prices,' 'or which may tend to advance, reduce or control the price or the cost to the producer or consumer.' The intent of the combination cannot be considered, whether such intent was to increase, reduce, or control prices. The possibility of either falls within the meaning of the act. The demurrer is overruled."

The defendant Virginia-Carolina Chemical Company excepts to the judgment, upon the following grounds:

"That the presiding judge should have sustained the demurrer herein, and held as conclusions of law:

"First. That the acts of the General Assembly of the state of South Carolina referred to in article 10 of the complaint herein, to wit, the act passed by the General Assembly of South Carolina on the 25th day of February, 1897, and the act amendatory thereof passed by the said Assembly of South Carolina on the 19th day of February, 1898, upon and to enforce the provisions of which this action is brought, are invalid, null, and void, and inoperative, under the Constitution or the laws of the United States, in that: (a) That said acts undertake, in contravention of section 8 of article 1 of the Constitution of the United States, and the acts of Congress in pursuance thereof, to prohibit and render null and void all arrangements, contracts, or agreements whatsoever, between persons, firms, or corporations which intentionally or unintentionally tend to lessen full and free competition in the importation or sale of articles imported into the state, or in the manufacture or sale of articles of domestic growth or of domestic raw material. (b) The said articles undertake, in contravention of section 1 of article 14, in amendment of the Constitution of the United States, to prohibit and render invalid, null, and void, all arrangements, contracts, or agreements whatsoever between persons, firms, or corporations, which intentionally or unintentionally tend to advance, reduce, or control the price or cost to the producer or to the consumer of any articles imported into the state, or manufactured or grown therein. (c) The said acts undertake, in contravention of section 8 of article 1 of the Constitution of the United States, and the acts of Congress in pursuance thereof, and of section 1, art. 14, in amendment of said Constitution, to prohibit and render invalid, null, and void all arrangements and contracts between persons, firms, or corporations that may intentionally or unintentionally lessen or affect in any manner full and free competition in any tariff, rates, tolls, premiums, or prices in any branch of business, trade, or commerce, or may seek to control the same. (d) The said acts undertake, in contravention of section 10, art. 1, of the Constitution of the United States, and of section 2, art. 4, of said Constitution, to impair and destroy the rights, privileges, and immunities agreed to be given and granted to foreign corporations by the public laws and statutes of the state of South Carolina in consideration of their locating, carrying on business, or owning property therein. (e) The said acts undertake, in contravention of section 1, art. 14, in amendment of the Constitution of the United States, to deprive all corporations of their property without due process of law, and to deny to them the equal protection of the laws, and to abridge the privileges and immunities given and granted to foreign corporations by the public laws and statutes of the state of South Carolina, in consideration of their locating and carrying on business therein. (f) The said acts undertake, in contravention of sections 5 and 6 of article 1 of the Constitution of the state of South Carolina, to abridge the rights, privileges, and immunities of this defendant, and deprive it of its property without due process of law, and impair the obligation of the contract entered into with this defendant when it was invited to enter and locate and acquire property in the state of South Carolina by the public laws and statutes of said state, and deny to this defendant the equal protection of the laws.

"Second. That it nowhere appears upon the face of the said complaint, under the terms of the said act of 25th February, 1897, and amendatory act of 19th February, 1898, that any act or thing charged in the complaint as done by the defendants in this action, or any of them, has had the effect of lessening full and free competition in the importation or sale of articles imported into the state, or in the manufacture or sale of articles imported into the state, or in the manufacture or sale of articles of domestic growth or domestic raw material, or has had the effect of having tended either to advance, reduce, or control the price or cost to the producer or consumer of any such product or article, or has lessened or affected in any manner the rates, tariff, tolls, premiums, or prices in any branch of trade, business, or commerce.

"Third. That it nowhere appears upon the face of the said complaint that any act

or thing charged in the complaint as done by the defendants in this action, or any of them, is in violation of the act passed by the General Assembly of South Carolina on the 25th day of February, 1897, and the act amendatory thereof passed on the 19th day of February, 1898, which said acts are set forth in the complaint, or of any other provision of law.

"Fourth. That his honor the presiding judge erred in overruling the demurrer and in holding: (a) That the acts in question are police regulations, and as such were not governed by the fourteenth amendment, whereas he should have held that the acts in question were not police regulations, and should further have held that no statute, whether by way of police regulation or otherwise, can be passed by any state in contravention of the direct terms of the fourteenth amendment. (b) That, inasmuch as by statute law in this state the power is reserved to the state to alter and amend charters of corporations, therefore the acts in question would be valid as having that effect only, whereas he should have held that the acts in question were not amendments or modifications of any charter or privilege, but undertook, in contravention of the provisions of the United States and state Constitutions, to impose a penalty or punishment upon individuals and corporations for performing acts expressly authorized by law. (c) That the objection to the acts in question as in violation of the federal authority to regulate interstate commerce was untenable, because the complaint herein has no reference to the violation of the importation clause, and, so far as defendant is concerned, the question is merely speculative, whereas he should have held that the validity of the act is to be determined by its language in its application to interstate commerce, and not by the circumstances of the particular case at bar. (d) That from the admitted facts well pleaded in the complaint the conclusion was irresistible that the complaint states facts which fall clearly within the purview of both the spirit and letter of the acts in question, whereas he should have held that from the complaint, taken in connection with the stipulation, the facts which appeared and which alone could be considered by the court were all acts which were authorized by law, and that no unlawful intent can be inferred by the court from the mere performance of a series of lawful acts which are not alleged to have eventuated in any unlawful result, nor can a crime be committed by or punishment be inflicted for the performance of a lawful act, no matter what was the motive or result of its performance."

Mitchell & Smith, James Simons, and W. A. Holman, for appellants. U. X. Gunter, Jr., Atty. Gen., for the State.

GARY, A. J. This is an appeal from an order overruling a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action in the particulars mentioned in the first, second, and third exceptions, which, together with the other exceptions, the complaint, and the order of his honor the circuit judge, will be set out in the report of the case.

The first question that will be considered is the construction of the statute of this state prohibiting certain trusts and combinations. In the case of Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 454, 466, 48 L. Ed. 679, the court had under consideration the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which provides that "every contract combination in the form of trust or otherwise, conspiracy in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared to be illegal. * * *" Mr. Justice Harlan, who wrote the opinion of the court, in which three other members concurred generally, and Mr. Justice Brewer in a separate opinion, announced the proposition: "That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce." Mr. Justice Brewer did not accept this proposition, except in so far as it was applicable to unreasonable restraints imposed upon trade or commerce, but, in speaking of former decisions of the court, said: "Instead of holding that the anti-trust act includes all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose was rather to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy." The opinion of Mr. Justice Harlan, to the extent of Mr. Justice Brewer's concurrence, correctly stated the principles governing the construction of the act then under consideration. That principle is applicable to the statute of this state, and it must be construed as intending that the contracts, etc., herein mentioned, were unlawful and against public policy only when made with a view to lessen, or which tend to lessen, full and free competition to an unreasonable extent. The ad-

mitted substantive facts set forth in the order of his honor the circuit judge show beyond doubt that they lessened, or tended to lessen, full and free competition to an unreasonable degree. This was a natural consequence that might reasonably have been expected to result from them. Therefore it must be presumed that such result was intended. 22 Enc. of Law, 1235. What, then, was the effect of this intention upon the transactions set out in the complaint? In the case of Swift & Co. v. United States, 25 Sup. Ct. 276, 279, 49 L. Ed. 518, the principle is thus stated: "The scheme, as a whole, seems to us to be within the reach of the law. The constituent elements, as we have stated them, are enough to give the scheme a body, and, for all we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. *The plan may make the parts unlawful.* Aikens v. Wisconsin, 195 U. S. 194, 206, 25 Sup. Ct. 3, 49 L. Ed. 154. The statute gives this proceeding against combinations in restraint of commerce among the states, and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. Com. v. Peaslee, 177 Mass. 267, 272, 59 N. E. 55. *But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.*" (Italics ours.) In Aikens v. Wisconsin, 25 Sup. Ct. 3, 49 L. Ed. 154, it is said: "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and, if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." See, also, National Cotton Oil Co. v. State of Texas, 25 Sup. Ct. 379, 49 L. Ed. 689, and Gwynn v. Citizens' Tel. Co., 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111. In 15 Enc. of Law, 934, it is said: "Where a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract, and not its actual results."

The principles just stated show that the different acts alleged in the complaint, in combination with the intent to effect the result of lessening or tending to lessen full and free competition in an unreasonable manner, were unlawful and against the public policy of this state. Upon all other questions in the case this court concurs in the rulings of his honor the circuit judge, for the reasons stated in his order.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

Judge D. A. TOWNSEND sat in place of Mr. Justice WOODS, disqualified.

(123 Ga. 441)

PARKER v. BALLARD.

(Supreme Court of Georgia. June 17, 1905.)

1. WITNESS — COMPETENCY — TRANSACTION WITH DECEDENT.

Where an equitable petition was filed by the administrator of the grantor seeking to cancel a deed on the ground that the deceased was mentally incapable of making it, that it was procured by fraud and undue influence, and that, while it purported to be made in consideration of services rendered by the grantee to the grantor, no such services were in fact rendered, on the trial the grantee was incompetent to testify that services were in fact rendered to the grantor by himself and his children, and to state the character of such services.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 664.]

2. EVIDENCE—PETITION IN COURT OF RECORD.

The contents of a petition filed in a court of record in a county other than that where the trial took place should be proved by a certified copy of the record, and not by parol.

3. DEED—ACTION TO CANCEL — INCAPACITY—UNDUE INFLUENCE—NEW TRIAL.

In an equitable action brought by the administrator of the grantor to cancel a deed on the ground of want of mental capacity on the part of such grantor to make it, and on the ground that it was procured by fraud and undue influence exercised by the grantee, where it was alleged by the plaintiff that the deed purported to be made in consideration of services rendered to the grantor by the grantee, but that in fact no services were rendered, and that the grantee had been fully paid for any services which he may have rendered, but that, if it should be found that any such services were rendered, the plaintiff was ready and offered to pay the value thereof in order to have the deed canceled; and where, on the trial, some evidence was introduced by the defendant to show certain services rendered, but no estimate of their value was made by the witnesses: and where the court submitted special questions of fact to the jury, one of which inquired if any services had been rendered, and, if so, what was their value; and where it does not appear that any objection was made to such question, and no error is assigned in the motion for new trial or by bill of exceptions on the submission of that issue—under such circumstances it furnished no ground for a motion for new trial on behalf of the defendant that the jury fixed a valuation upon such services in their verdict, thus finding in his favor such sum.

4. SAME—EVIDENCE.

Considering the entire evidence, both that in regard to the question of mental capacity of the grantor to make the deed involved in this case, and that introduced by the defendant tending to show recognition of the deed during lucid intervals after it was made, the verdict was supported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action by R. W. Ballard, administrator, against L. B. Parker, administrator. Judgment for plaintiff, and defendant brings error. Affirmed.

R. W. Ballard, as administrator of S. R. Parker, deceased, filed an equitable petition against L. B. Parker in the superior court of Jasper county seeking to recover certain land, and to have a deed made by the deceased to the defendant canceled on the ground that the deceased did not have mental capacity to make it, and that it was procured by undue influence. By amendment the plaintiff alleged that the deed sought to be canceled expressed a consideration of services rendered; that this was wholly fictitious, and no such services were rendered by the defendant to the deceased; that the defendant had been fully paid for any services which he may have rendered; and that, if it should be found that any services were rendered, the plaintiff was ready and offered to pay the value thereof, as an offer and tender precedent to having the deed canceled. Mesne profits were also claimed. The defendant admitted that he was in possession of the land, and claimed it as owner, but denied the substantial allegations on which the plaintiff based his claim for relief. On the trial the evidence was conflicting. The defendant introduced some evidence to show that he and his children rendered services to the deceased in the latter part of his life, while he was feeble and in bad health. No witness gave any opinion as to the value of such services. The case was submitted to the jury on special questions of fact, and, so far as the record discloses, no objection was made to the questions propounded. The jury, in answer to them, found that the deed was void for want of mental capacity on the part of the maker: that a reasonable rental value of the land was $150, and that the defendant rendered services to the deceased of the value of $150. A motion for a new trial was overruled, and the defendant excepted.

F. Jordan & Son, for plaintiff in error. Greene F. Johnson, for defendant in error.

LUMPKIN, J. (after stating the facts). 1. The administrator of the grantor being the plaintiff in the proceeding to cancel the deed, the purported consideration of which was services rendered to the deceased by the defendant, the latter was an incompetent witness to testify that he and his children had rendered services to the deceased. The rendering of such services by him was a transaction between him and the deceased. Moreover, services rendered by his children were irrelevant, except in so far as they might be treated on the same basis as services rendered by him, on the ground that he was entitled to such service. Acts 1900, p. 57; Civ. Code 1895, § 5269.

2–4. The other rulings complained of sufficiently appear in the headnotes, except as to the finding of the jury in regard to the value of the services of the defendant. The plaintiff sought to cancel the deed of the defendant on the ground that the grantor was non compos mentis. On its face it purported to be made upon a consideration of services rendered and to be rendered. Plaintiff denied that any such services had been rendered, and claimed that they were altogether fictitious. But he alleged that, if it should

appear that any such services had in fact been rendered, he was ready and offered to pay the value thereof before having the deed canceled. As he denied that there were any such services, and only made the offer to do equity in the case if it should be found that there were any, it was not incumbent on him to disprove his own case by introducing evidence to show that there were such services, and what was their value.

On the trial the defendant introduced evidence for the purpose of showing that some services were rendered, but did not prove what they were worth. The court submitted the case to the jury upon special questions of fact, one of which inquired, "Were any services rendered S. R. Parker by the defendant, and, if so, what is the value of such services?" In answer to this the jury found the value to be $150. No exception or objection appears to have been taken at the time to the submission of this issue to the jury, nor does the motion for a new trial or the bill of exceptions contain any exception or assignment of error to such submission. The motion for a new trial alleges only that the finding of the jury as to the value of such services was contrary to the evidence, and without evidence to support it. Under these circumstances, if the jury, after having found that the grantor did not have mental capacity to make a deed, put a valuation upon the defendant's services from the best information which was furnished them, we are of the opinion that it would not furnish a ground for a new trial at the instance of the defendant. If the plaintiff were complaining of such finding, perhaps the case might be different. But the verdict seems to have been in favor of the defendant for more than in strictness he may have been entitled to.

Judgment affirmed.

(123 Ga. 458)

BOSTON MERCANTILE CO. et al. v. OULD-CARTER CO. et al.

(Supreme Court of Georgia. June 17, 1905.)

1. INSOLVENCY — JURISDICTION — PROCEEDINGS IN BANKRUPTCY.
When proceedings have been begun under the federal bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], the operation of the insolvent traders' act (Civ. Code 1895, §§ 2716–2722) is, as to the subject of the suit, suspended; but in the absence of any proceeding in the United States courts, the state courts have jurisdiction to try all cases coming within the purview of the act last mentioned.

2. CORPORATION — INSOLVENCY — RECEIVER.
The petition was awkwardly drawn, but was sufficient to authorize the order granted, appointing a receiver, and making the injunction permanent.

3. INJUNCTION — PETITION — VERIFICATION.
The affidavit of the attorney for the plaintiff in a petition for injunction and receiver, to the effect that he knows the recitals of fact in the petition to be true, is a sufficient verification of the petition.
[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 898–901.]

4. NEW TRIAL—INTRODUCTION OF EVIDENCE.
The admission of relevant evidence at any stage of a case is never ground for a new trial. This is so though the party offering the evidence, which consisted of affidavits, failed to comply with an order of the court requiring that all affidavits to be used as evidence be filed in the clerk's office a given number of days before the day set for the hearing.

5. TRIAL—ARGUMENT ON DEMURRER.
Where, at an interlocutory hearing of a petition for injunction and receiver, to which a demurrer has been filed, the whole case is heard together on the petition, demurrer, answer, and evidence, it is not error to refuse to allow the defendant to open and conclude the argument on the demurrer.
[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 44–47.]

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Action by the Ould-Carter Company and others against the Boston Mercantile Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

M. Baun and L. W. Branch, for plaintiffs in error. Hansell, MacIntyre & MacIntyre, W. H. Hammond, S. A. Roddenberry, Roscoe Luke, W. C. Snodgrass, and Theo. Titus, for defendants in error.

CANDLER, J. The case laid by the petition is substantially as follows: The Boston Mercantile Company, a trading corporation doing business in Boston, Thomas county, Georgia, is indebted to plaintiffs in named amounts; the debts being matured, unpaid, and unsecured, and amounting to more than one-third of the unsecured indebtedness of the corporation, which is insolvent. Payment has been demanded and refused. On January 13, 1905, W. Z. Brantley, C. P. McRae, Fred Feltham, and C. R. McRae, all stockholders of the Boston Mercantile Company, presented to the superior court of Thomas county a petition praying the court, for reasons therein set forth, to permit the surrender of the franchise of the Boston Mercantile Company, and for the appointment of a receiver to take and hold the assets of the corporation, so that they might be duly administered, and that the funds arising therefrom, if any, remaining after payment of creditors, be distributed among the stockholders as their interests might appear. The court accepted the surrender of the franchise and appointed a receiver as prayed. On January 16, 1905, the petitioning stockholders appeared before the court and asked leave to dismiss their petition, "and upon said motion the court passed an order dismissing the petition, and directing the receiver * * * to surrender the assets to the petitioners in said petition," which was done. "The order passed upon the petition of said stockholders enjoined all creditors from proceeding in any manner to enforce their

claims against said corporation, and required them to appear in this court and prove their claims, and assert whatever legal rights they may have in the premises in the said proceedings." It was alleged that the surrender of the franchise of the corporation as set out left the assets which were in the hands of the receiver without any person legally qualified to administer them, and that there was "manifest danger of loss or destruction of same, or material injury to those interested in said assets." The stockholders of the Boston Mercantile Company are continuing the business of that concern as a partnership under the name of the Boston Mercantile Company. An indebtedness was alleged against this firm in the same amounts and on the same claims as those charged against the corporation in the outset of the petition. It was also alleged that the firm was insolvent, and that the amount due by it to the plaintiffs constituted more than one-third of the unsecured debts of the insolvent firm. The prayers of the petition were (1) that a receiver be appointed to take and hold, subject to the order of the court, all the assets of the Boston Mercantile Company and of said insolvent firm of traders; (2) that the Boston Mercantile Company and said insolvent firm of traders be enjoined from selling or disposing of or incumbering any of said assets; and (3) for judgment for the amounts alleged to be due, for general relief, and for process. The defendants demurred to the petition on numerous grounds, but the demurrer was overruled. They also filed an answer in which the material allegations of the petition were denied. They also denied the existence of any partnership composed of the stockholders of the Boston Mercantile Company, and averred that, after the appointment of a receiver and the dismissal of the petition of the stockholders, the assets of the corporation were turned over by the receiver, not to the stockholders as individuals, but to the corporation through its president. The court granted a restraining order and appointed a temporary receiver. At the hearing the evidence offered went mainly to the value of the assets of the Boston Mercantile Company in the hands of the receiver, and was quite conflicting. There was no evidence of the existence of any partnership consisting of the stockholders of the corporation, nor did it appear that the stockholders, as individuals, had ever been in possession of the assets. On the contrary, it appeared that the order of January 16, 1905, granted upon the request of the stockholders for leave to dismiss their former petition, directed "that the receiver be discharged, and that he turn over to the plaintiff the Boston Mercantile Company, through its president, W. Z. Brantley, all of the property and assets of said corporation, and the keys of said store." After hearing the evidence and arguments, the court passed the following order: "Upon hearing had this day it is ordered, considered, and adjudged that injunction issue as prayed, and that James M. Jones, Esq., be, and he is hereby, appointed permanent receiver and ordered to take charge of all the assets of the defendant. It is further ordered that the receiver keep open the storehouse of defendant, and proceed to sell at retail the stock of goods, keeping a strict account of all sales made, and report same to the court. Said receiver is authorized to employ only such assistants as are actually necessary to carry on the business, and pay the assistants weekly, taking their receipt for same as his vouchers." The defendants except to this order, to the overruling of their demurrer, to the refusal of the court below to allow them the opening and conclusion of the argument on the demurrer, and to the admission of certain evidence over their objection.

1. An important question raised by the demurrer is whether jurisdiction of the suit was in the state court or in the federal court. It is urged that the passage of the federal bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], had the effect to suspend the operation of our insolvent traders' law, and that while the United States law is in force all proceedings to administer the estate of an insolvent trader must be brought in the federal court under the bankruptcy law. That the Georgia insolvent traders' act is in some respects similar to a state bankruptcy law is undoubtedly true, and attention has been called by this court to these features of the act in Comer v. Coates, 69 Ga. 491, and Ryan v. Kingsbury, 88 Ga. 361–389, 14 S. E. 596. In the first of these cases the court, through Chief Justice Jackson, in discussing the insolvent traders' act, said (page 495): "It is putting a trader in bankruptcy and relieving him from past debts, as far as state legislation can do;" and upon the authority of this case, and that of Ryan v. Kingsbury, supra, the United States Circuit Court, in the case of Carling v. Seymour Lumber Co., 8 Am. Bankr. Rep. 29, 113 Fed. 483, 51 C. C. A. 1, held that the Georgia insolvent traders' act "is a kind of state bankruptcy law, putting a trader in bankruptcy and relieving him from past debts as far as state legislation can do so, but its operation was suspended by the passage of the bankrupt act of 1898." This case, as well as that of Comer v. Coates, proceeds upon the idea that the insolvent traders' act contains that essential to a valid bankrupt law—a provision that the debtor shall be relieved from further liability on his then existing debts. How this idea could ever have obtained, we are at a loss to understand. The only warrant for it is in Civ. Code 1895, § 2722, which is as follows: "It shall be in the power of the chancellor, in his final judgment in the cases provided for, to express his opinion, if the facts authorize it, that, from the facts as they have transpired during the progress of the cause, the defendant has honestly and fairly delivered up his

assets for distribution under the law, and to recommend to the creditors of the defendant that they release him from further liability." In its last analysis, this section means nothing more than that the judge shall have power to express his opinion in open court as to the good faith which the defendant has shown in surrendering his assets to the receiver, and to give some benevolent, but useless, advice to the creditors. He may play Portia to the creditors' Shylock, reminding them that "the quality of mercy is not strained," and admonishing them: "Though justice be thy plea, remember this: that in the course of justice none of us should see salvation. We do pray for mercy, and that same prayer doth teach us to render the deeds of mercy." But if, like Shylock, the creditors should fail to appreciate the beauty of this advice, and should demand to the utmost the pound of flesh, the law of Georgia, unlike that of Venice, affords no avenue by which the unfortunate debtor can "get back at" his adversary. We have yet to learn of a case where even the scant power given by the Code section has been exercised by any chancellor. In Comer v. Coates, supra, the question whether a debtor could be released from his debts by the exercise of the power conferred on the trial judge in the Code section under consideration was not even remotely involved, so that the assertion of the learned chief justice that the insolvent traders' act is "putting a trader in bankruptcy, and relieving him from past debts, so far as state legislation can do so," may well be considered as obiter and not binding on this court; while the ruling of Judge Shelby in Carling v. Seymour Lumber Co., supra, which rests upon the authority of that case, may be dismissed from consideration upon the ground that the learned jurist who delivered the opinion was simply misled by the dictum above referred to.

The insolvent traders' act is unquestionably an insolvency law, but, as we have seen, it lacks one necessary element of a bankruptcy law, viz., a provision that after discharge the debtor shall be released from further liability on his debts. If, after proceedings have been begun under its terms, the federal court obtains jurisdiction of the person or property of the defendant, either by a voluntary petition in bankruptcy, or by a suit filed by other creditors of the defendant, there can be no doubt that the state court must yield jurisdiction. Merry v. Jones, 119 Ga. 643, 46 S. E. 861. But where the bankrupt court has never taken jurisdiction, we do not deem it to be necessary for creditors to go into the federal court in preference to the state court. The law on this subject is fully and clearly stated in Collier on Bankruptcy (4th Ed.) 531, from which we quote as follows: "No bankruptcy law since that of 1800 has contained any provision declaring the effect of such a law on analogous state laws. That law (section 61) provided as follows: 'This act shall not repeal or annul, or be construed to repeal or annul, the laws of any state now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may affect persons who are or may be within the purview of this act.' So far as it goes, the clause quoted is doubtless still the law. There was no need to insert it in subsequent statutes, for, ere the act of 1841 was passed, the Supreme Court had delivered two epoch-making decisions, which settled the law on the subject: (1) That, when Congress has exercised its constitutional power to enact a uniform bankruptcy law, all existing state insolvency laws applying to the same persons are suspended; but (2) that, this power not being exclusive, state laws are valid and continue operative so far as they do not conflict with the paramount federal law." Sturges v. Crowningshield, 4 Wheat. 122, 4 L. Ed. 529; Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606.

2. It must be admitted that the petition was awkwardly drawn. No good reason appears why the stockholders of the Boston Mercantile Company, as a partnership, should have been made parties to the action. It seems that an effort was made by them to dissolve the corporation of which they were members, that they offered to surrender their franchise to the court, and that this offer was accepted. It is not necessary to discuss the question whether the existence of a corporation may be terminated in this manner. It is sufficient to say that, after the attempt was made to kill the subject, restoratives were applied, and it was brought back to life. In fact, it was never "entirely dead." According to the petition, the assets of the corporation were turned over to the petitioning stockholders, presumably in their individual capacity. If such were the case, the individuals would hold the assets merely in trust for the corporation. But the evidence shows that the assets were turned over to the corporation itself, through its officers, and the stockholders were not shown to have been connected in the slightest manner with the business or the assets in their individual capacity or as a partnership. The petition was also faulty in that it alleged two distinct debts to be due to the plaintiffs by two distinct legal entities—one the Boston Mercantile Company, a corporation, and the other the Boston Mercantile Company, a partnership composed of named individuals. But construing the petition in the light of the undisputed evidence, it appears that the indebtedness sued on was due to the plaintiffs by the corporation, and that, had all reference to the stockholders as a partnership been left out, the petition would have been good. The action was one more against the property involved than the parties in whose possession it was, and, as there was no dispute as to who the real debtor was, or as to the justice of the debt, the granting

of the injunction and appointing of a receiver by the court in the face of the demurrer setting up the technical misjoinder of parties will not be held error.

3. Civ. Code 1895, § 4966, requires that "petitions for a restraining order, injunction, receiver, or other extraordinary equitable relief should be verified positively by the petitioner, or supported by other satisfactory proofs." This does not mean that only the petitioner may verify the petition, but that whatever verification is had shall be positive in character. Therefore, where, as in the present case, the attorney for the petitioner makes a positive affidavit that of his own knowledge the recitals of fact in the petition are true, the verification of the petition is sufficient. See Dunham v. Curtis, 92 Ga. 514, 17 S. E. 910.

4. It appears that, by an order of court passed prior to the hearing, all affidavits to be used as evidence were required to be filed at least three days in advance of the hearing, but that nevertheless certain affidavits were allowed in evidence over the objection of the defendants, which were filed on the day of the hearing, and of which the defendants had no notice of service. It does not appear, however, that the defendants asked for time in which to meet these affidavits. The admission of these affidavits is assigned as error. Clearly this was a matter within the sound discretion of the trial judge, and that discretion will not be controlled unless it is shown to have been abused. No such showing was made in this case. Electric R. Co. v. Savannah R. Co., 87 Ga. 261, 12 S. E. 512.

5. Error is also assigned upon the refusal of the court to allow the defendants' counsel the opening and conclusion of the argument on the demurrer filed to the petition. It appears that the demurrer was considered at the interlocutory hearing, along with the evidence introduced, and that the plaintiffs were allowed to open and conclude on the case as a whole. We see no error in this. Had the demurrer been heard separately at the proper time, upon the single question whether or not the petition made out a case to warrant the grant of the equitable relief sought, the defendants would undoubtedly have been entitled to open and conclude the argument; but where, at an interlocutory hearing, the entire case is heard, to determine whether the plaintiff is entitled to equitable relief, the demurrer has no special or favored standing as to the argument, and it is not error to grant the opening and conclusion to the plaintiff on the whole case.

The foregoing disposes of the material questions made by the bill of exceptions. Some of the grounds of the demurrer are not true in fact, as, for instance, those which raise the point that the petition does not allege that the defendants are insolvent, and that it fails to show that the plaintiffs own one-third of the unsecured debts of the insolvent corporation. Further comment upon these points is, of course, unnecessary. A careful examination of the entire record convinces us that the judgment of the court below should not be disturbed.

Judgment affirmed. All the Justices concur.

(123 Ga. 366).

CENTRAL OF GEORGIA RY. CO. v. GORTATOWSKY et al.

(Supreme Court of Georgia. June 16, 1905.)

1. TRIAL—DIRECTING VERDICT.

A presiding judge of a trial court should not direct the jury to find a verdict in favor of one party against the other, except where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, demands a particular verdict. Where there is conflict in the evidence on material issues, it is error to direct a verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 376–380.]

2. CONTRACT—WHAT CONSTITUTES.

In order to make a contract, there must be an agreement of parties. If there is a proposition, but it is not accepted, no binding contract results.

3. CARRIERS—CONTRACT OF SHIPMENT — MISTAKE.

If shippers applied to a railroad agent for a rate for the transportation of certain men and horses, and the agent (who was a "commercial agent, whose duty it was to solicit business"), not having authority to make a special rate, telegraphed to the general agent for the purpose of obtaining one, and the general agent replied, through the telegraph office of the road, stating a rate, but by an error in transmission the telegram, as delivered to the agent dealing with the shipper, stated an amount lower than the general agent had written in the original telegram, and if upon receipt of such telegram the agent correctly quoted a rate as stated in it to the shippers, and if they accepted such offered rate in good faith, and the mistake was not evident, and they did not have knowledge of it, this created a binding contract upon the company.

4. SAME.

If the mistake was evident on its face or known to the shippers, they could not seize upon it to take an unfair advantage of the other party.

5. SAME—RESCISSION.

If a contract is made, one party to it cannot rescind it by merely giving notice to the other of its intention to do so, without the agreement or assent of such other; but it may be rescinded with the assent of both parties.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1146–1150.]

6. TRIAL—DIRECTING VERDICT.

This case should have been submitted to the jury, and it was error to direct a verdict.

(Syllabus by the Court.)

Error from Superior Court, Dougherty County; W. N. Spence, Judge.

Action by A. C. Gortatowsky and others against the Central of Georgia Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

A. C. Gortatowsky et al. brought suit against the Central of Georgia Railway Company for the sum of $552. On the trial

the evidence showed, without conflict, the following facts: I. C. Brinson was the commercial agent of the defendant at Albany. His duties were to solicit business. He did not have authority to make contracts for special rates on its behalf, and this was known to the plaintiffs. At their instance he telegraphed to J. C. Haile, the general passenger agent at Savannah, who had authority to make special rates for the road, for such a rate, for the transportation of troops from Lytle to Albany and return. Haile wrote, and delivered to the railroad telegraph office in Savannah, a telegram dated November 30, 1903, directed to Brinson, the body of which was as follows: "Chairman has announced rate six dollars each direction movement troop Seventh Cavalry Albany Lytle return account street fair for men, rate on horses fifty dollars per car special service. Quote this rate to committee endeavor to secure deposit for movement our line advising." In transmission a mistake was made in this message by the omission of the word "direction," thus making the message read "six dollars each," instead of "six dollars each direction." Brinson quoted this rate to Gortatowsky on Tuesday, December 1, 1903, about noon. On the same day plaintiffs wrote to Haile a letter, the material parts of which are as follows: "We would appreciate it if you would allow us to pay one-half of this transportation now balance due carnival week. In as much as the subscription given by the merchants, only one-half is payable now, balance during carnival. Unless absolutely necessary we would not care to advance the entire amount now, as our advertising expense is very heavy. You will kindly advise Mr. Brinson if this is perfectly satisfactory." On the next day Mr. Haile replied in a letter which contained the following: "We would like very much to accommodate you in the matter of payment, but it is not within our power to deviate from our usual custom with respect to collecting prepaid transportation, therefore, we are powerless to do anything except to instruct our representative to collect the full amount sufficient to cover the movement, Lytle to Albany, which is, $510.00 provided coaches are used; if sleepers are used $570.00." Brinson later received a copy of the letter written to the plaintiffs, telegraphed to Haile, and learned of the mistake on Thursday. He notified plaintiffs of it. The troops were carried to Albany, plaintiffs paying the amount of $552. Afterwards they were transported back to Lytle, and plaintiffs again paid $552, under protest, and it is for this that suit is brought. The difference between $570 and $552 was due to the fact that not as many men were carried as at first it was thought would be transported.

As to other matters in connection with the transaction, it is necessary to briefly set out the testimony of each side respectively. One of the plaintiffs testified as follows: The rate was quoted to them on Monday or Tuesday. They accepted it in good faith. There was nothing in the rate quoted to put them on notice that it was wrong. Brinson did not say that the rate was any lower than it had been, and the rate quoted to plaintiffs was that which they expected to pay, and which they told Brinson would be the usual rate. Brinson told the plaintiffs that Haile had telegraphed him, and was expecting him to secure "the movement"; and plaintiffs said to him that they expected to pay about $600, and to get the rate, and he would get the business. He told them that he would have to get the rate from Haile. Brinson went to one of the plaintiffs on the night of December 3d and told him that the rate which he (Brinson) had quoted was a mistake, and that the amount named would be for each way. When Brinson first quoted the rate, the witness told him that it was a contract; that they would take the rate, and to go ahead; that it was his "movement." The plaintiffs afterwards wrote a letter to Haile asking him to let them pay one-half the freight at that time. But the rate was accepted without any condition. Prior to these negotiations plaintiffs had spent $20 in advertising this attraction for the carnival. Brinson telegraphed to Haile on the 30th of November or the 1st of December that he had secured the movement. A check for $570 was given to Brinson. The difference between this and $532 was refunded, or the amount corrected. The check bore date December 2d, and on it were the words, "movement troop C." In regard to this payment the witness testified as follows: "We paid the money to him the latter part of the week some time. When we paid Mr. Brinson that money, we understood that there had been a mistake; but I will tell you why we paid the money. When Mr. Brinson sent the telegram, that was right after he received the telegram, and he said: 'I have wired Mr. Haile that I have received that money, and, when he wires me to dispose of it, I will come over and get a check for it;' and it was there subject to Mr. Brinson's call. When we paid that money we understood that it was for the payment of the troops one way. We lost a good deal of money on the carnival, and this attraction did not prove as much as we thought it would. I don't know that I knew until after the carnival was over that we had lost a good deal of money, because one or two days of a carnival can pick up things wonderfully. It is not true that I did not make any complaint about this matter until I found out how much we had lost on the carnival. I notified Mr. Brinson the night of the 3d, when he came to the opera house and told me that he had gotten instructions from Mr. Haile that there was a mistake in that telegram, and we told him that we were going to hold them to it, and he said,

'I know I never made a mistake about it.'" After the troops were brought to Albany, plaintiffs demanded that the defendant should return them without additional compensation, which it refused to do.

Another witness for the plaintiff testified that he was present when Brinson spoke to one of the plaintiffs about the mistake in the rate quoted; that the plaintiff stated that that was wrong, and Brinson replied, "Yes, I think it is a mistake, and I so wired Mr. Haile;" and that the plaintiff said, "I want you to understand that I expect to hold the railroad to this rate." This witness appears to have been an agent for the plaintiffs. He further stated: "Mr. Brinson sent me a receipt by a boy, and I took it, as I didn't know what it was. He brought it to me in an envelope. I sent the check to him, and told the boy not to accept any receipt."

Another of the plaintiffs testified that the rate quoted was accepted in good faith, because he knew that the defendant had made four "movements" of this cavalry at a cent a mile; that he had investigated it beforehand to find out what it would cost them.

Brinson testified, among other things, as follows: "Plaintiffs made no agreement with me relative to the movement of Troop C, other than that, if my rate were as low as they could get over other lines, that they would give me the movement. * * * When I quoted that rate to Mr. Gortatowsky I do not remember what he said, but he gave me to understand that he liked that rate, and that it was lower than he really expected. There was no written contract entered into at the time; there was no oral acceptance of it; he simply said that it was better than he expected. I didn't have any intention of making a contract at the time I quoted the rate. * * * I notified Mr. Gortatowsky of the mistake between 9 and 10 o'clock Thursday night, and they said it must be wrong, and that I had better take the matter up with Mr. Haile. They had not paid me any money at that time." No money had been expended by plaintiffs except for advertising, which was done before the rate was quoted. Plaintiffs paid Brinson the money on Friday afternoon, and he gave a receipt stating that it was for the movement of Troop C, Lytle to Albany, "and it was understood then that that was for one way." He afterwards said that he made this statement "because my former rate had been withdrawn." The troop left Lytle at 10 o'clock Saturday night, and arrived in Albany about 3 o'clock Sunday afternoon. "I received my first real complaint about it about Thursday of the following week during the carnival, 48 hours before the troop left. The attendance of the carnival had not been good, and both of the Gortatowsky brothers stated to me that they were losing money. The rate that was first quoted was exceedingly low, being less than one cent a mile for the round trip, the mileage being, if I remember correctly, 353 miles, and I stated to Gortatowsky on my first trip that it was an exceedingly low rate, and he stated that it was a very low rate, because it was less than a cent a mile. * * * I don't know that that rate was accepted by Gortatowsky Bros. He had already stated that he would give me the business, and when I quoted the rate he stated to me that it was very low and satisfactory, and I understood that the movement was mine before I quoted the rate; that is, that the movement was mine provided I could quote a rate as low as any of the other roads, and as to whether they accepted the rate when I quoted it is the question. He never used the word that he would accept the rate; he said that he was very glad to get the rate. I had telegraphed and written Mr. Haile that I would secure the movement before I had quoted the rate. * * * On Thursday I received this telegram from Mr. Haile showing that this mistake had been made. It is not true that at that time the Messrs. Gortatowsky told me that they would expect me to protect that rate quoted them by mistake. I showed him that telegram in the opera house at the time, and if he said that I didn't hear it, and I wasn't put on any notice at that time that we would be held responsible for that rate. * * * Gortatowsky Bros. made no direct statement to the effect that they would release us from the rate already quoted."

At the conclusion of the evidence the court refused to direct a verdict for the defendant, but directed one for the plaintiffs. Defendant excepted.

Wooten & Hofmayer, for plaintiff in error.
Crosland & Jones, for defendants in error.

LUMPKIN, J. (after stating the above facts). The court may direct the jury to find for the party entitled thereto, where there is no conflict in the evidence, and where that introduced, with all reasonable deductions and inferences therefrom, demands a particular verdict. Civ. Code 1895, § 5331. Unless this state of facts exists, a verdict should not be directed, but the jury should be left to pass on the issues. In this case there were two leading questions: Did the parties ever arrive at a valid, binding contract? and, if so, was there a rescission or release from the original terms by mutual consent or agreement? The first question may be divided into two subordinate parts: First, when the telegraphing agent made a mistake in transmission, and Brinson correctly offered to the plaintiffs the rate as received by him, considering what had transpired previously and also at that time, did the plaintiffs accept this rate and make a contract whereby they agreed to have the troops transported over the defendant's road, and the defendant agreed to so transport them? Second, if there was such an acceptance by the plaintiffs in good faith and without notice of any mistake, was it binding on the company, or was the

defendant relieved by reason of the mistake in the transmission of its message? The first of these last mentioned questions is one of fact; the second, one of law.

On the subject of acceptance the evidence for the plaintiffs was to the effect that, when Brinson quoted the proposed rate to them, they accepted it. Nevertheless, they wrote to Haile asking him to agree for them to pay one-half of the amount in cash and the balance later, and, though he declined this, they succeeded in getting Brinson to treat the matter as if they had made some deposit, when in fact they had made none until after they were notified of the mistake. It is true that Haile's telegram to Brinson says, "Endeavor secure deposit," etc.; but his letter to plaintiffs, dated December 2d, required prepayment. The first check which was given to Brinson bore date on its face December 2d, though in fact it appears not to have been given until Friday, December 4th. Brinson denied flatly in one part of his testimony that the rate quoted by him was accepted, or that he understood that a contract was then made, while elsewhere he said that the plaintiffs had told him they would give him "the movement" if he could quote as low a rate as others, and that, when he did inform them of Haile's telegram naming the rate, they expressed themselves pleased with it. His testimony, considered in connection with the letters above referred to, makes it by no means absolutely certain that any contract was consummated, so as to authorize the direction of a verdict. If his statement be correct, that the plaintiffs merely said that the rate was low, or was satisfactory, or the like, did the plaintiffs, in the light of all the evidence, bind themselves to make the shipment at that rate? Whether or not there was an acceptance and a completion of a contract should have been left to the jury.

If the rate stated in the telegram received by Brinson was correctly communicated by him to the plaintiffs, and they accepted it, and closed the contract at that rate, and were not in a position where they knew or ought to have known of the mistake, would the railroad company be bound by the contract, or would it be relieved by reason of the mistake made in the transmission of the message of its general agent? Two opposing views on this subject are entertained by the courts, which are respectively very well stated in the opinion of the majority, and in the dissenting opinion of Clark, J., in the case of Borden v. Richmond & D. R. Co., 113 N. C. 570, 18 S. E. 392, 37 Am. St. Rep. 632. The views of the majority of the court are expressed in the headnotes of that case as follows: "(1) Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, a party to it cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. If, however, a proposal by one evidently contains a mistake, the other cannot, by snapping at it, be permitted to take advantage of the error. (2) Where a local freight agent of defendant railroad company made a written offer to ship cotton between two points at 69½ cents per hundred for plaintiff, who at once, and in writing, accepted the offer, and it was conceded that the said local agent was authorized to make such proposal on the part of the defendant, and the agent plainly and unequivocally expressed what he understood to be the price to be charged for carrying cotton, and there was no misunderstanding between the plaintiff and the agent as to any of the terms of the alleged contract, and it appears that, by an error in the transmission of a telegram from the general freight agent to the local agent, '89½' was changed to '69½,' held: (1) That the contract was binding on defendant company, notwithstanding the mistake; (2) that, in an action by the shipper (who had paid the larger rate under protest) to recover the difference between the two rates, all evidence in regard to plaintiff's purchase of cotton was irrelevant, and plaintiff was entitled to recover." But in the case of Hartford, etc., R. R. Co. v. Jackson, 24 Conn. 514, 63 Am. Dec. 177, a rate was named by an agent of a railroad who understood the shipper to say that there were 100 bundles of laths, when in fact the latter said 500 bundles. It was held that the railroad company was not bound. In Gulf, C. & S. F. Ry. Co. v. Dawson (Tex. Civ. App.) 24 S. W. 566, where a shipper informed the agent of a railway company of the character of the fruit shipped, but the latter misunderstood him and quoted a rate under a mistake as to the character of the shipment, it was held that the parties did not assent to the same thing at the same time, so as to constitute a binding contract. See, also, Rowland v. R. Co., 61 Conn. 103, 23 Atl. 755, 29 Am. St. Rep. 175. This court has held that in the transmission of a telegraphic message the telegraph company is the agent of the sender, and that if an offer is made by telegram, and as delivered to the addressee it is materially different from the telegram delivered for transmission, and is accepted, the sender is bound by the terms of the proposal as contained in the telegram delivered to the addressee. Western Union Tel. Co. v. Flint River Lumber Co., 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; Brooke v. Western Union Tel. Co., 119 Ga. 694, 46 S. E. 826. These decisions are based on the ground that the telegraph company is the agent of the sender in transmitting the message. If this be true of an independent company to whom a message is delivered for transmission, we can perceive no reason why the case would be different if the telegraphing were done by the company or operators under the control of the railroad in

transmitting a message to an agent who dealt directly with the plaintiffs. The evidence states that the telegram sent by Haile to Brinson was filed "in the railroad telegraph office" in Savannah, which we understand to mean a telegraph office under control of the railroad company. There is no doubt, as Mr. Justice Cobb points out in the Flint River Lumber Company Case, that, if the status of a telegraph company is to be considered from the standpoint of agency, some very strong reasoning can be adduced to sustain the position that the minds of the parties never met, and that there was in fact no binding contract; and also that this falls within the rule that a special agent who is directed to communicate a particular message or do a particular thing has no authority to deliver another message or do some other thing, so as to make a binding contract for his principal. Civ. Code 1895, § 3023. But we think that the telegraph cases above referred to in principle bear strongly on this point. And we must take position with the majority of the Supreme Court of North Carolina in the Border Case.

If, however, the plaintiffs had known, or from all the circumstances should have known, that the rate quoted to them was a mistake, they could not have seized upon an evident mistake to take an unfair advantage of the other party. Shelton v. Ellis, 70 Ga. 297; Singer v. Match Co., 117 Ga. 86, 43 S. E. 755. Courts cannot relieve from bad contracts or hard bargains, where they have been deliberately made, and where there has been no fraud or deceit, and the terms of the contract are clear and unambiguous. If a man puts a low price upon his property, and it is accepted, he cannot escape from the contract on the ground that he ought to have charged more. This is not the character of mistake which is a ground for relief in equity. Alexander v. Herring, 54 Ga. 200. Nor does mere ignorance of a fact by both parties do so. Civ. Code 1895, § 3985. Nevertheless, the law of this state does recognize a difference between reforming a contract, and executing a contract in case of a mistake. To authorize a reformation of a contract on the ground of mistake, such mistake must be mutual; but the courts may decline to enforce the execution of a contract if the mistake is confined to the party refusing, provided it is such a mistake as furnishes a good defense, and it can be corrected without injustice to the other party, and the party seeking the rescission or asserting the mistake has not been guilty of such negligence or laches as to prevent his doing so. On the subject of mistake as furnishing a basis for defense or for equitable relief, see Civ. Code 1895, §§ 3535, 3660, 3981–3985, 3974; Stix, Krouse & Co. v. Roulston, 88 Ga. 743, 15 S. E. 826; Singer v. Grand Rapids Match Co., 117 Ga. 86, 43 S. E. 755; Werner v. Rawson, 89 Ga. 619, 15 S. E. 813; Jossey v. R. Co., 109 Ga. 439, 447, 34 S. E. 664 (discussing the Werner Case and section 3974 of the Civil Code of 1895); Keith v. Brewster, 114 Ga. 176, 39 S. E. 850; Atlanta Trust & Banking Co. v. Nelms, 116 Ga. 915, 923, 43 S. E. 380; Comer v. Granniss, 75 Ga. 277 (in which case rescission of an executed contract was denied); Du Bignon v. Mayor, 106 Ga. 317, 32 S. E. 102; Dyar v. Walton, 79 Ga. 466, 7 S. E. 220.

If a binding contract was entered into between the plaintiff and the defendant, the latter could not rescind without the assent of the former. One party to a contract cannot rescind it by mere notice to the other. Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112. But rescission may be had by mutual consent. There was no express statement that the original contract should be rescinded or changed, but the evidence was conflicting as to what transpired and as to the conduct of the parties. If there was a valid binding contract, but the parties consented to a correction so as to make it conform to the telegram sent, whether this would amount to a technical novation, with the requisites thereof, does not require decision at this time. The issues as to whether or not there was an acceptance and the making of a contract, and whether or not there was an assent to a rescission or change from the rate first quoted, were made by the plea. The question whether there was knowledge of the mistake on the part of the plaintiffs, and an effort to seize on the mistake to take an unfair advantage, was suggested in the briefs, but was not made in the plea filed.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 287)

SMITH et al. v. McWHORTER et al.

(Supreme Court of Georgia. June 15, 1905.)

1. TRUST DEED — CONSTRUCTION — ESTATE CONVEYED.

In 1869 Sarah Finch conveyed to "John F. Smith for the use, benefit and advantage, in trust, for said Mary A. Smith, for life, exempt from the marital rights of said John F. Smith, or any future husband, * * * for her sole and separate use, and on her decease to such child or children, or representatives of child or children, born of the said John F. Smith and the said Mary A. Smith, as she may leave in life," certain described land. "To have and to hold the said tract or parcel of land to him, the said John F. Smith, in trust for the said Mary A. Smith and her children, as above specified, forever, free from the debts, liabilities, obligations or control of her present, or any future, husband of the said Mary A. Smith." The trust created by this deed was for the life estate only, and, under the operation of the married woman's act of 1866, became executed immediately upon the delivery of the deed, and the legal title to the life estate vested in the life tenant. The remainder created was a legal remainder.

2. SAME — ESTATE IN REMAINDER — POWERS OF TRUSTEE.

The estate in remainder being a legal estate, the trustee did not represent the remaindermen, and the judge of the superior court had no jurisdiction, on the application of the trustee, in chambers, to authorize the sale of the interest of the remaindermen.

3. REMAINDERMEN—ADVERSE POSSESSION.

As the trustee did not represent the remaindermen, their right of action did not accrue until the death of the life tenant, and the possession of the defendants was not adverse to the plaintiffs until they had their cause of action.

4. ESTOPPEL—RATIFICATION.

Mere knowledge of the illegal decretal order and the sale thereunder will not estop the remaindermen from asserting their title after the death of the life tenant against the grantees of the purchaser under the void order. Nor can the remaindermen be said to have ratified such void sale, unless, with knowledge of the facts, something was done by them to indicate their adoption and approval of the sale under the decree.

(Syllabus by the Court.)

Error from Superior Court, Oglethorpe County; H. M. Holden, Judge.

Action by S. C. Smith and others against Lula McWhorter, executrix, and others. Judgment for defendants, and plaintiffs bring error. Reversed.

On September 2, 1869, Sarah Finch made to John F. Smith a deed to certain land in Oglethorpe county, known as the "William Finch Tract"; the consideration expressed in the instrument being the natural love and affection which the grantor had for his wife, Mary A. Smith, and their children, as well as the sum of $5 in hand paid by John F. Smith. By this conveyance Sarah Finch granted the premises described "unto the said John F. Smith, for the use, benefit and advantage, in trust, for said Mary A. Smith, for life, exempt from the marital rights of said John F. Smith or any future husband, * * * for her sole and separate use, and on her decease to such child or children, or representatives of child or children, born of the said John F. Smith and the said Mary A. Smith, as she may leave in life. * * * To have and to hold the said tract or parcel of land to him, the said John F. Smith, in trust for the said Mary A. Smith and her children, as above specified, forever, free from the debts, liabilities, obligations or control of her present, or any future, husband of the said Mary A. Smith." On November 22, 1875, John F. Smith, as "trustee for his wife, Mary A. Smith, and children," presented a petition to the judge of the Northern Circuit, praying leave to sell the lands of the trust estate, and to reinvest the proceeds of the sale in a tract of land belonging to petitioner, which was represented to be a more suitable place to rear his children, and was then occupied by himself and family as a residence. Upon the following day, which was in vacation, the chancellor passed an order granting the prayer of the petition on condition that a guardian ad litem thereby appointed to represent the minor children should assent in writing to such sale and reinvestment. The assent of the guardian ad litem was procured, and the trust property was brought to sale. J. H. McWhorter became the purchaser at the sale, and on February 24, 1876, John F. Smith, as trustee for his wife and children, made to him a deed which recited, as authority for its execution, the above-mentioned order of the chancellor. On December 20, 1876, J. H. McWhorter conveyed the property to Jos. McWhorter, who by will devised the land to certain persons therein named. At the time the trust deed was executed, Mary A. Smith was over 21 years of age. She died December 27, 1900, leaving five children surviving her. These children on March 31, 1902, after the death of their father on February 24, 1901, brought an action to recover the land described in the trust deed against J. H. McWhorter, the purchaser at the sale by the trustee, and certain persons claiming under him. The defendants in their answer set up the claim that the deed of trust from Sarah Finch to John F. Smith clothed him with the fee-simple title to the property thereby conveyed, that the order of the chancellor conferred upon him power to sell the property for the purposes of reinvestment, and that J. H. McWhorter acquired the legal title thereto as purchaser at the sale made by Smith, trustee. The defendants set up the further defense that, if such sale was not valid and binding in the first instance, it was subsequently ratified by the plaintiffs, who for more than 20 years enjoyed the proceeds of the sale with full knowledge of the facts.

To the answer filed by the defendants the plaintiffs demurred both generally and specially. Thereupon the defendants amended their answer by alleging in support of their contention that the sale had been ratified by the plaintiffs the following facts: Plaintiffs had actual knowledge of the occupancy by

Joseph McWhorter of the land sued for, continuously from November 20, 1876, up to the time of bringing suit; plaintiffs having been born and having lived on the Finch tract, and having removed therefrom at the time of the sale thereof to J. H. McWhorter on February 24, 1876, and having from time to time thereafter been the tenants of Joseph McWhorter, and having seen him make improvements upon it, and also having heard their parents say he was in possession in pursuance of the sale by their father as trustee. While plaintiffs remained members of the family of their father they were supported from the tract of land which he had purchased with the proceeds of that sale, and derived a support therefrom after the death of their mother and up to the time of his death. They knew the property so occupied and enjoyed by them was purchased with funds arising from the sale by the trustee, yet they did not assert an adverse claim to the premises sued for, or notify McWhorter that they had any interest therein, and with full knowledge of all the facts, remained in possession of the substituted tract of land after the death of the life tenant.

The plaintiffs demurred to the answer as amended, but their demurrer was overruled. A trial was had on the merits, and resulted in the direction of a verdict for the defendants. The plaintiffs except to various rulings made during the trial, as well as to the overruling of their demurrer and the direction of the verdict.

Saml. H. Sibley, for plaintiffs in error. Wm. M. Howard and Hamilton McWhorter, for defendants in error.

EVANS, J. (after stating the facts). 1. The rights of the parties in the present litigation very largely, if not entirely, depend on the construction of the deed from Sarah Finch to John F. Smith, trustee, executed on the 2d day of September, 1869. A copy of this deed appears in the statement of facts. At the time the deed was made, Mary A. Smith, the life tenant, was an adult. The practical question is whether by the terms of this deed a trust estate was created for the life tenant and the remaindermen, executory at least until the death of the life tenant, or was the trust limited to the life estate and executed by the "married woman's act" immediately on the signing and delivery of the trust deed. It is a general rule, upon which "the authorities all concur, that, in creating a trust estate, the trustee, without words of inheritance—and in the case of wills with them—takes only such quantity of estate as is necessary for the purposes of the trust." East Rome Town Co. v. Cothran, 81 Ga. 361, 8 S. E. 737. If there is no need of a trustee to protect and preserve the interests of those who are to take by way of remainder, the trust will be limited to the life estate. As was pointed out in Fleming v. Hughes, 99 Ga. 448, 27 S. E. 791, before the Code a trust was necessary to preserve a contingent remainder, because such a remainder might be defeated by the premature termination of the precedent estate; but since the Code, as no particular estate is necessary to sustain a remainder, the defeat of the particular estate for any cause does not destroy the remainder. It is not, therefore, necessary to interpose a remainder to trustees to preserve a contingent remainder. Hence it has often been held that a conveyance to a trustee in trust for one for life, and after the death of the life tenant to such children as the life tenant may leave living at the time of her death, created a trust only for the life estate, and that the remainder was a legal, and not an equitable, estate. Tillman v. Banks, 116 Ga. 250, 42 S. E. 517, wherein the prior cases on this subject are collated. See, also, Luquire v. Lee, 121 Ga. 624, 49 S. E. 834; Stiles v. Cumming, 122 Ga. 635, 50 S. E. 484. A grantor may convey the title to the remainder estate to the trustee, and the trustee in such cases will hold the legal title to the remainder estate until the trust becomes executed. Askew v. Patterson, 53 Ga. 209; Ford v. Cook, 73 Ga. 215; Knorr v. Raymond, 73 Ga. 749; Cushman v. Coleman, 92 Ga. 772, 19 S. E. 46; Moore v. Sinnott, 117 Ga. 1010, 44 S. E. 810, s. c. 113 Ga. 908, 39 S. E. 415. Likewise a grantor, while not expressly conveying to the trustee the title to the remainder estate, may create a duty in the trustee with respect to the estate in remainder, so as to convert the legal estate into an equitable one, and make the trust executory until the duty may be performed under the terms of the trust. Thus, if the instrument creating the trust imposes upon the trustee the duty of making division among indeterminate remaindermen after the termination of a precedent life estate, the trust is executory pending the existence of the life estate. Riggins v. Adair, 105 Ga. 727, 31 S. E. 743; Cushman v. Coleman, 92 Ga. 772, 19 S. E. 46. Or if the trustee is expressly empowered to act and manage the property for the life tenant and for infant or contingent remaindermen, the trust is executory until the life estate is determined. Johnson v. Cook, 122 Ga. 524, 50 S. E. 367. Generally, where the title is conveyed to a trustee in trust for a life tenant, with a remainder over, where no express trust for those who are to take in remainder is created, nor any duty imposed on the trustee with respect to the estate in remainder, such remainder is a legal, and not an equitable, estate. The mere fact that the remainder estate may be contingent does not necessarily convert it into an equitable estate. Mitchell v. Turner, 117 Ga. 959, 44 S. E. 17. The contingency of the remainder, however, is always an important factor in construing the character of the estate passing to the trustee, in the effort to arrive at the true intent of the grantor.

The cases of Thomas v. Crawford, 57 Ga.

211, and Jennings v. Coleman, 59 Ga. 718, are distinguishable from the case at bar. In both cases the issue presented for determination arose upon the levy of a fi. fa. upon the interest of the tenant for life and a claim by the trustee. In the first case the bequest of the property was to the trustee, who was to pay over the rents, issues, and profits annually to the person whom it was contended owned a life estate. By the will the corpus of the estate was expressly devised to the trustee. He was to have possession of the land, was to manage it and pay the income annually to Howard, and upon Howard's death the trustee was to deliver possession to those entitled in remainder. The phraseology of the will clearly indicated that the testator intended that the trustee should represent the whole estate during the life of Mr. Howard, and that the trust was to be executory so long as he lived. In the latter case the property conveyed by the deed before the court was subjected to the same trusts, uses, and conditions as were contained in the will of the father-in-law of the grantor; and it was held that the deed, interpreted and construed with the will, created an executory trust. This case is controlled by its own special facts, and the conclusion reached was the result of an attempt to give effect to the two instruments so as to effectuate the grantor's intent.

Discarding all technicalities, the plain and manifest intent of the grantor in the deed before us was to create a trust for the life estate only. No express trust was created for the remaindermen; no powers were conferred on the trustee, and no duty imposed for the benefit and protection of the remaindermen. The evident purpose of the grantor in conveying the title to the life estate to a trustee was to protect the life tenant against the marital rights of the husband. This deed was made shortly after the enactment of the "married woman's act of 1866," and at that time the emancipation of a married woman's property was hardly appreciated by the public. As to her separate estate, the wife was then a feme sole, and the husband's marital right of reducing to possession the wife's property, and in this way acquiring the title thereto, no longer existed. Only the naked legal title to the life estate passed to the trustee. The estate in remainder was a purely legal estate. As no trust at the date of this deed could be created for an adult married woman, the trust was executed on the delivery of the deed, and the complete title to the life estate vested in Mary A. Smith. The trustee represented neither life tenant nor remaindermen, and, having no duty to perform, the trust was executed. Tillman v. Banks, supra.

2. The estate in remainder being a legal estate, the trustee did not represent the remaindermen; and the judge of the superior court had no jurisdiction in chambers, on the application of the trustee, to authorize the sale of the interest of the remaindermen. Milledge v. Bryan, 49 Ga. 397; Knapp v. Harris, 60 Ga. 398; Rogers v. Pace, 75 Ga. 436; Pughsley v. Pughsley, Id. 95; Taylor v. Kemp, 86 Ga. 181, 12 S. E. 296; Fleming v. Hughes, 99 Ga. 444, 27 S. E. 791. The order of sale being without authority of law, the sale thereunder was necessarily void.

3. This suit was instituted within two years of the death of Mrs. Smith, the life tenant. As the trustee did not represent the remaindermen, their right of action did not accrue until the death of the life tenant, and the possession of the defendants was not adverse to the plaintiffs until they had their cause of action. Luquire v. Lee, 121 Ga. 634, 49 S. E. 834.

4. The defendants further pleaded that if the title did not vest in the trustee by virtue of the deed from Finch to Smith, trustee, but vested in the life tenant and the remaindermen, they and their predecessors in title had full and complete possession of the premises since the date of the deed from Smith, trustee, to J. H. McWhorter (February 24, 1876), with the knowledge and consent of the remaindermen, who after their maturity enjoyed the proceeds of the sale. We have already pointed out that the trustee was not invested with the title to the land under the Sarah Finch deed. Under this deed, Mary A. Smith took a life estate, and the plaintiffs the estate in remainder. The trustee's sale was absolutely void. Whether the life tenant was estopped from denying the legality of that sale, or had ratified it, does not enter into the present controversy. She died without having disaffirmed it, and the litigation is between the grantees of the purchaser at that sale and the remaindermen, whose estate did not come into possession until after the life tenant's death. The rule in such cases is that remaindermen who do not participate in the sale by the life tenant are not bound to proceed against the purchaser nor give him notice until the accrual of their title. Parker v. Chambers, 24 Ga. 518. Before an estoppel can be urged against the remaindermen, they must have done some act whereby they derived a benefit or prejudiced another. It is quite evident from the allegations of the plea that the purchaser at the sale relied upon the validity of the decree of sale, and the deed executed by virtue of and conformably with the decree. It is not even hinted that the remaindermen acted in any way to induce the purchase. The plea discloses that the ages of the remaindermen at the date of the filing of the plea ranged from 27 to 35 years. The plea was filed in the year 1902, and the sale occurred in 1876, so that the oldest of the plaintiffs was approximately 9 years of age when the decree was entered. In a case where a trustee for two persons sells and conveys the whole property in fee, purporting to act

as trustee for one only, and a part of the price or of the proceeds of the sale passes from the trustee to the beneficiary not named in the transaction, such beneficiary must refund the same to the purchaser, or to those holding under him as subsequent purchasers, before he will be allowed to recover the whole of his interest in the trust estate so sold and conveyed. Bazemore v. Davis, 55 Ga. 504. Also, where a trustee for the life tenant, who does not represent the remaindermen, sells and conveys the entire fee, and the remaindermen receive a part of the proceeds of the sale, they must refund the amount so received before they can recover the whole estate in remainder. Luquire v. Lee, 121 Ga. 636, 49 S. E. 834. In the case before us the life tenant died in 1901, and suit was brought by the remaindermen 15 months thereafter. Of course, they cannot hold the land conveyed to the trustee in exchange for the land conveyed by him, and also recover the land which the trustee conveyed. Their action in suing for this land so soon after the life tenant's death amounts to a disaffirmance and repudiation of the sale by Smith, trustee, to McWhorter. It is familiar doctrine that, to bind one by a ratification of an illegal or void act, it must be shown that he had full knowledge at the time of the alleged ratification of the facts which would make such acts illegal and void, and the burden of proving ratification is upon the person asserting it. De Vaughn v. McLeroy, 82 Ga. 688, 10 S. E. 211 (4). The bare fact that plaintiffs lived on the exchanged land as members of their father's family, and were supported by their father from the proceeds thereof, would not amount to ratification of the sale. Their father owed them a support during their minority, and the acceptance after majority of their father's bounty would not be a ratification of an illegal and unauthorized sale of their land. Neither would their brief occupancy of the exchanged land after the accrual of their right to sue ratify the illegal sale, unless something else was done by them to indicate their adoption and approval of the sale under the decree. Nothing of this kind was alleged in the plea, and the court should have stricken the same on demurrer.

Inasmuch as the trial judge held contrary to some of the principles of law herein enunciated, a new trial is ordered.

Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 344)

CALLAWAY v. IRVIN.

(Supreme Court of Georgia. June 16, 1905.)

1. DOWER—ASSIGNMENT—PRESCRIPTION.

Where land belonging to the estate of a decedent is actually admeasured by commissioners appointed to set apart dower to his widow, and she enters into possession of the same with the acquiescence of all persons concerned, it is not essential to the creation of a dower estate therein that there should be an order of court formally assigning the land to her as dower. It follows that the right to enjoy the reversionary interest in the land is postponed until the termination of the dower estate by her death, and prescription will not run against persons entitled to the reversion until their right of enjoyment accrues.

2. ORDER—COLLATERAL ATTACK.

Where the record of a legal proceeding shows on its face that an order passed in vacation by the judge of the superior court is void for want of jurisdiction over the subject-matter, such order may be collaterally attacked at any time by any person who has not by his conduct estopped himself from questioning its validity.

3. EXECUTORS AND ADMINISTRATORS — SALE OF LAND—VALIDITY OF ORDER.

Under the act of March 17, 1866 (Acts 1865–66, p. 221), declaring under what circumstances a judge of the superior court may, in vacation, give direction in a case where it appears that it has become impossible to carry out the provisions of a will, jurisdiction of the subject-matter depends upon the consent in writing of all persons at interest who are sui juris that the judge may render a decree. If a feme covert be a beneficiary under a will probated prior to the married woman's act of 1866, and her husband has taken no steps to enforce his marital rights with respect to the devise or bequest made to her by the testator, her written consent that the judge may entertain jurisdiction of a petition for direction presented by the executor is essential to the validity of an order passed in vacation authorizing the executor to sell the property of the estate.

4. JUDGMENT—RES JUDICATA.

Estoppel by judgment cannot be successfully urged as a defense to a suit brought by a single plaintiff, where it appears that in a former suit, jointly instituted by him and others, with respect to the same matter, the defendant interposed several distinct defenses, some going to the merits of the controversy, and one to the right to maintain the action as brought, and it does not appear upon which of these defenses the judgment in his favor was rendered.

(Syllabus by the Court.)

Error from Superior Court, Wilkes County; H. M. Holden, Judge.

Action by M. S. Callaway against C. E. Irvin, administrator. Judgment for defendant, and plaintiff brings error. Reversed.

On August 25, 1861, Seaborn Callaway died, leaving a will which contained the following provisions: "Item 2. I wish all my property kept together and used as I have used the same during the life of my wife, she to have the privilege, with the consent of my executors, of giving off to my children, as they become of age or marry, such parts as she and they may select, to be accounted for in the final division, as shall be also what I have given heretofore to any of my children. Item 3. At the death of my wife, I wish my property equally divided between my children. * * * Item 5. If any of my children die without leaving children, I wish the share given to them by this will to revert to my other children. * * * Item 7. In the event of my wife's marriage, I wish her to have an equal part of my estate set off to her, which shall at her death revert to my children under the above limitations." The will was duly probated on September 9th of

the same year, and letters testamentary issued to Simeon Parker Callaway, one of the executors therein named, who was a son of the testator. The property of the estate was kept together until the year 1866, when Mrs. Callaway, the widow of the testator, intermarried with one William Bryant, and gave notice to the executor of her election to take dower. The executor thereupon presented a petition for direction to the judge of the superior court of Wilkes county, reciting in the petition that Mrs. Callaway had remarried and had elected to take dower, and stating various reasons why it was no longer practicable to carry out the intention of the testator of keeping the property together for the support of his family. The executor also set forth the names of the children interested in the estate, some of whom were minors, and stated that one of the adult beneficiaries under the will, Martha L. Callaway, had married Henry E. Spratlin. Included among those alleged to have attained their majority was the name of Marshall S. Callaway. By an order passed at chambers, the judge appointed Spratlin as guardian ad litem to represent the minor children, and he accepted the appointment, and, in his representative capacity, signed a written consent that the judge might at chambers render such decree as he might deem proper under the petition, and might decide any issue of fact that might be raised by any of the parties at interest. This written consent appears to have been signed by Spratlin in his individual capacity also, and by all of the children whom the petition alleged were adults, except the wife of Spratlin, formerly Martha L. Callaway, and the executor. It was also signed by the testator's widow, Mrs. Bryant, and by William Bryant, with whom she had intermarried. At chambers, on December 13, 1866, the judge passed an order which recited that "the parties interested" had requested that he should "decide the various matters presented in said will," and which directed the executor to sell at public sale, in the same manner as executors usually sell, "all the property of [the testator], except so much as may be set off for the widow's dower." The executor was also, by this order, given instructions as to how to make distribution of the proceeds of the sale. The land belonging to the estate was brought to sale by the executor under this order, was bid off by Samuel Barnett, and on February 5, 1867, the executor made to him a deed. The purchaser at the sale subsequently conveyed the land to Gabriel Toombs, and from him it passed by a chain of deeds, made by persons claiming under him, to Barnett Irvin, to whom it was conveyed on January 6, 1886. The conveyances last referred to purported to convey a fee-simple estate in the land, Samuel Barnett having on January 9, 1867, prior to the executor's sale, secured a deed from William Bryant and his wife, formerly Mrs. Callaway, to that portion of the tract which she claimed as dower. The portion so claimed as dower was run off and platted by commissioners, she took possession of it as her dower, and it was so treated by all persons concerned, though no order of court formerly setting it apart as dower appears of record. Barnett Irvin and his predecessors in title under the executor's sale and the deed conveying the dower interest remained in undisturbed possession of the land up to the time of the death of Mrs. Bryant, which occurred in December, 1898. On January 12, 1900, Simeon Parker Callaway, Marshall S. Callaway, and others claiming under the will of Seaborn Callaway brought against Barnett Irvin an action to recover the tract of land which Mrs. Bryant had claimed as dower. Soon thereafter Barnett Irvin died, and his administrator, Charles E. Irvin, was made a party defendant in his stead. The defense interposed was (1) title derived from Samuel Barnett; (2) title by prescription, and the making of valuable improvements on the land; (3) a denial that dower was ever set apart to the widow of Seaborn Callaway: and (4) estoppel operating against Simeon Parker Callaway from asserting title to the premises, he having, in his capacity of executor of Seaborn Callaway, conveyed the land by absolute deed to Samuel Barnett, the defendant's predecessor in title. The case was tried by the court, without the intervention of a jury, upon an agreed statement of facts, and judgment in favor of the defendant was rendered. The case was then taken to the Supreme Court for review, but was there dismissed for want of prosecution.

The present action is a complaint for land brought by Marshall S. Callaway on October 3, 1903, against Charles E. Irvin, as administrator of Barnett Irvin, to recover a one-seventh undivided interest in the tract of land in which the plaintiff's mother, Mrs. Bryant, claimed a dower estate. In addition to the defenses interposed to the previous action to which the plaintiff was a party, the administrator filed a plea of res adjudicata. By an amendment to his petition the plaintiff alleged that the order under which the land was sold at executor's sale was void for want of jurisdiction on the part of the judge of the superior court to pass it in vacation without the written consent of all parties at interest, and the sale was attacked on the ground that it was not made in conformity to the order, and for other reasons. The case proceeded to a trial on the merits, and resulted in the direction of a verdict in favor of the defendant. Exception is taken by the plaintiff to the disposition thus made of his case.

S. H. Sibley, for plaintiff in error. S. H. Hardeman, for defendant in error.

EVANS, J. (after stating the facts). 1. As the land which Mrs. Bryant claimed as dower was actually admeasured by commis-

sioners appointed to set apart dower to her out of the lands of her deceased husband, and as she went into possession of this tract, and all persons concerned acquiesced in her assertion of a dower estate therein, including the defendant's predecessors in title, it matters not that no formal judgment of the superior court of ordinary assigning dower to her was shown to have been rendered. Wells v. Dillard, 93 Ga. 682, 20 S. E. 263. The right of action of the plaintiff did not accrue until the death of Mrs. Bryant. Id., at page 683 of 93 Ga., page 264 of 20 S. E.; Napier v. Anderson, 95 Ga. 618, 23 S. E. 191.

2. The plaintiff swore as a witness on the trial that, at the time the executor of his father's will procured the order of the chancellor authorizing a sale of the property of the estate, he (the plaintiff) was only 19 years of age; that he had no notice of the executor's petition for direction, did not sign the written consent upon which the order was based, nor authorize any one to sign his name thereto; and that not until after his mother's death in 1898, when he was investigating his rights with respect to the lands set apart to her as dower, did he learn of the sale made by the executor under color of that order. Counsel for the defendant in error insists, however, that it was not the right of the plaintiff to make this collateral attack upon the order, which is to be treated as the judgment of a court of competent jurisdiction, and the presumption indulged that the plaintiff did consent in writing, and that all necessary jurisdictional facts were made to appear to the chancellor. Unless the record of the proceedings shows on its face the want of jurisdiction to pass the order, the position of counsel is doubtless maintainable. Mayer v. Hover, 81 Ga. 309, 315, 7 S. E. 562. But it affirmatively appears that the judge acted upon the petition without procuring the written consent of Martha L. Spratlin (formerly Miss Callaway), who was one of the beneficiaries under the will of Seaborn Callaway; and if such consent on her part was necessary, then the record shows upon its face that the order of the judge was void for want of jurisdiction to pass it, as the petition filed by the executor names her as one of the children of his testator who was interested in the estate. The order, if void, could be collaterally attacked by the plaintiff, unless he was for some reason estopped from calling into question its validity. His testimony was therefore pertinent as tending to show he was not instrumental in procuring the order or effecting the sale thereunder, he not having any notice of the proceeding or its result until after his mother's death, years after the sale. It further appears from the testimony introduced in his behalf that he never received any of the proceeds arising from the sale.

3. The only authority which the chancellor had to entertain jurisdiction of that proceeding in vacation was such as was conferred by the act of March 17, 1866. Acts 1865–66, p. 221; Civ. Code 1895, § 4855. That act declares that when, "for any reason already existing or to exist, it becomes impossible to carry out any last will and testament, in whole or in part, the judges of the superior court shall have power to render at chambers, during vacation, any decree that may be necessary and legal in the premises; provided, all parties in interest consent thereto in writing, and there is no issue as to facts; or if there is such an issue, there is a like consent in writing that the judge presiding may hear and determine said facts, subject to a revision by the Supreme Court, as in other cases"; and provided, further, "that in all cases where minors are interested, the consent of the guardian at law or guardian ad litem shall be obtained before such decree is rendered." If Mrs. Spratlin was a party "in interest," the written consent of her husband, acting in his individual capacity and as guardian ad litem for minor children, was insufficient to give the judge jurisdiction over her, or to authorize him to pass any order disposing of the property of the estate. The will provided that upon the death of the testator's wife his executors should divide his property equally between his surviving children and the offspring of deceased children. Mrs. Spratlin was therefore to receive her share of the estate only in the event she survived her mother. The evidence discloses that the husband of Mrs. Spratlin never made any attempt to reduce her interest in the estate to his possession in the exercise of his marital rights. Accordingly, when the order of sale was passed, she was a party at interest. Archer v. Guill, 67 Ga. 195; Sterling v. Sims, 72 Ga. 51; De Vaughn v. McLeroy, 82 Ga. 704 et seq., 10 S. E. 211, and cases cited; Arnold v. Limeburger, 122 Ga. 72, 49 S. E. 812. On the day that order was passed (December 13, 1866), the married woman's law went into effect; so, when the sale took place, her interest in her father's estate had become a part of her separate estate. Since that time she has not been deprived of such interest by any act on the part of her husband. She, and not he, was therefore the party in interest whose written consent was essential to confer jurisdiction upon the judge of the superior court to pass the order of sale, unless it be that the assent of both was necessary in order to cut off his future right to reduce her property to his possession. The record of the proceedings before the judge disclosed the fact of her marriage, as well as the fact that she was a beneficiary under her father's will; nevertheless, as the record also shows upon its face, her written consent to the judge's entertaining jurisdiction of the executor's petition for direction was not procured, and the order of sale was consequently a mere nullity. Nothing passed to the purchaser at the executor's sale, and the legal title to the reversionary interest in the tract of land set apart as

dower was not shown to be in the defendant.

4. The present action is in no legal sense a renewal of that brought jointly by the plaintiff, Simeon Parker Callaway, and others claiming under the will of Seaborn Callaway. White v. Moss, 92 Ga. 244, 18 S. E. 13. Their right to recover depended upon their ability to show that they, and each of them, had title as against the defendant. Wooding v. Blanton, 112 Ga. 509, 37 S. E. 720. If one was not entitled to recover, there could be no recovery by any of his coplaintiffs. Walker v. Pope, 101 Ga. 666, 29 S. E. 8; McGlamory v. McCormick, 99 Ga. 148, 24 S. E. 941, and cases cited. The fact being brought to light on the hearing of that case that Simeon Parker Callaway was estopped from setting up title to the land because of the deed executed by him, in his representative capacity as executor of his father's estate, in pursuance of the sale he had brought about, a finding in favor of the defendant against all of the plaintiffs was the only logical result of the trial. Medlock v. Merritt, 102 Ga. 212, 29 S. E. 185. All the facts with regard to the executor's sale, and the connection which the plaintiffs had with the proceeding, and the order of the judge under which it was made, were ventilated at that hearing. Upon what reason the presiding judge placed his judgment does not appear, but that the judgment was right is apparent. The defendant relied, upon the trial of the case now under review, upon this previous adjudication as sustaining his plea of res adjudicata, insisting that a trial was had upon the merits and the same issues were involved. He did not, however, undertake to go further and show what was actually decided.

Upon the party setting up an estoppel by judgment rests the burden of proving it. 1 Herman, Estoppel & Res Judicata, § 410. It matters not how numerous the questions involved in the suit may be, provided they were tried and decided (Id. § 210), for the judgment is conclusive not only of the thing directly decided, but of every fact which was essential to the adjudication. Id. § 231. "Any conclusion which the court or jury must evidently have arrived at in order to reach the judgment or verdict rendered will be fully concluded." 24 Am. & Eng. Enc. L. (2d Ed.) 766. But even if a particular matter was put in issue, "if the issue was not determined, by reason of the decision turning upon some other point, or otherwise, there is no estoppel." Id. 776, 777. And if "there be any uncertainty as to the precise issue involved and determined in the action, as, for example, if it appear that several distinct matters were litigated, upon any one or more of which the judgment may have turned, the whole matter of the action will be at large, and open to subsequent controversy." Id. 773–775. Thus, where several defenses are pleaded, and the judgment does not show upon which issue the decision was rendered, there is no estoppel. Id. 775, note, and cit. "It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment." De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956. In the case before us, no such certainty exists; the defendant in the first suit interposed several defenses, one of which was that Simeon Parker Callaway was estopped by the deed he had executed from asserting title to the land; and this special defense was established, and affected not only his right to recover, but also cut off his coplaintiffs from any recovery in that suit, independently of whether any of the other defenses were meritorious. That the judge reached the conclusion that the defendant had the better title rests upon the bare surmise that the judge may have fallen into the error of so deciding, instead of placing his judgment upon the ground that one of the plaintiffs was clearly estopped from setting up his claim of title. As was held in Worth v. Carmichael, 114 Ga. 699, 40 S. E. 797, "A judgment rendered in litigation between the same parties is not conclusive in a subsequent suit between them on a different cause of action, except as to issues actually made and determined in the former litigation." See, also, Draper v. Medlock, 122 Ga. 234, 50 S. E. 113. That the plaintiff had an opportunity of having the merits of his claim passed on by the court, and was not cut off therefrom by the fact that one of his coplaintiffs had estopped himself from maintaining the action, should be made to affirmatively appear before the plaintiff is denied the privilege of proving, as he is now able to do, that his claim is just. "The estoppel" which the law contemplates "does not depend upon technicalities, but rests in broad principles of justice, and it can apply only when the party has had his day in court and an opportunity to establish his claim. * * * Nothing would seem to be plainer than that no man could be barred by a judgment against him who was not by the issue placed in such a position that establishing his demand would entitle him to a judgment in his favor." Fifield v. Edwards, 39 Mich. 266, 267. So it has been held that even in an equitable proceeding the rule is not different, and "where in the answer various matters of defense are set forth, some of which relate only to the maintenance of the suit, and others to the merits, and there is a general decree of bill dismissed, from which it does not appear what was the prevailing ground of defense, it is impossible to hold that the decree operates to preclude future proceedings." Foster v. The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125. We are content to rest our decision upon this question on the reasoning of the learned justice who pronounced the opinion in that case.

Judgment reversed.

SIMMONS, C. J., absent.

(123 Ga. 483)

COKER et al. v. ATLANTA, K. & N. RY. CO. et al.*

(Supreme Court of Georgia. June 15, 1905.)

1. MUNICIPAL CORPORATIONS — VACATING STREETS—POWERS.

A municipal corporation is without power to vacate a public thoroughfare unless authority so to do be conferred upon it in express terms or by necessary implication.

(a) The charter of the city of Atlanta clothes it with no such power.

(b) Authority "to open, lay out, to widen, straighten, or otherwise change" streets within the city does not comprehend the power to abandon a thoroughfare and open another to take its place over a strip of land running parallel with, but some 26 feet distant from, the nearest boundary line of the street sought to be vacated and devoted to a purpose inconsistent with its use by the public.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 149, 722, 1429.]

2. PUBLIC NUISANCE—INJUNCTION.

Though the unauthorized obstruction of a city street by the laying of railway tracks and the erection of permanent structures thereon may, as matter of law, amount to a public nuisance, none save persons who will thereby sustain injury not shared in by the public at large can maintain an equitable proceeding to enjoin the creation of such nuisance.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1503.]

3. INJUNCTION — ABANDONMENT OF STREET —WHO MAY MAINTAIN.

One whose property rights will be injuriously affected by the unauthorized abandonment and obstruction of a street which furnishes an important avenue of approach to his place of business, in that the closing of the street will divert travel from the thoroughfare on which his property is situated, and render the same less valuable and less remunerative to him, can maintain an action to prevent the infliction of such special injury.

4. MUNICIPAL CORPORATIONS — CONTRACTS—INJUNCTION.

That great benefits will flow to a city from the carrying out of an ultra vires contract made in its behalf affords no reason for denying appropriate equitable relief to a citizen who attacks the contract as illegal, and whose rights will be infringed, if its terms are given effect.

5. SAME—DEFENSES—EVIDENCE.

There is no merit in the defense that a property owner will not sustain damage from the unlawful closing of a street, for the reason that another street to take its place will be immediately opened, unless it be shown that the street to be opened will be permanently maintained.

(a) Evidence that the street to be substituted for that closed will afford better access to the complainant's property, and will render it more valuable, is not open to the objection that benefits thus arising cannot be set off against the damages which he would sustain from the unauthorized abandonment and obstruction of the street to the closing of which he objects.

(b) After an ultra vires contract wherein a municipality is named as a party is wholly or partially performed by the other contracting party, a court of equity cannot undertake to enjoin the city authorities from restoring to that party such fruits of the unauthorized contract as have not been dissipated, but remain in the custody of the municipality.

6. ESTOPPEL BY CONDUCT.

Even though a citizen may, by his conduct, induce the authorities of a city to believe that he will not question the validity of an ordinance providing for the vacation of a public thoroughfare, he will not be estopped from attacking the ordinance at any time before definite action is taken thereunder by the parties interested in giving it effect.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Suit by F. M. Coker, Jr., and W. S. Kendrick against the Atlanta, Knoxville & Northern Railway Company and the city of Atlanta. Decree for defendants, and plaintiffs bring error. Reversed.

The Atlanta, Knoxville & Northern Railway Company undertook to secure for the joint benefit of itself and other railroad companies with which it was associated terminal facilities in the city of Atlanta affording access to Central avenue, in the heart of the city. As a part of the project, the railway company desired to acquire title to a street known as "Waverly Place," which divided property it had purchased from the freight yards of one of the companies with which it was associated; to also acquire title to a lot upon which stood one of the fire engine houses belonging to the city; and to secure the privilege of crossing certain streets intersecting a right of way leading to the property which the railway company had purchased for use as a terminal station. The city of Atlanta, acting through its general council, indicated a willingness to encourage and foster the enterprise, and negotiations between the railway company and the city council were entered into, with a view to granting to the railway company the desired privileges, and conferring upon it the right to use Waverly Place as it might see fit. The city of Atlanta also had a purpose of its own in view. It much desired to acquire the right to construct a viaduct across the railroad yards of the companies associated with the Atlanta, Knoxville & Northern Railway Company, and to get from the railroad companies substantial aid in the building of this expensive structure from Washington street, on the south, to Collins street, on the north, of the railroad yards. As a result of the negotiations, the city council, on December 23, 1904, adopted an ordinance which provided, in substance, as follows: The railway company was to be granted (1) the privilege of crossing the streets intersecting its right of way to the proposed terminal station; (2) the city's fire engine lot; (3) the street known as Waverly Place; and (4) the right to cross with its tracks a portion of Washington street at a grade which would admit of trains passing under the proposed viaduct. On the other hand, the city was to acquire from the railway company (1) a right of way for the viaduct across the railroad yards; (2) the

*Rehearing denied July 17, 1905.

sum of $50,000, to be used in building this viaduct; (3) a lot in the neighborhood, upon which should be erected by the railway company a modern fire engine house to take the place of that granted to the railway company; and (4) the use of a street laid out across the property of that company south of Waverly Place, and to be used in its stead till the city should take steps to build the viaduct, and should receive from the company the $50,000 to be used in its construction, when the strip of land laid out as a street across the railway company's property should be reconveyed to that company, provided the city was not prevented by legal proceedings from so doing; the $50,000 to be paid to the city in any event.

The railway company assented to the terms of the ordinance, and it was about to be carried into effect, when F. M. Coker, Jr., and W. S. Kendrick filed an equitable petition, therein naming the Atlanta, Knoxville & Northern Railway Company and the city of Atlanta as defendants, and praying that they be enjoined from proceeding under the ordinance to do anything affecting the existing status. Petitioners attacked the contract evidenced by the ordinance as ultra vires, alleged that they were the owners of property in the immediate vicinity of Waverly Place which would be injuriously affected by the closing and obstruction of that street, and denied any right or authority on the part of the city to vacate it, or to grant to the railway company the privilege of using the same for railroad purposes. On the hearing of the case, no attempt was made to show that any special injury to Kendrick would result from the closing of the street, but it did appear from the uncontradicted evidence that if Waverly Place should be vacated, and no thoroughfare taking its place should be substituted, the market value of certain property owned by Coker would depreciate from 5 to 10, or possibly 25, per cent. The fact was also brought out at the hearing that subsequently to the filing of the petition for injunction the city council had in certain respects amended the ordinance complained of. The only change therein which need be noticed is the striking of the provision for the payment by the railway company of $50,000, and the insertion in lieu thereof of the following stipulation: "Sec. 6. That the said railroad company, by accepting this ordinance, agrees and contracts with the city of Atlanta to pay a part of the expense or cost of the construction of said viaduct, corresponding to the amount needed to erect that part of the viaduct extending over the tracks of the railroad from the abutment at Washington street to the abutment at Collins street, as shown on the plans of the original ordinance, approximating a distance of 393 feet, thus connecting the viaduct constructed to either side of said railroad property and completing said viaduct, provided the cost of such part of the same does not exceed $80,000, any saving to be for the benefit of the railroad, its successors and assigns. The city of Atlanta will adopt a resolution directing the mayor to execute a conveyance in its name quit claiming all the city's right, title and interest in and to Waverly Place, as changed, to the Atlanta, Knoxville & Northern Railroad Company, its successors and assigns, at the time said railroad company, its succesors and assigns, shall pay their part for the construction of said viaduct, as above provided; and the good faith of the city is hereby pledged to accordingly secure said street to said railroad company and its successors and assigns: provided, however, that should the city of Atlanta be prevented by legal proceedings from making said quit claim conveyance, the payment for said viaduct shall nevertheless be made as herein provided." To certain evidence offered by the defendants objection was made by the plaintiffs, and the court reserved its decision as to the admissibility of this evidence until a date subsequent to the hearing, at which time the objections were overruled and an order was passed denying the injunction prayed for. To the ruling of the court as to the admissibility of this evidence, as well as to the refusal to grant an injunction, exception is taken.

Jno. L. Hopkins & Sons, for plaintiffs in error. King, Spalding & Little, J. L. Mayson, and W. P. Hill, for defendants in error.

FISH, P. J. (after stating the facts). 1. "The plenary power of the Legislature over streets and highways is such that it may, in the absence of special constitutional restriction, vacate or discontinue the public easement in them, or invest municipal corporations with this authority." 2 Dill. Munic. Corp. (4th Ed.) § 666. "But the power must be conferred in express terms or by necessary implication, and the construction of ambiguous words alleged to confer it 'ought to be in favor of the common right of highway.' Highways cannot, in any event, be discontinued for the purpose of devoting them to private and inconsistent uses." Elliott, Roads & Streets (2d Ed.) § 875. Such is the law as heretofore announced by this court. Marietta Chair Co. v. Henderson, 121 Ga. 403, 404, 49 S. E. 312. No express power to vacate a public thoroughfare has been conferred by the General Assembly upon the city of Atlanta. On the contrary, its control over streets and alleys has been in terms limited to the right "to open, lay out, to widen, straighten, or otherwise change" the same. Acts 1874, p. 131, § 60. To exclude the general public from the enjoyment of a street, and to devote it to a purpose wholly inconsistent with its use as a thoroughfare, is not such a "change" therein as the city's charter contemplates. That the city has power to abandon or vacate the street known as Waverly Place was not claimed by counsel for the defendants in error, but their conten-

tion is that the "change" in that street provided for by the ordinance adopted by the city council is one which the municipality has power, under the above-quoted provision of its charter, to effect. The facts are Waverly Place is to retain its name, but change its residence, if the carrying out of the plan outlined in the ordinance is not interfered with. That street is but one block in length, and connects Central avenue, on the west, with Washington street, on the east; the two streets last named running parallel to each other, and at right angles to Waverly Place. On the north adjoin the railroad yards, now used by the companies associated with the defendant railway company, while on the south lies property all of which is either owned or controlled by that company. Washington street extends no further north than the railroad yards. Central avenue continues northward beyond them. Both streets extend for a considerable distance southward, and are much-used thoroughfares, as is also Waverly Place. The banking house of Coker is on the west side of Central avenue and faces the open street called Waverly Place. It is proposed to so change the location of the latter street as that it shall occupy a strip of land belonging to the railway company, of equal length and width, lying some 26 feet south of the present southern boundary of Waverly Place where it connects with Central avenue, and some 30 feet south of the point where its southern boundary touches Washington street. In other words, Waverly Place is to be moved bodily over 86 feet in a southerly direction, and deposited upon the lands of the railway company, over 26 feet distant from its extreme southern boundary as now located, so that its extreme northern boundary will be 86 feet away from its present northern boundary. The journey involves 86 feet of travel, the street being 60 feet wide, and every inch of it journeying southward. None of it is to remain at its present abode, but it is in its entirety to seek other quarters provided for it further down Washington street. The proposed "change" in Waverly Place is one of location or residence, and after it moves there will be nothing to identify it but its name, for the ordinance contemplates that all luggage in the shape of sidewalks and other personal effects shall be left behind. The street is not an asset which the city can move from place to place at will. The so-called "change" in the street practically amounts to an entire abandonment of it as a thoroughfare and the opening of a new street through the property of the railway company. Under the ordinance adopted by the city council that company can acquire no right, title, or interest in or to any portion of Waverly Place. The contract which the city council sought to enter into with the railway company was clearly ultra vires, and the same is not enforceable at the instance of either party thereto. Not until power derived from the Legislature is conferred upon the city can it become legally bound by, or have any right to enter into, such a contract as that embodied in the ordinance under discussion.

2. It does not follow, however, that merely because the city was without power to close Waverly Place and permit the railway company to use it for terminal facilities, the plaintiffs were entitled to the injunction they sought against the railway company to prevent it from taking possession of the street or making any alterations therein. They are undoubtedly correct in their contention that, as matter of law, the building of terminal structures in the street would amount to a public nuisance (Daly v. Railroad Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286), as would also the using of the street as a switching yard or place for the delivery of freight (Atlantic & Birmingham R. Co. v. Montezuma, 122 Ga. 1, 49 S. E. 738), or the unauthorized laying of its tracks longitudinally along the surface of the street (Davis v. Railway Co., 87 Ga. 605, 13 S. E. 567; Augusta R. Co. v. Augusta, 100 Ga. 701, 28 S. E. 126). But unless, from the unauthorized use of the street, the plaintiffs will suffer injury not common to the general public, peculiarly affecting their property rights, and causing special damage to them, they cannot maintain an action to either enjoin the nuisance or to recover damages for its maintenance. Coast Line R. Co. v. Cohen, 50 Ga. 451; East Tenn. Ry. Co. v. Boardman, 96 Ga. 356, 23 S. E. 403. It was admitted on the hearing in the court below that the railway company would, unless enjoined, occupy the strip of ground now known as Waverly Place longitudinally with its tracks and terminal structures; and on the argument here counsel for the plaintiffs insisted that the banking house of Coker would be depreciated in market and rental value, and the enjoyment of the property injuriously affected, by the noise, smoke, and cinders incident to conducting upon the street the operations of the railway company. However, no anticipated injury to Coker thus arising was either alleged or proved. His property does not abut on Waverly Place, but is situated on the west side of Central avenue. The precise manner in which the railway company expected to use Waverly Place was not shown, and that they expected to so use it as to injuriously affect Coker's property is purely a matter of inference. Bare conjecture cannot adequately supply proper allegations and proof, and the court below would have been unwarranted in granting an injunction upon the assumption that the use to which the street was to be put would result in special damage to either of the plaintiffs.

3. If Coker was for any reason entitled to the relief sought, it was upon the theory that the unlawful closing of the street by the city and the placing of obstructions therein by the railway company would deprive him

of the benefits of one of the principal avenues of approach to his place of business, rendering it less valuable and less remunerative to him. If such would be the result of the closing of the street, then Coker would be entitled to an injunction to prevent the visitation upon him of this special injury. Georgia Southern R. Co. v. Harvey, 84 Ga. 372, 10 S. E. 971; s. c., 90 Ga. 66, 15 S. E. 783; Brunswick & Western R. Co. v. Hardey, 112 Ga. 604, 37 S. E. 888, 52 L. R. A. 396; Savannah & Western R. Co. v. Woodruff, 86 Ga. 94, 13 S. E. 156; S. F. & W. Ry. Co. v. Gill, 118 Ga. 737, 745, 746, 45 S. E. 623. The evidence introduced in his behalf showed that this would undoubtedly be the case in the event Waverly Place were closed and no street to take its place was opened and maintained.

4. As matter of defense, the defendants offered the affidavits of a number of persons who therein expressed their conviction, based upon a knowledge of all the surrounding facts and circumstances, that the building of a viaduct from Washington street to the north side of the railroad yards, so as to connect that street with thoroughfares in the northern portion of the city, was a great public necessity, and that the swap of the city's property and property rights for the property and property rights moving from the railway company was a most excellent business proposition, and was to the undoubted advantage of the city and the citizens at large. This evidence was objected to as irrelevant, but was held by the court to be admissible. It should not have been taken into consideration. The issue was not whether or not the city council had made a good bargain with the railway company, but whether or not that bargain was ultra vires.

5. The defendants also sought to overcome the prima facie case made out by the plaintiffs by showing that the new street to be opened across the property of the railway company would not only fully take the place of Waverly Place, but would afford better access to Coker's place of business, and render his property more valuable. Evidence to this effect was objected to, but was held to be admissible. The plaintiff's objections were that the evidence was irrelevant and immaterial: (1) Because the unlawful occupancy of Waverly Place by the railway company would be a public nuisance, and no benefits flowing to plaintiffs from the opening of the new street could be set off against the injury inflicted by closing Waverly Place; and (2) "because the rights which the city would acquire in the proposed new street were not equal in character or nature with those which it possessed in the present Waverly Place, the latter rights being perpetual, while the rights in the new street were conditioned upon the happening of the event provided for in the ordinance, at which time the right to use the strip of ground known as 'New Waverly Place' would be lost to the city and the public." The first of these objections was not well taken. The purpose of the evidence was, not to set off benefits against damages, but to show that the closing of Waverly Place, under the terms of the ordinance, would not result in any special injury to Coker, or damage to his property. If such were the truth of the matter, he could have no standing in court as an aggrieved party. Farkas v. Towns, 103 Ga. 154, 29 S. E. 700, 68 Am. St. Rep. 88. The second objection is not to be so easily disposed of. The ordinance imposed upon the city the moral, if not the legal, obligation of reconveying title to the new street to the railway company so soon as that company should comply with its undertaking to share the expense of building the viaduct, provided the city should not be "prevented by legal proceedings from making said quit claim conveyance." In other words, the city was bound to reconvey and contracted to reconvey if within its power to do so. If it had the legal right to do so when called on by the railway company at the appointed time, then the new street would be legally closed, and Coker would lose all benefits flowing from the substituted street. So if Coker is to be denied the privilege of objecting to the closing of Waverly Place on the ground that another and better street will be substituted for it, the fact must be made to clearly appear that the new street cannot hereafter be legally closed at the will of the city, despite the express provision in the ordinance pledging the good faith of the city to reconvey it to the railway company unless "prevented by legal proceedings." Could the city be so prevented by any proceeding which Coker might hereafter bring to enjoin the closing of that street? Neither in his capacity of citizen and taxpayer nor in his capacity as property owner could he be heard to assert that he had any greater interest in the street than had the city of Atlanta, or stood in any better situation to object to the abandonment thereof. If the railway company proposed to make to the city a dedication of the new street by way of gift and without condition, then the new street would stand upon the footing of other public thoroughfares, and could not be legally vacated at the will of the city. But the company does not contemplate any dedication to the public, but has entered into a cold business proposition to convey the proposed new street to the city on condition that the city will reconvey the same, if within its power, in the event specified in the ordinance. Suppose Coker had waited till the city undertook to do so in accordance with its terms. Aside from being met with the charge of laches, he would have to overcome the difficulty of successfully pointing out some reasonable ground upon which a court of equity could base a right to interpose and enjoin the city from making a conveyance such as

the ordinance calls for. That ordinance evidences an ultra vires contract, which the court could not enforce or give recognition to. Coker could not assert that it was valid in so far as it provided for a conveyance of the new street to the city, but invalid in so far as it provided for a reconveyance to the railway company. He could not in part ratify and in part repudiate the contract, or insist that the city was entitled to hold on to any of the fruits of the same. To return to the railway company so much of the fruits of this ultra vires bargain as had not been dissipated would be the equitable duty of the city, as to do so would be in accord with good conscience, and would impose no burden nor injury upon any citizen, property owner, or taxpayer. See 1 Dill. Munic. Corp. (4th Ed.) § 462, note; 29 Am. & Eng. Enc. L. (2d Ed.) 54, and authorities cited. Certainly, no court of equity could consistently undertake to interfere with such restoration, whether made under color of the ultra vires contract by way of compliance with its terms or voluntarily under a proper recognition of the true character of the contract. The city could then reply to Coker: Treating the ordinance as valid, no more is being done than the city is bound to do under its express terms. If the ordinance be invalid, as claimed, then it is the right and duty of the city to restore to the railway company the strip of land conveyed as a street, and to take proper steps to reoper Waverly Place to the public. Even though the city might at the same time decline to take such steps, the court could not attempt to compel the city to take action, and Coker would be remitted to the remedy pointed out in Gill's Case, 118 Ga. 737, 45 S. E. 623, to have the nuisance created by the railway company in Waverly Place abated at his instance, the city authorities not themselves exercising the right to have it abated in accordance with the provisions of Civ. Code, § 4762. Now, if ever, is the time for Coker to complain of the invalid ordinance and object to the closing and obstruction of Waverly Place before the public nuisance therein is created; and the defense that he would suffer no injury because of the opening of the proposed new street was not tenable.

6. Counsel for the defendants in error call attention to the fact that there was no evidence going to show that Kendrick would sustain any special injury by the closing of the street to the public, and insist that Coker had, by certain conduct prior to the passing of the ordinance, estopped himself from setting up its invalidity. It appears that pending the negotiations between the railway company and the city authorities Coker attended some of the meetings of a special committee to which the council had referred the matter of granting to the railway company the privileges for which it asked: that he was very actively in favor of the construction of the Washington street viaduct, and that he had expressed himself as willing to have Waverly Place entirely closed up and abandoned if the viaduct could be secured. But, though Coker attended these meetings, he did not address the committee upon the subject under discussion, nor favor or acquiesce in the adoption of the ordinance which the city council passed. He did make to council a written proposition to loan to the city $25,000 for six months, with interest at the rate of 4 per cent. per annum, this sum to be used in the construction of the viaduct according to the plans and specifications on file in the office of the city engineer, though this offer was not accepted. On the hearing below counsel for Coker stated that he would submit to all injury to his property without pay if, as a part of the ordinance and the delivery of Waverly Place to the railway company, the building of the viaduct was unconditionally secured, and an appropriation for the beginning of the work made; but that this had not been done; that the ordinance in its present shape did not, in his opinion, insure the erection of the viaduct; and that he therefore intended to stand upon his legal rights. The defendants introduced a resolution presented to the council for passage by one of its members, providing that the sum of $20,000, to be taken from the tax fund, should be appropriated for the purpose of beginning the construction of the Washington street viaduct. What action was taken by council upon this resolution did not appear.

Such are the facts upon which the defendants rely as creating an estoppel against Coker. If what he did influenced the council in adopting the invalid ordinance of which he complains, it is strange that this should be so. Granting that such is the case, however, no one has as yet been hurt by what he did. The doctrine of equitable estoppel must have a subject-matter to work upon. In due time Coker repented of his folly, if, indeed, he committed any. He brings to the attention of the court the attempted commission of a public wrong and the unjustifiable usurpation of a power which has never been conferred upon the city council. In no sense can it be said that Coker is in pari delicto with the defendants, and for that reason is not a person to whom the court can becomingly grant the relief for which he prays.

Judgment reversed.

SIMMONS, C. J., absent. LUMPKIN, J., disqualified.

(71 S. C. 457)

RILEY et al. v. CHARLESTON UNION STATION CO.

(Supreme Court of South Carolina. April 18, 1905.)

1. EMINENT DOMAIN—CONSTITUTIONAL LAW—RIGHT TO CONDEMN.

Act Feb. 20, 1902 (23 St. at Large, p. 1168), granting a corporation the right to condemn lands, is not unconstitutional, in that it

does not provide some tribunal to determine any question made by the landowners as to the right of the corporation to condemn.

2. SAME—DUE PROCESS OF LAW.

Act Feb. 20, 1902 (23 St. at Large, p. 1168), granting a corporation the right to condemn lands for union depot purposes, is not a violation of the fourteenth amendment of the federal Constitution; the condemnation being for public use, and the statute having made ample provision for the protection of property owners and compensation for property condemned.

3. SAME—UNION DEPOT—PUBLIC USE.

A corporation organized under Act Feb. 20, 1902 (23 St. at Large, p. 1168), for the erection of a union depot, with its connecting necessities, is a corporation organized for a public use, so that the provision in such act authorizing it to condemn land is not unconstitutional; and the fact that the railroad companies, who are stockholders and whose officers are officers in such corporation, owned sites suitable for such station, is immaterial.

4. STATUTES—TITLE OF ACT—CONSTITUTIONAL LAW.

Act Feb. 20, 1902 (23 St. at Large, p. 1168), incorporating a union depot company, does not violate Const. art. 3, § 17, providing that an act shall relate to but one subject, and that expressed in the title, in that it authorizes railroad companies to subscribe to and hold its stock and guaranty its bonds.

5. RAILROADS — AMENDMENT OF CHARTERS—SPECIAL ACT.

Act Feb. 20, 1902 (23 St. at Large, p. 1168), organizing a corporation to build a union station, is not in violation of Const. art. 9, § 2, prohibiting the amending of charters by special act by granting to several railroads the said powers, where the act of incorporation was passed under a concurrent resolution.

6. EMINENT DOMAIN—NECESSITY — QUESTION FOR COURT.

The determination whether a particular piece of property is required for a railroad company is for the court.

7. SAME—PROPERTY TO BE CONDEMNED.

Where a company is organized to construct a union depot, with power to condemn land, and owns no property which it may use for the purpose named, it is no abuse of discretion on its part that it seeks to condemn certain property adapted for that purpose, without attempting to use property belonging to certain of its stockholders, which might be adapted to the purpose.

8. EMINENT DOMAIN—DEFENSES.

In a suit to enjoin the condemnation of land for a union depot, that the party whose land the depot corporation proposes to condemn was not given personal notice of the introduction of the bill authorizing such condemnation is immaterial.

Appeal from Common Pleas Circuit Court of Charleston County; Dantzler, Judge.

Action by Ann and John F. Riley against the Charleston Union Station Company. Judgment for defendant, and plaintiffs appeals. Affirmed.

The following is the circuit decree:

"The defendant, Charleston Union Station Company, was incorporated by a special act of the General Assembly of this state, approved February 20, 1902 (23 St. at Large, pp. 1168–1171). By section 3 of that act, it is vested, among other powers, with the power 'to acquire by purchase, lease or assignment of lease, such real estate as may be necessary for the purposes of its incorporation, and it shall also have power to acquire for said purposes land or easements therein by condemnation, and shall be entitled to all the rights and privileges embraced in sections 1743 to 1755 of the Revised Statutes of South Carolina of 1893, and all acts amendatory thereof.' Thereafter the defendant proceeded by virtue of the powers thereby conferred to condemn certain property owned in fee by Mrs. Ann Riley, one of the plaintiffs herein, in which her coplaintiff, John F. Riley, was interested as lessee. Thereupon this action was commenced by the plaintiffs to enjoin such proceedings. A temporary order of injunction was, upon application of the plaintiffs, granted against the defendant, and a rule against it issued at the same time. Upon return to such rule the order of injunction was dissolved, and on appeal to the Supreme Court the order dissolving such injunction was reversed. 67 S. C. 84, 45 S. E. 149. Such other proceedings were had as resulted in an order of reference to G. H. Sass, Esq., one of the masters of Charleston county, to take testimony and report the same to this court; and, upon his report of the testimony taken, the case came on to be heard before me during the session of the court of common pleas for Charleston county. The testimony is voluminous, and the arguments of counsel, made from time to time, were correspondingly elaborate.

"The plaintiffs assail the constitutionality of the act of incorporation on numerous and various grounds, to wit, 'in that the same is repugnant to and in violation of the fifth and fourteenth amendments to the Constitution of the United States, prohibiting the depriving of any person of his property without due process of law, taking of private property for public use without just compensation, and denying to any person the equal protection of the law,' and, continuing, further allege 'that the said act of incorporation * * * is on its face, and under the facts * * * alleged in this complaint, also unconstitutional, null, and void on each of the following grounds, to wit, in that the same is repugnant to and in violation of (a) article 1, § 5, of the Constitution of the state of South Carolina, in that it deprives plaintiffs of their property without due process of law, and denies to plaintiffs the equal protection of the laws; (b) article 1, § 17, of the Constitution of South Carolina, in that it takes private property for private use without just compensation being first made therefor; (c) article 3, § 17, of the Constitution of the state of South Carolina, in that it relates to more than one subject expressed in its title; (d) article 3, § 34, of the Constitution of the state of South Carolina, in that it being a case where, for the establishment and incorporation of union stations in the state of South Carolina, a general law can be made applicable, a special

law, to wit, said act, has been enacted; (e) article 9, § 2, of the Constitution of the state of South Carolina, in that the same, not being a general law, but a special law, amends the existing charter of the railroad companies now entering Charleston, to wit, the Southern Railway Company and the Atlantic Coast Line Railroad Company, by conferring the right upon such railroad companies to guaranty the principal and interest of the bonds of said Charleston Union Station Company, and to guaranty the performance of any other contract whatsoever that such Union Station Company may make in regard to its corporate interest, and also in that it confers upon such railroad companies the right to subscribe to and hold stock in or bonds of the said Charleston Union Station Company; (f) article 9, § 20, of the Constitution of the state of South Carolina, providing that no right of way shall be appropriated to the use of any corporation until full compensation therefor shall first be made to the owner or secured by deposit of money, irrespective of any benefit from any improvement proposed by such corporation; (g) article 8, § 4, of the Constitution of South Carolina, in that the said act of incorporation, granting the right to lay and to operate railroad track or tracks along the streets of Charleston and on the said streets abutting the said premises of plaintiff, as claimed, set forth, and delineated in such plan attached to Exhibit A, filed in this court, was passed by the General Assembly without first obtaining the consent of the city council of Charleston, in control of the streets proposed to be occupied by defendant for such purpose.' These constitutional objections to and criticism of the act referred to will be considered in the order in which they have been made.

"It is sufficient to say in relation to the fifth amendment of the Constitution of the United States that it has no application to the case at bar; the provisions of that amendment having been and being intended as limitations upon the powers of Congress, and as restraints upon the government of the United States, and not upon a state government. Withers v. Buckley et al., 20 How. 84, 15 L. Ed. 816.

"Nor are the provisions of the fourteenth amendment of the Constitution of the United States violated. One of the attributes of state sovereignty is the right of eminent domain—the right of providing for the taking of private property for public uses. 'Each state, by virtue of its statehood, has the right to exercise the power of eminent domain. This is doubted nowhere. And the provisions of the federal Constitution do not relate to the eminent domain of the state.' Am. & Eng. Ency. Law (2d Ed.) 1052, citing in note Barron v. Baltimore, 7 Pet. 243, 8 L. Ed. 672. What constitutes a public use? 'The term "public use" is flexible, and cannot be confined to public uses known at the time of framing the Constitution. All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain. Any use of anything which will satisfy a reasonable public demand for facilities of travel, for transmission of intelligence or commodities, would be public use.' Trenton, etc., Turnpike Co. v. American, etc., Commercial News Co., 43 N. J. Law, 384. 'And it is well established, upon the authorities, that private property may, under the power of eminent domain, be taken for a right of way, a passenger or freight depot, stockyards, and for engine houses and shops, in which to repair cars and locomotives, and the like.' Am. & Eng. Ency. Law, supra, 1074, 1075, and authorities cited in note. Union Depot Company v. Morton, 83 Mich. 265, 47 N. W. 228; New York, etc., v. Kip, 46 N. Y. 546, 7 Am. Rep. 385. It is well settled by the authorities cited, and under other authorities which could have been named, that the property sought to be condemned is for public use. And the act incorporating the defendant and empowering it to condemn property, and making such condemnation proceedings subject to the provisions of sections 1743-1755 of the Revised Statutes of 1893 (now sections 2187-2199 of volume 1, Code of Laws of 1902), amply provides for the protection of property owners and for compensation for property so condemned.

"The contention that the act in question violates article 1, § 5, and article 1, § 17, of the Constitution of South Carolina, is disposed of by what has been hereinbefore stated. But it is averred that the act 'relates to more than one subject expressed in its title,' and is therefore repugnant to article 3, § 17, of the Constitution of this state. A comparison of this article and section with article 2, § 20, of the Constitution of 1868, will show that the language is identical. And our Supreme Court, in Connor v. Railway Company, 23 S. C., at pages 434, 435, construing section 20 of article 2 of the Constitution of 1868, said: 'Section 20, art. 2, of the Constitution, with which the act here in question is supposed to be inconsistent, reads as follows: "Every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." As we have said in Charleston v. Oliver, 16 S. C. 56, upon the authority of Mr. Justice Cooley, "there has been, and ought to be, a general disposition to give a liberal construction to constitutional provisions like this now under consideration, rather than to embarrass legislation by an unnecessary strictness of construction." Hence, when a question under a clause of the Constitution is presented for adjudication, we are bound to make a liberal and enlarged view, and, if practicable, bring the legislation which is assailed as unconstitutional within the limits prescribed by the supreme law of the land. Now, looking at the act in question in this spirit, we

do not see how it conflicts with the provision of the Constitution which has been quoted. The subject to which the act relates is the Green Pond, Walterboro & Branchville Railway Co., and that subject is undoubtedly expressed in the title. Nor do we find that the act relates to any other subject. As is usual with acts bearing such titles, after constituting certain persons a body politic and corporate by the name which they have chosen, it goes on to declare what such corporation may do, and how it may obtain the means for effecting the desired purpose—by receiving subscriptions to its capital stock. The fact that it also provides that a certain corporation, which otherwise would not have the power to do so, may subscribe to the capital stock upon certain prescribed conditions, does not, it seems to us, bring that portion of the act in conflict with the Constitution. No new subject is introduced into the act, but the subject which all the while engages the attention of the Legislature is the railway, which necessarily includes any appropriate means for its construction. For, as is well said in San Antonio v. Mehaffy, 96 U. S. 315, 24 L. Ed. 816, "when an act of the Legislature expresses in its title the object of the act, the title embraces and expresses any lawful means to achieve the object; thus fulfilling the constitutional injunction that every law shall embrace but one subject, and that shall be expressed in its title." ' The provisions of the act assailed in the case cited and quoted from differed in no essential respects from the provisions of the act assailed in this case, and the reasoning of the Supreme Court and the conclusion announced in Connor v. Railway Company, supra, sustained the constitutionality of the act in that particular now under consideration. And such is the conclusion of this court.

"It is further alleged that section 34 of article 3 of the Constitution of this state has been violated, 'in that it being a case where, for the establishment and incorporation of union stations in the state of South Carolina, a general law can be made applicable, a special law, to wit, said act, has been enacted'; that section 34 of article 3 declares, 'The General Assembly of this state shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit.' Then follows an enumeration of the subjects and purposes prohibited. In division 11 of that section it is provided, 'In all other cases, where a general law can be made applicable, no special law shall be enacted.' Standing alone and construed alone, this constitutional inhibition would be decisive of the question in favor of the contention of the plaintiffs. But section 2 of article 9 of the Constitution of 1895 provides: 'No charter of incorporation shall be granted, changed or amended by special law, except in the case of such charitable, educational, penal or reformatory corporations as may be under the control of the state, or may be provided for in this Constitution, but the General Assembly shall provide by general laws for changing or amending existing charters, and for the organization of all corporations hereafter to be created, and any such law so passed, as well as all charters now existing or hereafter created, shall be subject to future repeal or alteration: Provided, that the General Assembly may by a two-thirds vote of each house on a concurrent resolution allow a bill for a special charter to be introduced, and when so introduced may pass the same as other bills.' It is well known that the fundamental principle to be followed in the interpretation of Constitutions is that a Constitution must be considered as a whole, and that no construction which raises a conflict between parts of the instrument is admissible if by any reasonable construction they can be made to harmonize. The rule laid down by Judge Cooley (Cooley on Const. Lim. 58) is that 'effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.' Says the same author: 'It is scarcely conceivable that a case can arise where a court would be justifiable in declaring any portion of a written Constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together.' Can division 11 of section 34, art. 3, be made to harmonize with section 2 of article 9? There seems to be no difficulty whatsoever, if the proviso of the latter section can be made to apply to and modify division 11 of section 34 of article 3. It is necessary for this to be done, in order to reconcile the inhibition of that division with the proviso of section 2 of article 9, unless section 2 of article 9 be construed to apply solely to corporations. In either event the conclusion follows that the act in question is not unconstitutional in this respect if the General Assembly, 'by a two-thirds vote of each house, on a concurrent resolution,' allowed a bill for the special incorporation of the defendant to be introduced, and passed such bill. Such condition precedent having been fulfilled, the act, so far as this contention is concerned, is therefore a valid act.

"It is further alleged and contended that the act incorporating the defendant is violative of article 9, § 2, of the Constitution of the state of South Carolina, in that the same, not being a general law, but a special law, amends the existing charter of the railroad companies now entering Charleston, to wit, the Southern Railway Company and the Atlantic Coast Line Railway Company, by con-

ferring the right upon such railway companies to guaranty the principal and interest of the bonds of said Charleston Union Station Company, and to guaranty the performance of any other contract whatsoever that such Union Station Company may make in regard to its corporate interest, and also in that it confers upon such railroad companies the right to subscribe to and hold stock in or bonds of the said Charleston Union Station Company. The portion of the act assailed by this allegation is that portion of section 5 beginning on the first line of page 1170, and is in the following words: 'And such railroad company or companies shall have the right, severally or jointly, or jointly and severally, to guarantee the principal and interest of such bonds as may be issued by the Charleston Union Station Co., and may in like manner guarantee the performance of any other contract whatsoever that such Union Station Co. may make in regard to its corporate business; and any such railroad company or companies shall have the right to hold and dispose of shares of the capital stock of the said Charleston Union Station Co., or the bonds that may be issued by it.' An examination of the act shows that neither the name of the Southern Railway Company nor that of the Atlantic Coast Line Railroad Company appears in it, but the power to do the acts complained of is conferred upon 'any railroad company whose railroad enters the city of Charleston. * * *' It is sufficient to say in relation to this proposition that, even if the power intended to be conferred by the act upon railroad companies was unconstitutional legislation, the constitutionality of the act would not be affected, because the life of the defendant corporation in no way depends upon the exercise of such power or powers on the part of such railroad companies.

"The objection that the act violates 'article 9, § 20, of the Constitution of the state of South Carolina, providing that no right of way shall be appropriated to the use of any corporation until full compensation shall first be made to the owner or secured by a deposit of money, irrespective of any benefit from any improvement proposed by such corporation,' cannot be sustained. It is evident from an examination of the statute upon this subject (section 2194, Code Laws 1902, vol. 1), by which the defendant is to be governed, that the payment of compensation is a prerequisite for any appropriation of any right of way. No interest vests until compensation is paid, and therefore no appropriation is made or can be made until that condition is met and performed. Gillison v. Railroad Co., 7 S. C. 173; Buckner v. Railroad Company, 7 S. C. 325.

"It is finally urged that 'article 8, § 4, of the Constitution of South Carolina,' is violated, in that the 'said act of incorporation, granting the right to lay and operate railroad track or tracks along the streets of Charleston, and on said streets abutting the said premises of plaintiff, as claimed, set forth and delineated in such plan attached to Exhibit A, filed in this court, was passed by the General Assembly without first obtaining the consent of the city council of Charleston, in control of the street proposed to be occupied by defendant for such purpose.' That part of the act of incorporation of the defendant within the purview of the above criticism is section 4 (page 1169) thereof, and is as follows: 'That whenever it may be necessary in order to enable said corporation to acquire and construct proper railroad facilities in said city of Charleston, S. C., or to connect such facilities with the tracks of any railroad company with which said corporation may have contracted to furnish such facilities, said corporation, with the consent of the proper authorities of the said city of Charleston, shall have the right to lay and operate a railroad track or tracks, a bridge or bridges, across, along or over, or under, any such street where it shall be necessary in order to furnish proper railroad terminal facilities in said city; but no street of said city shall be obstructed or interfered with until the consent of the proper authorities of said city shall have been first obtained.' Section 4 of article 8 of the Constitution, which it is claimed that section of the act just quoted contravenes, is as follows: 'No law shall be passed by the General Assembly granting the right to construct and operate a street or other railway, telegraph, telephone or electric plant, or to erect water or gas works for public use, or to lay mains for any purpose, without first obtaining the consent of the local authorities in control of the streets or public places proposed to be occupied for any such or like purposes.' It is manifest that this constitutional prohibition has not been violated. It is expressly provided in the act that 'no street of said city shall be obstructed or interfered with until the consent of the proper authorities of said city shall have been first obtained.' The granting of the right is predicated upon the 'consent of the proper authorities of said city * * * first obtained.' Without such consent, there can be no grant of such right. The right is granted only when such consent is had, and not until then.

"Therefore, for the reasons hereinbefore specifically stated, the various and numerous objections interposed by the plaintiffs to the constitutionality of the act incorporating the defendant are overruled.

"The issues raised by the pleadings, in relation to the allegations contained in paragraphs 11 and 12 of the complaint will now be considered, the following being such allegations:

" '(11) Plaintiffs further allege that the right of way claimed and required by the defendant over said land of the plaintiffs, here-

tofore particularly described, is not necessary for the purpose of its incorporation and operation, as particularly set forth in said act.

"'(12) And plaintiffs further allege that the Southern Railway Company and the Atlantic Coast Line Railroad Company are the only two railroad systems entering the city of Charleston and having termini in the city of Charleston; that officers of the said defendant company, and all stock of said defendant company was subscribed and now owned by the said Southern Railway Company and Atlantic Coast Line Railroad Company, and that under and by the terms of the said act of the General Assembly the said union station can now be leased or used only by the said Southern Railway Company and the Atlantic Coast Line Railroad Company, both and each of which said railroad systems already have, as railroad corporations, and the successors of railroad corporations, land heretofore already condemned for public use by and under power of eminent domain, situated in the city of Charleston, suitable and sufficient and advantageously located for such union station for use of such railroads and all other railroads, and it is not necessary, but oppressive, to further exercise the power of eminent domain of the state of South Carolina, by and through the said defendant company, to condemn and take from the plaintiffs forcibly their lands and home, and destroy their business, for the benefit of the said Southern Railway Company and the Atlantic Coast Line Railroad Company, in addition to the lands now already owned by the said railroad systems, and each of them, capable of serving the same public purpose and use.'

"The defendant has the right and power, under the act of incorporation, to condemn 'such real estate as may be *necessary* [italics mine] for the purpose of its incorporation; and for such purposes is entitled to all the rights and privileges embraced in sections 1743 to 1755 of the Revised Statutes of South Carolina of 1893, and all acts amendatory thereof.' Is it necessary 'for the purpose of its incorporation' for the defendant to condemn the property it has sought to condemn? The question raises another question of law and fact: (1) As to legal meaning of the word 'necessary,' and whether or not, in the light of such legal construction, it is necessary, under the testimony, for the defendant to condemn such property for the purpose of its incorporation?

"'As to the degree of necessity which must exist, there is, as might be expected, considerable difference of opinion. Some courts have held that the necessity must be an absolute one, but the better opinion is that it must be a reasonable one.' Lewis on Eminent Domain (2d Ed.) § 276. 'If the authority permits the acquisition of as much as may be necessary, or, in still more general terms, confers the power to condemn property for the purposes of the undertaking, it will be construed to authorize the taking of so much as may be reasonably necessary under the circumstances.' Id. § 279. And on page 675 the same author lays down the following general rule: 'In general, the condemnor is allowed a large discretion in determining the quantity necessary, and the exercise of this discretion will not be interfered with except in case of abuse. The grantee of the right to exercise the power of eminent domain can do nothing in exercising the power that is not prescribed in the grant from the Legislature in express terms or by necessary implication, and every provision in the act or statute conferring the grant must be followed with the utmost strictness. Yet when the right is granted the grantee is allowed to exercise much discretion in determining what and how much land shall be taken, and where and how the work shall be located. In general, if there appears to be no bad faith on the part of the grantee in the matter of location, his discretion will not be interfered with.' In the note numerous authorities are cited to support the rule announced in the text above quoted—among them, the case of New York Cent., etc., R. Co. v. Metropolitan Gaslight Co., 5 Hun, 201, wherein the following opinion is stated to have been expressed: 'Upon the point that the lands proposed to be taken are not necessary, because it might be practicable for the respondents to lay their tracks upon their own lands by adopting another curve, we are not prepared to concur with appellants' counsel. It is not a question of possibilities nor of strict practicabilities, within the opinion of engineers. No route was ever surveyed for a railroad which was not open to such objections, and if the right to take lands was to be determined by conflicting evidence whether, after all, the tracks might not, with greater or equal convenience, be laid elsewhere, the construction of a road would be attended with the most serious embarrassments. Reasonable necessity must be shown, but a reasonable discretion must be allowed to the officers who locate the tracks of a railroad, for it cannot be presumed that the corporation is unnecessarily incurring heavy expenses in obtaining lands, when those it already has would answer its purposes. We think enough was shown to bring this case within the rules of the authorities in respect to this question. New York, etc., R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Matter of Boston, etc., R. Co., 53 N. Y. 574.'

"The rule as settled by the great weight of authority is that one empowered to condemn property cannot capriciously or in bad faith do so, but that a reasonable necessity must exist for such condemnation. Such being the rule as I understand it, I am satisfied from the testimony in this case that the property undertaken to be condemned by the defendant is reasonably necessary 'for the purposes of its incorporation,' and I so conclude as matter of fact and law.

"The Southern Railway Company owns no property which is practicable for the purposes of the incorporation of the defendant. Mr. R. G. Rhett, a witness, was asked this question: 'Will you state the reasons which induced you and the committee to recommend the Chapel street station?' He replied as follows: 'The reasons that induced me were because it is impossible, in my judgment, to operate any large number of passenger trains through the center of the city. A number of streets have to be crossed, slow speed is necessary, and, moreover, a station must occupy necessarily more ground than one square. From John to Ann street is something over 400 feet, I think, and the shed itself, proposed, is 600 feet. Therefore it would be for that reason absolutely impossible to have a union station shed at John street. At Line street the same difficulty would occur. Sheppard street has been a bone of contention for some time, and, if that street should be opened, it would be impracticable to have a station there. Moreover, in my judgment, a number of streets should be opened between, running from King to Meeting street, just above Line, and therefore I am satisfied it was out of the question to put a union station at any of the points along the Southern Railway track.' The introduction of this testimony was objected to by counsel for plaintiffs, though no exceptions to its admission were filed. However, I think that it was relevant and competent. The witness gave his reasons for the opinion expressed by him, and it was certainly relevant in relation to the question of good faith. Upon consideration of such testimony and testimony of like character, and upon consideration of the whole testimony respecting the subject-matter of inquiry, I am convinced that it would be impracticable to establish a union station on any of the property of the Southern Railway Company, due regard being had to the public interests.

"The Atlantic Coast Line Company owns property near the property sought to be condemned. At reference held previous to the beginning of the hearing of this case, prominent and disinterested witnesses testified that the Riley property was necessary to be had for the location and operation of the union station, if such station was located on Chapel street, and Chapel street was thought by them to be the most advantageous site for such station. Subsequently, during the hearing of this case, I made an order that other testimony be taken, and I find from such testimony, and from the whole testimony, that, while the Atlantic Coast Line Railroad Company owns property on Chapel street, yet, in order to secure an advantageous site on its property for such union station, it would be necessary for the railroad company to remove its freight station, its freight buildings and yards, elsewhere. Mayor R. G. Rhett, who was examined at a reference held during the session of this court, said: 'I think the ideal situation is across the street, but it is now occupied by the freight station of the Atlantic Coast Line. If they could arrange to transfer that station eastward, toward the river, or might have it practically at some site without crossing Bay street, that would be my idea of the best location in the city. Whether practicable or not, from a railroad standpoint, of course, I do not know.' Furthermore the same witness said: 'In fact, I think that an ideal spot, if you could take up the freight station of the Coast Line and move it eastward, or move it out of the way.' The same witness at a previous reference said: 'The Chapel street station is peculiarly well situated, inasmuch as it is within a little over two squares of Meeting street, and yet the approaches to it are through marshes and through sections not built up. Trains can be run quickly in and out of this station, and at the same time come almost into the heart of the city. Moreover, this station has streets on three sides, making the approaches peculiarly advantageous for a union station.' He furthermore said: 'In my judgment, it is absolutely impracticable to establish a union passenger station on the Chapel street site without the acquisition of the Riley property.' The meaning of the witness evidently is this: That the acquisition of the Riley property is necessary if the union station is put on Chapel street, provided the Atlantic Coast Line Railroad Company does not remove its freight buildings and yards elsewhere, but that it is not necessary if such railroad company removes its freight buildings and yards, and places the union station on the space occupied by them. But the Atlantic Coast Line Railroad Company contends that it needs all the land that is available for its freight business, and that, even if its freight station and yards were removed, there would not be sufficient property available for that purpose. I am not prepared to say that such is not the case. Mr. J. R. Kenley, a witness, and an official of the Atlantic Coast Line Railroad Company, said— He was asked this question: 'Since you testified, there have been certain gentlemen here (Mr. Rhett and others) who have testified that you had room enough on the lands of the Atlantic Coast Line, to the east of Bay street, upon which to put the new union passenger station. What have you to say with regard to that?' His answer was: 'Well, in my judgment, it is not practicable to build the new union station east of Bay street. To say that we have not got the land— If we tore out everything we have there, and devoted everything we have there to a union station, it could be put there, but it is not practicable.' He was further questioned: 'The testimony of some of them was that you might move your present freight houses, or certainly the one on Bay street, and put your union station where that depot

now is. What have you to say with regard to that suggestion?' He answered: 'We could not do that without giving up room that is absolutely necessary for our freight facilities. I think those gentlemen, before we got through with the discussion, were satisfied that was true. However, in my judgment, it is true. We have not got as much ground as we ought to have in Charleston to-day for our freight facilities, and the city is growing and the business is growing. We are now going to develop every foot we have got that is available for our freight business, and the sooner we do it the better it will be for us and for our patrons.' So far as the Atlantic Coast Line Railroad Company is concerned, I find and conclude that the property in question is reasonably necessary for the purposes of the incorporation of the defendant. Furthermore, where a corporation owning no property is empowered to condemn property for the purpose of its incorporation, such corporation, in condemnation proceedings for such purposes, is not required to condemn the property of a stockholder, to the exclusion of any other property which may be necessary for its corporate purposes.

"Counsel for the defendant, in the course of argument, moved that certain testimony of Mr. John Riley in relation to the introduction of the bill to incorporate the defendant be stricken out. The motion is granted, and it is so ordered. The testimony is incompetent and irrelevant, so far as the issues are involved. Not only has there been no improper motive shown in the introduction and passage of the bill incorporating the defendant, but the General Assembly is presumed to have acted in good faith, and it is not the province of courts to inquire into its motives and purposes.

"Having disposed of all issues raised by the pleadings, it is finally ordered, adjudged, and decreed that the order of injunction heretofore made be, and hereby is, vacated; that the injunction heretofore granted be, and hereby is, dissolved, and the complaint herein be dismissed."

The plaintiffs appeal on the following exceptions:

"Exception First. The court erred in not holding that the act incorporating the defendant company was unconstitutional, null, and void, under the fourteenth amendment to the Constitution of the United States, prohibiting the depriving of any person of his property without due process of law.

"Exception Second. The court erred in holding: 'Nor are the provisions of the fourteenth amendment of the Constitution of the United States violated. One of the attributes of state sovereignty is the right of eminent domain—the right of providing for the taking of private property for public uses. Each state, by virtue of its statehood, has the right to exercise the power of eminent domain. This is doubted nowhere. And the provisions of the federal Constitution do not relate to the eminent domain of the state.' On the grounds: (1) That the act of February 20, 1902 (23 St. at Large, S. C., pp. 1168-1171), does violate the fourteenth amendment to the Constitution of the United States, in that it operates to taking private property without due process of law, without providing a tribunal for the hearing and determination of the question as to the necessity for the taking of said land, and also as to the existence of the corporation, or trial of any other fact necessary to exercise the power of eminent domain by the defendant company, except the amount of compensation to be paid. (2) On the ground that the provision of the federal Constitution, and particularly the fourteenth amendment to the Constitution of the United States, prohibiting the depriving of any person of his property without due process of law, does relate to eminent domain of the state of South Carolina, and does, as a constitutional principle, control the law of eminent domain in the state of South Carolina.

"Exception Third. The court erred in holding as follows: 'It is well settled by the authorities cited, and under other authorities which could have been named, that the property sought to be condemned is for public use.' On the ground that under the facts and circumstances of this case, alleged and proven, that the property sought to be condemned is not for public use, but for private use, against the provisions of article 1, § 17, Const. S. C., prohibiting the taking of private property for private use.

"Exception Fourth. The court erred in holding: 'And the act incorporating the defendant, and empowering it to condemn property, and making such condemnation proceedings subject to the provisions of sections 1743–1755 of the Revised Statutes of 1893 (now sections 2187–2199 of volume 1, Code Laws 1902), amply provides for the protection of property owners, and for compensation for property so condemned.' On the ground that the act of February 20, 1902 (23 St. at Large S. C., p. 1168), subject to provisions of sections 1743–1755 of the Revised Statutes of 1893 (now sections 2187–2199, vol. 1, Code Laws 1902), does not provide for the protection of property owners, in that it fails to provide any hearing to the landowner as to the necessity for the taking of his property, or as to the question of incorporation of the company, and other facts necessary before the right of eminent domain can be exercised, and on the further ground that such statute provides only for the assessment of compensation for property condemned, and provides for determination of no other question.

"Exception Fifth. The court erred in not holding the said act incorporating the defendant company unconstitutional, null, and void, under article 1, § 5, Const. S. C., prohibiting the depriving of any person of his property

without due process of law. The court further erred in holding: 'The contention that the act in question violates article 1, § 5, and article 1, § 17, of the Constitution of South Carolina, is disposed of by what has been hereinbefore stated.' On the ground that the said act is unconstitutional, in depriving plaintiffs of private property without due process of law, and on the ground that the said act does not provide for the hearing and determination of any question made by the landowner as to the necessity of the taking of such land, or any other question necessary to the exercise of such right by the defendant company, but provides only for the determination of amount of compensation to be paid to the landowner.

"Exception Sixth. The court erred in holding that said act incorporating defendant company is not repugnant to section 17, art. 3, of the Constitution of South Carolina, in that it relates to more than one subject expressed in its title, on the ground that, besides incorporating the defendant company, the said act amends existing charters of the railroads entering Charleston, to wit, Atlantic Coast Line Railroad and Southern Railway, by a special law, and not by a general law, forbidden by article 9, § 2, of the Constitution of South Carolina.

"Exception Seventh. The court erred in holding that said act does not violate section 34, art 23, of the Constitution of South Carolina, in that, being a case where, for the establishment and incorporation of union stations in the state of South Carolina, a general law can be made applicable, a special law, to wit, said act, has been enacted.

"Exception Eighth. The court erred in holding that the said act incorporating defendant company did not violate article 9, § 2, of the Constitution of the state of South Carolina, in that the same, not being a general law, but a special law, amends the existing charters of the railroad companies now entering Charleston, to wit, Atlantic Coast Line Railroad Company and Southern Railway Company, by conferring the right to guaranty the principal and interest of the bonds and performance of any contracts whatsoever that such Union Station Company may make as to its corporate interest and the right to subscribe to and hold stock and bonds of the defendant company.

"Exception Ninth. The court erred in holding: 'Even if the power intended to be conferred by the act upon railroad companies was unconstitutional legislation, the constitutionality of the act would not be affected, because the life of the defendant corporation in no way depends upon the exercise of such power or powers on the part of such railroad companies.' On the ground that it was provided by section 2 of said act that 'the said company may be organized and commence business when the sum of $50,000 has been subscribed to its capital stock,' and it appearing from the evidence that, of the $50,000 of stock subscribed, nine-tenths thereof is the invalid stock subscriptions of the Southern Railway Company and the Atlantic Coast Line Railroad Company, the defendant corporation is not organized under the act, and its corporate life has not actively begun, in law, and it is without authority of law to institute condemnation proceedings under said act.

"Exception Tenth. The court erred in not holding that the defendant company is not duly incorporated, and not duly organized and authorized to commence business under the terms of the act of incorporation, on the ground that fifty per cent. of the capital stock has not been lawfully subscribed; it appearing that nine-tenths of the subscription to the $50,000 total capital stock subscribed are invalid subscriptions, because subscribed by the Atlantic Coast Line Railroad Company and the Southern Railway Company, whose authority for such subscription, being the amendment of their charters of said railroad companies by said special act incorporating defendant company and not by general law, is unconstitutional, null, and void, under section 2, art. 9, of the Constitution of South Carolina.

"Exception Eleventh. The court erred in holding that the rights of way claimed and required by the defendant over the said lands of plaintiffs, particularly described in the complaint, are necessary for the purpose of incorporation and operation of the defendant company, as particularly set forth in said act.

"Exception Twelfth. The court erred in not finding and holding, as alleged, 'that the Southern Railway Company and the Atlantic Coast Line Railroad Company are the only two railroad systems entering the city of Charleston and having termini in the city of Charleston; that officers of the said two railroad systems are the corporators and officers of the said defendant company, and substantially all stock of said defendant company was subscribed and now owned by the said Southern Railway Company and Atlantic Coast Line Railroad Company; and that under and by the terms of the said act of the General Assembly the said union station can now be leased or used only by the said Southern Railway Company and the Atlantic Coast Line Railroad Company, both and each of which said railroad systems already have, as railroad corporations and the successors of railroad corporations, land heretofore already condemned for public use by and under power of eminent domain, situated in the city of Charleston, suitable and sufficient and advantageously located for such union station for use of such railroads and all other railroads; and it is not necessary, but oppressive, to further exercise the power of eminent domain of the state of South Carolina, by and through the said defendant company, to condemn and take from the plaintiffs forcibly their lands and home, and

destroy their business, for the benefit of the said Southern Railway Company and the Atlantic Coast Line Railroad Company, in addition to the lands now already owned by the said railroad systems, and each of them, capable of serving the same public purpose and use.'

"Exception Thirteenth. The court erred in holding 'that the property undertaken to be condemned by the defendant is reasonably necessary "for the purposes of its incorporation"; and I so conclude, as matter of law.'

"Exception Fourteenth. The court erred in holding that 'the Southern Railway Company owns no property which is practicable for the purposes of the incorporation of the defendant.'

"Exception Fifteenth. The court erred in holding 'that it would be impracticable to establish a union station on any of the property of the Southern Railway Company, due regard being had to the public interests.'

"Exception Sixteenth. The court erred in holding 'that while the Atlantic Coast Line Railroad Company owns property on Chapel street, yet, in order to secure an advantageous site on its property for such union station, it would be necessary for the railroad company to remove its freight station, its freight buildings and yards, elsewhere.'

"Exception Seventeenth. The court erred in holding as follows: 'So far as the Atlantic Coast Line Railroad Company is concerned, I find and conclude that the property in question is reasonably necessary for the purposes of the incorporation of the defendant.'

"Exception Eighteenth. The court erred in holding that all of the property and rights of way in question, as set forth in the proceedings for condemnation and original plat thereto attached, are necessary for the purposes of incorporation and operation of the defendant company—particularly that the rights of way claimed for the location and operation of the turntable and tracks leading thereto, as delineated on original plat, are necessary for the incorporation and operation of the defendant company.

"Exception Nineteenth. The court erred in not holding that the rights of way claimed as required and necessary for the location and operation of the turntable and tracks leading thereto, as delineated on original plan attached to condemnation proceedings, are not necessary for the incorporation and operation of the defendant company.

"Exception Twentieth. The court, under the facts alleged and proven in this case, erred in holding as follows: 'Furthermore, where a corporation owning no property is empowered to condemn property for the purposes of its incorporation, such corporation, in condemnation proceedings for such purposes, is not required to condemn the property of a stockholder, to the exclusion of any other property which may be necessary for its corporate purposes.'

"Exception Twenty-First. The court erred in not holding that a corporation is purely a fiction of the law, intended to promote justice, and can never be invoked to accomplish its defeat, and that this case being a cause in equity, and it being established that the Union Station Company is a company formed by the Atlantic Coast Line Railroad Company and the Southern Railway Company and their officers for their benefit, its stock is owned by both of these railroad companies, and its officers are the officers of the defendant company, and that the real owners and only possible users and lessees are the said stockholders, the Atlantic Coast Line Railroad Company and the Southern Railway Company, a court of equity should disregard the fiction of the corporation, and look to the real owners and real parties in interest, and where one or both of them have property already condemned for public use, capable of subserving the same public end and purpose, the court would refuse to condemn the property of a private person, and destroy home and business of private citizens for such alleged public purpose.

"Exception Twenty-Second. The court erred in not holding that the defendant company is a mere 'holding corporation' for the benefit of the Southern Railway Company and the Atlantic Coast Line Railroad Company, and in this case is bound by the equities that control either or both of these railroad corporations.

"Exception Twenty-Third. The court erred in holding as follows: 'Counsel for the defendant, in the course of an argument, moved that certain testimony of Mr. John Riley in relation to the introduction of the bill to incorporate the defendant, be stricken out. The motion is granted, and it is so ordered.' On the ground (1) that the defendant, having at the time of giving said testimony objected only to a portion thereof, cannot move thereafter to strike it all out; (2) on the ground that the defendant, having cross-examined Mr. Riley fully on the same matters objected to, is estopped to move to strike it out; (3) that the testimony is relevant to the issues.

"Exception Twenty-Fourth. The court erred in dismissing the complaint herein, and not decreeing the injunction as prayed in the complaint."

Bryan & Bryan, for appellants. Jos. W. Barnwell, W. Huger Fitzsimons, and P. H. Gadsden, for respondent.

JONES, J. This is an action for a perpetual injunction against condemnation proceedings instituted by the Charleston Union Station Company under an alleged power contained in the act of the General Assembly incorporating the defendant company, approved February 20, 1902 (23 St. at. Large, p. 1168). The decree of the circuit court, reported herewith, refused injunction and dismissed the complaint, after a full and able consideration of the questions presented

The plaintiffs appeal upon exceptions reported in full herewith, which, without further statement, we proceed to consider.

The first, second, fourth, and fifth exceptions make the point that the act under which the defendant seeks to condemn plaintiffs' property is unconstitutional, in that no tribunal is provided for the determination of any question that may be made by the landowner as to the right and power of the defendant company to take plaintiffs' property. This contention cannot be sustained. While it is true the condemnation statutes provide no special tribunal, except for the determination of the amount of compensation to be paid, nevertheless the regular machinery of the courts is available for the determination of any issue with respect to the right and power to condemn. Riley v. Union Station Co., 67 S. C. 93, 45 S. E. 149. The remedy provided by the condemnation statute is exclusive only as to matters falling within its provisions. These statutes, in conjunction with the general law, provide for full hearing before a lawful tribunal after due notice, and thus answer every requirement of the federal and state Constitutions with reference to due process of law. A sufficient answer to appellants' contention in this regard is the fact that in these proceedings they have rightfully invoked the machinery of the court of equity to determine the issues which they have raised, have had full trial thereon, and now are having the same reviewed by this court.

The second specification of the second exception objects to that portion of the decree of the circuit court wherein the court said: "Nor are the provisions of the fourteenth amendment of the Constitution of the United States violated. One of the attributes of state sovereignty is the right of eminent domain—the right of providing for the taking of private property for public uses. Each state, by virtue of its statehood, has the right to exercise the power of eminent domain. This is doubted nowhere, and the provisions of the federal Constitution do not relate to the eminent domain of the state." Appellants' ground of objection is that the provisions of the federal Constitution, and particularly the fourteenth amendment, do relate to and control the law of eminent domain of South Carolina. The exception puts an erroneous interpretation on the meaning of the circuit judge. The objectionable language was in the quotation from 10 Ency. Law (2d Ed.) 1052, which was based upon Barron v. Baltimore, 7 Pet. 243, 8 L. Ed. 672. The case cited was decided in 1833, and related to the fifth amendment, declaring that private property shall not be taken for public use without just compensation, which the court said was intended solely as a limitation on the exercise of the power of the federal government, and was not applicable to legislation of the statutes. Judge Dantzler did not intend to say that the provisions of the fourteenth amendment had no relation to the exercise of eminent domain by the state, but that such amendment was not violated by the statutes in question, as he proceeds to show that the condemnation proposed was for a public use, and that the statutes made ample provision for the protection of property owners and for compensation for property so condemned.

The third exception imputes error in holding that the property sought to be condemned is for public use, whereas the facts show that it is to be taken for private use, in violation of article 1, § 17, of the state Constitution. This exception cannot be sustained. The defendant company was incorporated for the purpose of constructing, maintaining, and operating a union passenger station in the city of Charleston, and, to this end, was given the right to acquire, by purchase, lease, or condemnation, all property necessary for the same, and to have the general powers and to be subject to the general restrictions imposed by law upon railroad corporations. By section 3, power was given to acquire such real estate as may be necessary to construct, maintain, and operate a union passenger station, comprising passenger depots, office buildings, sheds, storage rooms, and yards; also main and side tracks, switches, cross-overs, turnouts, bridges, and other terminal railroad facilities, appurtenances, and accommodations, suitable in size, location, and manner of construction, to perform promptly and efficiently the work of receiving, delivering, and transferring all passengers, baggage, and mail and express matter of railroad companies using said station, etc., with power to condemn lands for such purpose, under sections 1743–1755, Rev. St. 1893, and amendatory statutes. If defendant company is not in fact a railroad company, its main purposes are clearly within the objects of a regular railroad company, and it is so closely analogous thereto as to warrant the court in applying to it the same rule that would be applied to a regular railroad corporation in determining whether the property sought to be condemned is for a public use. If it should be conceded that the use of a union passenger station is private, appellant would have to reckon with the case of Boyd v. Granite Co., 66 S. C. 433, 440, 45 S. E. 10, 12, which, construing article 1, § 17, with article 9, §§ 2, 20, holds "that private property shall not be taken for private use without the consent of the owner, except in cases where this power is conferred upon corporations by the General Assembly, and then only in the manner prescribed in section 20, art. 9."

The first general principle which must control this question is, when the Legislature, in effect, declares that the construction, maintenance, and operation of the union passenger station in the city of Charleston is a public purpose, so as to authorize the condemnation of property, this conclusion is binding on the court, if there be any reason-

able ground to support it. Chicago & Northwestern Ry. Co. v. Morehouse, 112 Wis. 7, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918. But independent of the implication from the statute chartering the defendant company that the use is a public one, there is no room to doubt, from the testimony, that a union passenger station with appurtenant facilities in the city of Charleston would be a great and direct benefit to the traveling public. It is not easy to give a definition of "public use" which will be adequate to cover every case that may properly fall within the term, and this case does not call for an attempt to define the term. Some cases take the very broad view that "public use" is synonymous with "public benefit." A more restricted view, however, would seem to better comport with the due protection of private property against spoliation under the guise of eminent domain. Judge Cooley, in his Constitutional Limitations, 654, says: "The public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it." In Lewis on Eminent Domain, § 165, it is said that "public use" means the same as "use by the public." These definitions involve the idea that the public must have a definite and fixed use of the property to be condemned, independent of the will of the person or corporation taking title under condemnation, and that such use by the public is protected by law. Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855. The case of Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964, holds that a public use must be either a use by the public or by some quasi public agency, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity. If we accept either of these views of the meaning of "public use," the defendant company is clearly chartered for public purpose, and the condemnation of property for the construction, maintenance, and operation of a union passenger station in the city of Charleston is for a public use. No one doubts now that the laying of railroad tracks and the erection of depots by a regularly chartered railroad company is for such public use as to justify the exercise of eminent domain under the condemnation statutes. This franchise is in its nature as public as a franchise to transport passengers for hire. The defendant company is designed to carry out the same public use by affecting such a public utility as a union passenger station, involving the necessary railroad tracks, depots, and terminal facilities for accommodation of the public. The public, independent of the will of the defendant, and protected by law, has a fixed and definite right to use this station in dealing with the defendant company, or the railroad companies using the station in their business as common carriers of passengers.

The fact that the Southern Railway Company and the Atlantic Coast Line Railroad Company are the principal stockholders in the defendant company, and the officers of the defendant company are officers in said railroad companies, cannot affect this question, for the use is still a public use, whether considered with reference to the defendant company or with reference to the stockholding companies, as these railroad companies, as common carriers, are public agencies, and it is within the purpose of their organization to own or control depot facilities required for their business and the needs of the community. Nor is the question whether the use is a public use at all affected by the alleged fact that each of the railroad companies holding stock in the defendant company has one or more sites of its own to be suitable for a union passenger station. The question whether the use is public depends upon the nature of the use, and not upon the possessions of the particular individuals or corporations that may be interested in such use. Whether the last-mentioned fact influences the question whether there is a necessity for condemning plaintiff's property belongs more properly to the consideration of other exceptions to be hereafter noticed.

The sixth exception raises the point that the act incorporating the defendant company violates section 17, art. 3, of the state Constitution, in that it relates to more than one subject expressed in its title, since it not only incorporated the defendant company, but amended the existing charters of the Atlantic Coast Line Railroad and the Southern Railway by a special law, and not by a general law, which is forbidden by article 9, § 2, of the Constitution. The title of the act is to incorporate the "Charleston Union Station Co.," but in section 5 the statute gives the power to subscribe for and hold the stock and to guaranty and hold the bonds of the defendant company. The case of Connor v. Railroad, 23 S. C. 427, holds that "An act to incorporate the Green Pond, Walterboro and Branchville Railroad Co." does not relate to more than one subject expressed in its title, because of the fact that the act also authorized the county of Colleton to subscribe to the capital stock. The principle upon which the case rests is "that, when an act of the Legislature expresses in its title the object of the act, the title embraces and expresses any lawful means to achieve the object." San Antonio v. Mehaffy, 96 U. S. 315, 24 L. Ed. 816. When the creation of a corporation is the subject, it necessarily includes the powers to be given it. Ex parte Bacot, 36 S. C. 135, 15 S. E. 204, 16 L. R. A. 586. Among the powers granted was the

right to sell its stock and bonds to the railroad companies entering the city of Charleston and using said station. But while the principle is admitted, it is contended that it does not apply here, because the act incorporating the defendant company was a special act containing an amendment to the charters of said railroad companies in the particulars mentioned, contrary to article 9, § 2, of the Constitution, which provides, "The General Assembly shall provide by general law for the changing or amending existing charters"; and in view of this last-named clause of the Constitution, adopted since Connor v. R. Co., supra, was decided, the said amendatory provisions constitute a subject not embraced in the title. This question will be necessarily involved in the consideration of the seventh and eighth exceptions, which raise the question that the act incorporating the defendant company violates article 9, § 2, quoted above, and also article 8, § 34, which prohibits a special law when a general law can be made applicable.

The circuit court has disposed of this question very conclusively by construing these provisions of the Constitution together. Section 2, art. 9, of the Constitution, quoted in full, is as follows: "No charter of incorporation shall be granted, changed or amended by special law except in the case of such charitable, educational, penal or reformatory corporation as may be under the control of the state or may be provided for in this Constitution, but the General Assembly shall provide, by general laws, for changing or amending existing charters, and for the organization of all corporations hereafter to be created, and any such law so passed, as well as all charters now existing or hereafter created, shall be subject to future repeal or alteration: provided, that the General Assembly may, by a two-thirds vote of each house, on a concurrent resolution, allow a bill for a special charter to be introduced, and when so introduced may be passed the same as other bills." The above proviso clearly makes an exception to the general rule forbidding a special law when a general law can be made applicable, by providing that a special charter may be granted under the conditions named. In this case the conditions exist, and the statute recites the fact that a concurrent resolution allowing the bill to be introduced has been passed by a two-thirds vote of each house, as required by statute.

The ninth and tenth exceptions allege error in not holding that defendant company is not duly incorporated, organized, and authorized to commence business under the terms of the act of incorporation, because the act authorized the company to organize and commence business when $50,000 had been subscribed to the capital stock, and the evidence shows that nine-tenths thereof is invalid stock subscriptions of Southern Railway Company and Atlantic Coast Line Railroad Company; such invalidity resting in the contention that the special act incorporating the company is void, under section 2, art. 9, of the Constitution. This contention has been overruled in the consideration of the seventh and eighth exceptions above.

The 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, and 19th exceptions bring up the question of fact whether the property sought to be condemned is necessary for the purposes of the corporation. The case of S. C. R. Co. v. Blake, 9 Rich. Law, 228, shows that the grantee of the power to condemn lands is not the sole judge whether any particular parcel of land is required for the purposes of the road, and that the final determination of this question rests with the courts. This is in accord with many authorities cited in Chicago & N. W. Ry. Co. v. Morehouse, 88 Am. St. Rep. 946, note. Nevertheless it is right that weight should be given to the fact that the grantee to whom the statute has delegated the power to condemn has decided that the particular land in question is required. As said in Smith v. R. Co., 105 Ill. 511, and repeated in O'Hare v. Chicago, etc., R. Co. (Ill.) 28 N. E. 923, 925: "Every company seeking to condemn land for public improvement must, in a modified degree, be permitted to judge for itself as to what amount is necessary for such purpose." This right, however, is subordinate to the right of the courts to prevent an abuse of the power by restricting its exercise to the reasonable necessities of the case, since to take more than reasonable necessity requires is to appropriate private property to private use." We have carefully considered the testimony in view of these principles and see no just ground for overruling the decision of the circuit court that such reasonable necessity exists. It is strenuously contended by appellants that no reasonable necessity exists, because the testimony shows that the Southern Railway Company and the Atlantic Coast Line Railroad Company, holding the greater portion of the capital stock of the defendant company, each have lots suitable for the erection thereon of a union station, and that equity and good conscience would not allow these companies, associated under the name of the Charleston Union Station Company, to condemn the property of plaintiffs for said purposes. In a proper case the court of equity would undoubtedly look beyond the corporate entity to its constituent stockholders, as the real parties in interest, associated under the name of the corporation. But we find nothing in this case which calls upon this court to ignore the rights of defendant, as a corporation, to condemn the lands of others for a public use, founded in reasonable necessity. So far as appears, the defendant company owns no property which it may use for the purpose named. It would be a bold and far-reaching doctrine to an-

nounce that no quasi corporation could condemn property of a nonstockholder for public use as long as any stockholder had property which might be used for the purpose. Such a rule would lead the court into an impenetrable maze to ascertain and adjust the rights and claims of the various stockholders as to whose property should be taken, and whose left. The safer rule is that the grantee of the power to condemn must not abuse the discretion confided by the Legislature, and spoliate private property by taking, for pretended public use, more than a reasonable necessity requires. We find no abuse of discretion or bad faith in defendant's proposal to condemn plaintiffs' property, and the general rule is that, if there be no bad faith or abuse of discretion on the part of the grantee in the matter of location, his discretion will not be interfered with. 10 Ency. Law (2d Ed.) 1057, and cases cited in note 1. A somewhat similar contention was made in Kansas & Texas Coal Ry. v. Northwestern Coal & Mining Co., 161 Mo. 288, 61 S. W. 684, 51 L. R. A. 936, 84 Am. St. Rep. 722, and was overruled by the court. We do not find in the case anything to warrant a conclusion that the organization of the defendant company is a scheme by the Southern Railway Company and the Atlantic Coast Line Railroad to do something which they could not lawfully do under their own chartered powers. They have become stockholders in defendant company by authority of a valid act of the Legislature, and the plan of organizing the defendant company for the purpose of securing an important public utility in the line of their own chartered purpose has legislative sanction. The case presented has no similarity to the Northern Securities Case, 193 U. S. 358, 24 Sup. Ct. 436, 48 L. Ed. 679, and other cases on that line relied on by appellants, relating to combinations in restraint of trade, in violation of anti-trust legislation. These conclusions also require that the 20th, 21st, and 22d exceptions be overruled.

The twenty-third exception, relating to striking out all the testimony of Mr. John Riley in reference to the introduction of the bill to incorporate the defendant, is untenable. The purport of the testimony was that Mr. Riley received no personal notice of the introduction of the bill in the Senate, and thus had no opportunity to attempt to have the bill amended in the Senate by striking out the condemnation clause, although he knew from the newspapers of the passage of the resolution authorizing the introduction of the bill, and, as a matter of fact, was heard by the House committee in opposition to the bill. The ruling of the circuit court was quite proper. The testimony was wholly irrelevant to any issue in the case, and, even if it had been permitted to remain as a part of the record, it could be of no consequence in affecting the result of this case.

We find no error in refusing injunction sought and in dismissing the complaint.

The judgment of the circuit court is affirmed.

(123 Ga. 508)

BASHINSKI v. STATE (two cases).

(Supreme Court of Georgia. July 17, 1905.)

1. GAMING—INDICTMENT — APPEAL — EXCEPTION TO VERDICT.

Pen. Code 1895, § 398, making penal the keeping of a gaming house, or renting a house to be used for gaming, defines a single offense, which may be committed in any one of the three ways therein designated. Therefore an indictment containing two counts, one charging the defendant with maintaining a gaming house, and the other with knowingly renting the house with the view and expectation of the same being used for gaming, is not open to demurrer on the ground of misjoinder of separate and distinct offenses. Nor was the second count defective because the name of the tenant was not averred.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 266.]

2. CRIMINAL LAW—VERDICT — REVIEW — DIRECT EXCEPTION.

The verdict against the special plea in bar is not reviewable by direct exception, assigning error that it is contrary to law and the evidence.

3. SAME—GUILTY KNOWLEDGE—EVIDENCE.

Where guilty knowledge is the gist of the offense, anything going to show the existence of such knowledge is admissible in evidence, and it is immaterial when and from what source such knowledge was acquired.

4. SAME—FORMER CONVICTION.

Evidence of a prior conviction of a similar offense, or of the pendency of an indictment charging a like offense, offered by the state, is incompetent to prove the charge made in the indictment under which the defendant is being tried. Such evidence is hurtful, as giving the jury an opportunity to infer that the accused is a persistent violator of the law against gaming, and is in all likelihood guilty of the specific charge then brought against him.

5. GAMING—EVIDENCE.

Testimony that the defendant was lessee of the premises during the period within which it was alleged gaming was carried on in the house was admissible, as showing he had control over the premises.

6. SAME—NOTICE.

If the defendant did not rent the premises for an illegal or immoral purpose, he was under no obligation to use ordinary diligence in discovering the use to which the premises were put; but, if the circumstances of the conduct of that business were such as to put him upon notice that the premises were used for gaming, the jury would be authorized to find that the defendant had knowledge that the premises were so used.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, §§ 124, 202.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Ike Bashinski was convicted under two indictments for maintaining a gaming house, and brings error. Reversed as to one conviction, and affirmed as to the other.

J. R. Cooper and M. G. Bayne, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

EVANS, J. The indictment against the defendant contained two counts; the first charging him with keeping and maintaining a gaming house, where persons were permitted, with his knowledge, to come together and play for money and other things of value, and the second charging that he "did knowingly rent and let a house and room with the view and expectation of the same being used as a gaming house and gaming room." To this indictment the defendant demurred on the grounds that the second count did not specify the name of the tenant to whom the premises were rented, and that there was a misjoinder of offenses, and the court should require the state to elect upon which count it would proceed. The demurrer was overruled. The defendant then filed a plea of former conviction. This plea was traversed by the state, and the issue was submitted to a jury, who found in favor of the traverse and against the plea. Thereupon the defendant sued out a bill of exceptions, complaining of the overruling of his demurrer, and that the verdict of the jury was contrary to law and without evidence to support it. Afterwards, at the same term, the defendant was put upon trial and convicted. He made a motion for a new trial, which was overruled, and he sued out a second bill of exceptions; therein complaining of the refusal to grant a new trial upon the various grounds set out in his motion. The two cases were argued together before this court.

1. There is no merit in any of the grounds of the demurrer. The charge in the indictment was stated in the language of the statute (Pen. Code 1895, § 398). It is not necessary in an indictment for knowingly renting a house with a view and expectation of the same being used as a gaming house that the name of the tenant should be averred. 9 Enc. Pl. & Pr. 775. Neither was there a misjoinder of offenses. The offense of keeping a gaming house, as defined in the section of the Penal Code above cited, may be committed in any one of the three ways therein designated. The purpose of the statute was to make penal the maintenance of a gaming house, whether it was conducted directly by the owner, or by his servant or agent, or whether he permitted persons to come together at his house and play for money or other thing of value, or knowingly rented a house with the view and expectation that it should be used for that purpose. Thus it has been held that upon an indictment for keeping a gaming house, and also for renting a house to be used for gaming, a general verdict of guilty is sufficient. Dohme v. State, 68 Ga. 339.

2. Where an issue of fact has been tried by a jury and a verdict returned, and the losing party desires to have the correctness of the verdict reviewed by this court, a motion for a new trial is indispensable. Holsey v. Porter, 105 Ga. 837, 31 S. E. 784; Bacon v. Jones, 117 Ga. 497, 43 S. E. 689. There was no motion for a new trial, complaining of the finding of the jury upon the issue formed by the traverse to the plea of

autrefois convict, but the verdict is attacked by direct bill of exceptions. This being true, we cannot undertake to pass upon the correctness of that verdict.

3. During the course of the trial on the indictment the court admitted the testimony of a witness that two of the persons who frequented the place where gaming was conducted, one of whom the state contended was the tenant of the defendant, were professional gamblers, and had been for 10 years. This evidence was objected to because at a prior term of the court the defendant had been convicted of the offense of keeping and maintaining a gaming house by renting the house to one of these persons whom the witness testified were professional gamblers. The defendant urged the further objection that the reputation of these persons at a period extending beyond the statute of limitations was irrelevant. The gist of the offense of knowingly renting a house for the practice of gaming is knowledge on the part of the landlord that the house is to be used for that purpose. Knowledge may be proved by circumstances. As was said in Bashinski v. State, 122 Ga. 164, 50 S. E. 54, where guilty knowledge is the gist of the offense, anything going to show the existence of such knowledge is admissible, and it is immaterial when or from what source such knowledge was acquired.

4. The court also allowed in evidence, over the defendant's objection, an indictment against him charging him with having committed a like offense on November 14, 1904, with a verdict of guilty indorsed thereon, and a presentment against the defendant, charging him with the offense of keeping a gaming house, in the language of the indictment under which he was being tried, as having been committed on January 1, 1905, upon which latter charge he had not been tried. The objection to this evidence was that it was irrelevant and hurtful to the accused. The presentment could under no circumstances be of any evidentiary value. It amounted to merely an accusation by the grand jury that the defendant was guilty of the offense therein charged. The indictment under which he had previously been convicted was likewise irrelevant, because it was in no sense competent evidence to prove the charge made in the indictment under which the defendant was then being tried. That the admission of this evidence was harmful is manifest. In this improper way the jury were informed that the defendant had been previously convicted of a similar offense, and that a charge of having committed a like offense was still pending against him. Thus the jury were given the opportunity to infer that the accused was a persistent violator of the laws against gaming, and was in all likelihood guilty of the specific charge then brought against him.

5. Objection was made to the testimony of the owner of the premises that he had rented the same to the defendant. This testimony was competent to show that the defendant, by virtue of his lease, had control of the premises during the period within which it was alleged the house was conducted as a gaming establishment.

6. Criticism is made upon a charge of the court to the effect that the defendant would be guilty if he "ought to have known of the character of the room, in the exercise of the care of an ordinarily prudent man." It is apparent from a reading of the entire charge of the court that the presiding judge intended to instruct the jury that if the circumstances disclosed by the evidence were sufficient to satisfy a man of ordinary intelligence that the rented premises were being put to an illegal use, or at the time he rented the same he had good reason to expect they would be put to such a use, then the jury would be authorized to find that the accused had knowledge of the purpose for which the house was rented from him and was used by his tenant. The instruction complained of, however, is susceptible of the construction that the law imposed upon the defendant the duty of exercising ordinary diligence in ascertaining the character of the business conducted in the house over which he had control. If the defendant did not rent the premises for an illegal or immoral purpose, he was under no obligation to use ordinary diligence in discovering the use to which the premises were put; but, if the circumstances of the conduct of that business were such as to put him upon notice that the premises were used for gaming, the jury would be authorized to find that the defendant had knowledge that the premises were so used. Rivers v. State, 118 Ga. 42, 44 S. E. 859. Upon the next trial of the case the court will doubtless so frame its charge as to leave the jury to determine whether or not, under the circumstances brought to light, the defendant did, in point of fact, know that the premises rented by him were used as a gaming house, and that the illegal business therein conducted was with his tacit permission and consent.

Judgment in the one case affirmed; in the other, reversed.

(123 Ga. 506)

McEVOY v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. ASSAULT—SELF-DEFENSE.

"Unless there be great superiority in physical strength of an assailant who strikes another a blow with his fist, or ill health in the assailed at the time, or other circumstances producing relatively great inequality between them in combat, the assailed cannot justifiably resent the blow by stabbing the assailant." Morgan v. State, 46 S. E. 836, 119 Ga. 566 (3), and cit.

2. INSTRUCTIONS—EVIDENCE.

Considered as a whole, the charge was as favorable to the accused as he had any right, under the facts of the case, to demand. The

evidence fully warranted, even if it did not demand, the verdict; and no reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

J. F. McEvoy was convicted of an assault, and brings error. Affirmed.

Robt. L. Colding, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 508)

LITTLE v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. CERTIORARI—POINTS—VERIFICATION.
"Points made in a petition for certiorari not verified by the answer of the trial judge present nothing for determination either by the superior or the supreme court." Fitts v. Atlanta, 49 S. E. 793, 121 Ga. 567, 67 L. R. A. 803.

2. JURY TRIAL—VIOLATION OF ORDINANCE.
One arraigned in a municipal court for the violation of an ordinance of the municipality is not entitled to a trial by jury. Littlejohn v. Stells, 123 Ga. 427, 51 S. E. 390.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 152.]

3. INTOXICATING LIQUORS — VIOLATION OF ORDINANCE.
The charge of "keeping intoxicants for sale within the limits of Ft. Valley, Ga.," in violation of an ordinance of that town, does not charge the commission of a crime punishable under the laws of the state.

4. MUNICIPAL CORPORATIONS—VIOLATION OF ORDINANCE.
The charter of the town of Ft. Valley (Acts 1882–83, p. 480) empowers the mayor to impose a fine not to exceed $50 for a violation of an ordinance of that town.

5. INTOXICATING LIQUORS—ILLEGAL SALE.
The evidence warranted a finding by the mayor that the accused was guilty of violating the ordinance as charged, and the judge of the superior court did not err in overruling the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Joe Little was convicted of violating the liquor law, and brings error. Affirmed.

John R. Cooper and W. C. Lane, for plaintiff in error. L. L. Brown and Wm. Brunson, Sol. Gen., for the State.

FISH, P. J. Judgment affirmed.

(123 Ga. 501)

NANCE v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

CRIMINAL LAW—NEW TRIAL.
There is no complaint that the trial judge committed any error of law. The evidence for the state was sufficient to warrant the conviction of the accused on the charge of seduction, and it was not error to overrule the motion for a new trial, the only grounds of which were that the verdict was contrary to law and the evidence.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Will Nance was convicted of crime, and brings error. Affirmed.

Geo. G. Glenn and Starr & Erwin, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 502)

DAVIS v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. GAMING—EVIDENCE.
Evidence that the accused, with 10 or 12 others, was seen at night sitting around a box in a house; that some of these persons were engaged in playing cards; that the accused had cards in his hand; that when discovered they all ran; and that afterwards money was found on the box—was sufficient to authorize the conviction of the accused for gaming. Harmon v. State, 47 S. E. 547, 120 Ga. 197; Frost v. State, 47 S. E. 901, 120 Ga. 311.

2. SAME—INSTRUCTIONS.
The instructions with reference to circumstantial evidence and the rules to be applied in cases of conflict in the testimony were correct. If any fuller instructions as to these matters were desired, written requests should have been made therefor.

3. SAME—NEW TRIAL.
There was no error requiring the grant of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Alf. Davis was convicted of crime, and brings error. Affirmed.

Payton & Hay, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 494)

TARVER v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. CRIMINAL LAW — VENUE — INDICTMENT—RESIDENCE OF DEFENDANT.
The Constitution of Georgia requires that all criminal cases shall be tried in the county where the crime was committed. The residence of the defendant is wholly immaterial to the fixing of the venue. Although the form of the indictment prescribed in Pen. Code 1895, § 929, contains an averment of residence of the defendant, the omission of such averment in an indictment will not be ground for quashing the indictment where it conforms in all other particulars with the prescribed form, and the offense is plainly described in the language of the statute.

2. ERROR—ASSIGNMENTS WAIVED.
An assignment of error not referred to in the brief of the plaintiff in error will be treated as abandoned.
(Syllabus by the Court.)

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

Dick Tarver was convicted of beating his wife, and brings error. Affirmed.

The plaintiff in error, Dick Tarver, was indicted for the offense of beating his wife. The indictment did not allege the place of his residence, and it was specially demurred to on this ground. The demurrer was overruled, the case proceeded to trial, and a verdict of guilty was returned by the jury. The accused excepts to the overruling of his demurrer, and also complains in his bill of exceptions that he was not furnished an opportunity to plead, and was not arraigned, nor did he waive arraignment. It appears that when both sides announced ready for trial the solicitor general asked counsel for the accused "if he would sign the waiver, and he replied he would." The trial then proceeded without objection, and the attention of the court was not called to the fact that the waiver was not signed in accordance with the agreement.

Payton & Hay, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

EVANS, J. Under the early common law no addition to the name of the person was required in indictments against persons under the degree of a knight. By the statute of additions (1 Hen. V, c. 5), in all cases in which the exigent was awarded defendants were described in the indictment by adding to their names "their estate or degree or mystery, and of the towns, or hamlets or places and counties of which they were or be, or in which they be or were conversant." This statute was applicable only in those cases in which the exigent was awarded. "The exigent was the first process in outlawry, to be issued when the defendant was not found or did not give himself up; and upon it certain forfeitures, as well as outlawry, followed. Hence the English courts held the addition to be unnecessary where 'the process of outlawry lieth not against' the defendant." 1 Bish. Crim. Pro. § 673. As outlawry and forfeiture never prevailed in this state, it was unnecessary to describe the defendant in the indictment by the addition to his name of his place of residence.

The form of indictment prescribed in Pen. Code 1895, § 929, contains an averment of the addition to the defendant's name of his place of residence. In Studstill's Case, 7 Ga. 15, it was said: "The Constitution of the state of Georgia requires that all crimes should be prosecuted in the county where they are committed. The residence of the defendant is wholly immaterial as to fixing the venue. It need not be charged that he live in any particular county. It is sufficient if the offense is stated to have been committed in the county where it is prosecuted. It is this which gives jurisdiction to the court." It is true that this question was not raised by demurrer to the indictment, but on a motion to direct a verdict of not guilty. However, the point was directly made in the bill of exceptions, and no question was raised that the objection to the indictment could not be urged in the manner in which it was, and the ruling of the court was authoritative that the averment of the defendant's residence in an indictment was unnecessary.

The principle in the Studstill Case, supra, was applied in Loyd v. State, 45 Ga. 57. In that case there were two counts in the indictment. The first began and concluded in the statutory form. The second count omitted the introductory words, "And the jurors aforesaid, in the name and behalf of the citizens of Georgia," which appeared in the first count. This court held the indictment good, and that the statutory form need not be followed to the letter, if it was conformed to in all material particulars. In Stevens v. State, 76 Ga. 96, the indictment was headed, "Georgia, Liberty County," and proceeded, "The grand jurors selected, chosen, and sworn for the county of ———, to wit [naming them and proceeding as usual];" and the indictment was held good notwithstanding the blank in the form had not been filled by the insertion of the name of the county. The heading was deemed sufficient to show for what county the grand jurors were drawn and served, and of what county they were.

There can be no doubt of the authority of the Legislature, when not curtailed by constitutional constraint, to prescribe forms of pleading. When so prescribed, the forms should be given a liberal, and not a literal, intendment. Loyd v. State, supra. Judicial construction will not eliminate any part of the legislative formula, but rather make it effective by ignoring verbal superfluities and vanities in determining whether there has been a substantial compliance with the statute. The addition of the words after the defendant's name "of the county and state aforesaid," as has already been pointed out, was necessary only in certain cases by the statute of additions. By its own terms it was not applicable to our institutions, where outlawry and forfeiture of estates are unknown, and formed no part of the common law at the time of our adopting statute. The incorporation in the statutory form of indictment of the defendant's residence may have been due to inadvertence. All that it can amount to is a description of the person of the defendant. If the defendant is sufficiently identified by name, the addition of his residence would be mere surplusage.

It is insisted that the conclusion we have reached is not in harmony with the later

case of Hardin v. State, 106 Ga. 385, 32 S. E. 365, 71 Am. St. Rep. 269. If there is a clash between the case just cited and the earlier decisions, then the late case must yield to the older decisions. In Hardin's Case the indictment entirely omitted the words prescribed by the statute, "contrary to the laws of said state, the good order, peace and dignity thereof." The indictment did not contain any words of similar import, and it was held that the indictment should have been quashed on demurrer. The general doctrine of the common law was that the indictment must conclude "contra pacem," etc. 2 Hawk. P. C. c. 25, § 92. Whatever may have been the reason for declaring the acts constituting the crime was "against the peace of our said lord the King, his crown and dignity," these or similar words were considered by the English courts essential to the form of an indictment. Our statute requires that after alleging the offense the indictment shall conclude with the words "contrary to the laws of said state," etc. So much of the form as contained these words was declaratory of the common law at the time of the enactment of the statute, and were given their common-law significance in the case cited. In construing a statute the common-law construction should be considered, for the legislative will not be presumed to have made any further innovation upon the common law than the case required. Persons v. Hight, 4 Ga. 493; 1 Kent, Com. 463. Giving the common-law construction to the addition to the defendant's name of his residence, and to the necessity of concluding an indictment "contra pacem," etc., there would seem to be no conflict in the line of decisions to which we have referred.

2. The other assignment of error in the bill of exceptions was not referred to in the brief of the plaintiff in error, and will be treated as abandoned. Williams v. State, 121 Ga. 169, 48 S. E. 906.

Judgment affirmed.

(123 Ga. 508)

RAHILLY v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

CRIMINAL LAW—APPEAL—REVIEW.

The verdict of guilty in this case was supported by the evidence, and, having been approved by the presiding judge, it will not be set aside by this court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3084.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

J. A. Rahilly was convicted of crime, and brings error. Affirmed.

Robt. L. Colding, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 508)

TURNER v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

CRIMINAL LAW—APPEAL — REVIEW—GRANT OF NEW TRIAL.

No complaint being made that any error of law was committed on the trial, and the evidence relied on by the state for a conviction being sufficient to sustain the finding of guilty returned by the jury, this court will not undertake to control the exercise by the presiding judge of his discretion in refusing to grant a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3068, 3084.]

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

John Turner was convicted of crime, and brings error. Affirmed.

Busbee & Busbee, for plaintiff in error. F. A. Hooper, Sol. Gen., and E. F. Strozier, Sol., for the State.

EVANS, J. Judgment affirmed.

(123 Ga. 504)

MOSES v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. CRIMINAL LAW—NEW TRIAL—SUFFICIENCY OF INDICTMENT.

"No question as to the legal sufficiency of an indictment can be properly raised in a motion for a new trial." Womble v. State, 33 S. E. 630, 107 Ga. 666; Boswell v. State, 39 S. E. 897, 114 Ga. 40.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2152-2158.]

2. SAME — APPEAL — SUFFICIENCY OF EVIDENCE.

The evidence warranted the verdict, and there was no abuse of discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Lige Moses was convicted of crime, and brings error. Affirmed.

Watts & Powell and J. H. Hull, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 507)

MAYS v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

PARENT AND CHILD—ABANDONMENT — EVIDENCE.

Under repeated rulings of this court, in order to constitute the crime of abandonment as defined in Pen. Code 1895, § 114, it is necessary that the child shall be not only deserted, but left in a destitute condition. If, notwithstanding the desertion, the wants of the child be provided for by others, the statutory crime of abandonment is not made out. McDaniel v. Campbell, 78 Ga. 188; Jemmerson

v. State, 5 S. E. 131, 80 Ga. 111; Crow v. State, 22 S. E. 948, 96 Ga. 297; Dalton v. State, 44 S. E. 977, 118 Ga. 196.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, § 176.]

(Syllabus by the Court.)

Error from City Court of Forsyth; W. M. Clark, Judge.

John Mays was convicted of abandoning a child, and brings error. Reversed.

Persons & Persons, for plaintiff in error. H. E. Chambliss, Sol. Gen., and Samuel Rutherford, for the State.

CANDLER, J. Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 502)

BOAZ v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

CRIMINAL LAW—APPEAL—NEW TRIAL.

The evidence being sufficient to support the verdict, and there being no error of law complained of, this court will not interfere with the discretion of the court below in refusing a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3067-3071.]

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Spede Boaz was convicted of crime, and brings error. Affirmed.

Starr & Erwin, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 504)

GEORGE v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. CRIMINAL LAW—APPEAL — TRANSCRIPT—BRIEF OF EVIDENCE.

This court will not consider, in lieu of a brief of the evidence, a transcript of the stenographer's notes of the testimony taken on the trial of a case, consisting of questions asked by counsel and the answers given by the witnesses, and not approved by the trial judge. No agreement of counsel can avail to bring such a document to the attention of this court, for the law is imperative that there must be a brief of the evidence, approved by the judge, and made a part of the record. Civ. Code 1895, § 5529.

2. ARSON—INDICTMENT—EVIDENCE.

The indictment charged the accused with the offense of arson, for that on a named day he did "set fire to the mill and machinery building in the city of Tifton of the Tifton Knitting Mills, same being a house." There was no demurrer to the indictment. *Held*, that it was not error to allow the state to prove that the Tifton Knitting Mills was a corporation.

3. CRIMINAL LAW—APPEAL—REVIEW.

There being no approved brief of evidence in the record, other questions made by the motion for new trial cannot be decided.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Berry George was convicted of arson, and brings error. Affirmed.

J. Z. Jackson and J. W. Powell, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concur.

(123 Ga. 505)

BRIGMAN v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. CRIMINAL LAW—NEW TRIAL—OBJECTIONS TO EVIDENCE.

A ground of a motion for a new trial, complaining of the admission of evidence, which does not show that any objection thereto was made at the time of its admission, or what such objection was, is without merit. It is not enough to show that ground of objection existed at the time of the making of the motion.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2207.]

2. SAME—SUFFICIENCY OF EVIDENCE.

The verdict was supported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Appling County; T. A. Parker, Judge.

Ed Brigman, Jr., was convicted of crime, and brings error. Affirmed.

W. W. Bennett, for plaintiff in error. John W. Bennett, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 502)

BROWN v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. CRIMINAL LAW—PROOF OF VENUE.
Failure to establish the venue may be taken advantage of under a general assignment of error that the verdict is contrary to law and the evidence, though no question on that subject was raised before the trial court. Tipton v. State, 46 S. E. 436, 119 Ga. 304.
2. SAME—CERTIORARI.
The record fails to show that the venue was proved, and therefore it was error to overrule the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

John Brown was convicted of crime, and brings error. Reversed.

Payton & Hay, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

FISH, P. J. Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 503)

WHITE v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. ERROR TO CITY COURT—DISMISSAL.
When this case was formerly before this court the writ of error was dismissed on the ground that no direct writ of error would lie to review a judgment of the city court of Sylvester. White v. State, 49 S. E. 715, 121 Ga. 592.
2. CERTIORARI TO CITY COURT.
Where it was sought by a direct bill of exceptions to bring to this court for review a judgment of a local court, and where there was no authority of law for such proceeding, and the writ of error was dismissed in this court for that reason, it was too late to apply to the superior court of the circuit for a writ of certiorari for the purpose of reviewing the judgment, more than 30 days having elapsed from its date to the date of the application.
3. ERROR TO CITY COURT—DISMISSAL.
The case of Roach v. Sulter, 54 Ga. 458, arose in the city court of Savannah, from which a case may properly be brought to this court by writ of error. The writ was not a nullity, as in the case at bar, but was dismissed because of irregularities.
4. CERTIORARI—TIME OF APPLICATION.
The application for the writ of certiorari having been made too late, the judgment of the superior court overruling it must be affirmed.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Wade White was convicted of crime, and applied for a writ of certiorari. From a judgment denying the application, applicant appeals. Affirmed.

Payton & Hay, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 531)

EDWARDS v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

CRIMINAL LAW—VENUE—EVIDENCE.
So far as the record shows, there was an entire failure to prove the venue of the crime with which the accused stood charged; and for this reason the judge of the superior court should have sustained the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Johnson Edwards was convicted of crime, and brings error. Reversed.

Payton & Hay, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

CANDLER, J. Judgment reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 506)

OGLESBY v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. FALSE PRETENSES—INFORMATION — SUFFICIENCY.
An accusation framed under Act Aug. 15, 1903 (Acts 1903, p. 90), and charging that the accused fraudulently procured from the prosecutor "the sum of forty & $^{57}/_{100}$ dollars, or the value thereof," was subject to special demurrer, on the ground that it did not "set out what property or other thing of value defendant procured," and was "too vague and indefinite to specifically inform defendant of the nature of the offense" charged. See Henderson v. State, 39 S. E. 446, 113 Ga. 1148.
2. CRIMINAL LAW—APPEAL—REVIEW.
Such accusation being fatally defective, and the trial court having erred in overruling the special demurrer thereto, the Supreme Court will not, in such a case, pass on the constitutionality of the act of the General Assembly upon which the accusation was based. See Armstrong v. Jones, 34 Ga. 309 (3).

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Nathan Oglesby was convicted of obtaining money by false pretenses, and brings error. Reversed.

W. D. Tutt, Jr., for plaintiff in error. Thos. J. Brown, Sol., for the State.

FISH, P. J. Judgment reversed. All concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 505)

ROBERTS v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. USING PROFANE LANGUAGE — INSTRUCTIONS.
On the trial of one charged with using profane language, without provocation, in the presence of a female, it was not error for the court to instruct the jury that if the profane language "was used in her hearing that would be in her presence" (Brady v. State, 48 Ga. 311); especially when the court in the same connection, and as part of the same sentence,

charged that "the burden is upon the state to show you that the defendant knew that [the female] was present, or else that the circumstances were sufficient to show that he must have known that she was present."

2. SAME—EVIDENCE.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Dawson County; J. J. Kimsey, Judge.

J. M. Roberts was convicted of using profane language in the presence of a female, and brings error. Affirmed.

W. B. Sloan, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

FISH, P. J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 500)

ALLAMS v. STATE.

(Supreme Court of Georgia. July 17, 1905.)

1. HOMICIDE — INSANITY AS DEFENSE — INSTRUCTIONS.

Where the accused on trial for murder relied on the defense of insanity at the time of the homicide, it was not error to instruct the jury that the burden was upon him to show "that at the time of the killing he was not of sound memory and discretion. He must show this not beyond a reasonable doubt, but to the reasonable satisfaction of the jury, by a preponderance of the evidence." Beck v. State, 76 Ga. 452 (7); Keener v. State, 24 S. E. 28, 97 Ga. 388 (3); Minder v. State, 39 S. E. 284, 113 Ga. 772 (3).

2. SAME—BURDEN OF PROOF.

Nor was it error on the trial of such a case to charge the jury that, if the accused had been shown to be insane prior to the date of the homicide, the presumption would be that he continued to be insane, "and the burden of proof would be upon the state to show to the reasonable satisfaction of the jury, by a preponderance of the evidence, that at the time of the alleged homicide the defendant was of sound memory and discretion." Danforth v. State, 75 Ga. 614 (4), 58 Am. Rep. 480.

3. SAME.

"The rule of law in force in this state which relieves one from criminal responsibility for the commission of an unlawful act on account of mental disease is: If a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. An exception to this rule is where a man has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion, his will is overmastered, and there is no criminal intent, provided that the act itself is connected with the peculiar delusion under which the prisoner is laboring." Taylor v. State, 31 S. E. 764, 103 Ga. 746 (1). It follows, therefore, that it was not accurate to charge as follows: "The insanity which the law recognizes as an excuse for crime must be such as dethrones reason and incapacitates an individual from distinguishing between right and wrong as to the particular act in question, and of being mentally incapable of choosing to do or not to do the alleged act, and governing his conduct in accordance therewith." To relieve one from criminal responsibility on account of mental delusion for the commission of an unlawful act, it is not necessary that he be incapable of distinguishing right from wrong as to the particular act in question, and also incapable of choosing to do or not to do such act, and of governing his conduct in accordance therewith. The charge referred to in Quattlebaum v. State, 46 S. E. 677, 119 Ga. 433 (1), was not approved as a correct statement of the law; but it was held merely that the charge there given furnished the accused no cause of complaint, as it placed a greater burden on the state than the law authorizes. The inaccuracy of the charge last above quoted was not cause for a new trial, however, when the court subsequently fully, clearly, and correctly instructed the jury on the law of insanity as an excuse for crime, and specifically applied the correct rule on the subject to the contentions of the accused.

4. SAME—EVIDENCE.

The evidence fully warranted the verdict, and the court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

F. M. Allams was convicted of murder, and brings error. Affirmed.

L. M. Farmer, W. H. Daniel, R. O. Jones, Robt. Orr, and J. L. Jones, for plaintiff in error. J. R. Terrell, Sol. Gen., W. L. Stallings, and Jno. C. Hart, Atty. Gen., for the State.

FISH, P. J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 499)

ALLEN v. STATE.

EDMUNDS v. SAME.

(Supreme Court of Georgia. July 17, 1905.)

1. INDICTMENT—DEMURRER.

A demurrer to an indictment, on the ground that "said indictment shows upon its face interlineations, alterations, substitutions, and changes from the form in which it was originally drawn," is not good; there being nothing to indicate that the alterations were made subsequently to the time the indictment was acted upon by the grand jury. Jones v. State, 25 S. E. 617, 99 Ga. 46; Cook v. State, 46 S. E. 64, 119 Ga. 110.

2. RAILROADS — SHOOTING AT CARS—INDICTMENT.

An indictment for the violation of Pen. Code 1895, § 511, prohibiting throwing rocks or shooting at or in railroad or street cars, need not allege that the car at which it is charged that the accused threw or shot belonged to a chartered railroad company.

3. SAME.

The indictments in the cases of Sanders v. State, 45 S. E. 602, 118 Ga. 788, and Kiser v. State, 15 S. E. 495, 89 Ga. 421, were based on Pen. Code 1895, § 520, and are therefore distinguishable from the case at bar.

4. SAME—EVIDENCE.

The evidence was largely circumstantial, but that introduced by the state was sufficient to warrant the conviction of the accused; and it was not error to overrule the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Wilkinson County; H. G. Lewis, Judge.

Alonzo Allen and Randolph Edmunds were convicted of crime, and bring error. Affirmed.

Henry Bunn Wimberly, for plaintiffs in error. Jos. E. Pottle, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 497)

BROWN v. CITY OF ATLANTA.

(Supreme Court of Georgia. July 17, 1905.)

1. CRIMINAL LAW — SENTENCE IN ALTERNATIVE.

A sentence imposing two penalties in the alternative, one of which is unauthorized, is not void, but may be enforced as to the penalty which is authorized. Taff v. State, 39 Conn. 82; Lowrey v. Hogue, 24 Pac. 995, 85 Cal. 601; People v. Harrington, 42 N. W. 680, 75 Mich. 112; In re Sweatman, 1 Cow. 144, 149.

2. SAME—REVIEW.

A person upon whom such an alternative sentence has been imposed, and who voluntarily complies with that portion of the sentence which is legal, cannot thereafter have the judgment of conviction reviewed.

3. CERTIORARI—DISMISSAL.

A certiorari sued by such a person should be dismissed, and a judgment overruling the certiorari and dismissing the petition will not be disturbed.

4. SAME—ANSWER.

Even if the recorder could not properly state in his answer to the certiorari that the fine had been paid, a statement therein to this effect could be acted on by the superior court in the absence of a traverse of the answer or a denial of the fact therein stated.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

G. B. Brown was convicted of the violation of a city ordinance, and brings error. Affirmed.

Brown was convicted in the municipal court of the city of Atlanta for a violation of an ordinance against the keeping of intoxicating liquors for unlawful sale. The ordinance in question provided that upon conviction the offender should be punished "by a fine not exceeding five hundred dollars, or imprisonment not exceeding thirty days, either or both, in the discretion of the court." The recorder imposed upon the accused a sentence that he pay a fine of $100 and costs, and that in default of such payment said defendant work on the streets or public works of said city thirty days under the direction of superintendent of public works." The accused sued out a petition for certiorari, in which he alleged, among other things, that the imposition of the alternative sentence to labor upon the public works was without authority of law. The writ of certiorari was issued, and the recorder answered that the imposition of the alternative penalty complained of was due to inadvertence, that the accused paid the fine imposed in the sentence before being put to labor on the public works, and that the respondent had no notice of the error in the sentence until the certiorari was served upon him. The judge of the superior court overruled the certiorari, and the accused excepted.

John F. Methvin and Spencer R. Atkinson, for plaintiff in error. J. L. Mayson and W. P. Hill, for defendant in error.

COBB, J. It is contended by counsel for the city that under the charter of Atlanta the sentence of the recorder was legal in its entirety. But this question is immaterial. The recorder undoubtedly had authority to impose a fine. The sentence has been complied with, the penalty which it was lawful to impose has been paid, and the judgment is satisfied. The city is not seeking to enforce any other part of the sentence; neither can it do so, whether the alternative penalty which was not submitted to be legal or illegal. It would perhaps have been the better practice for the judge of the superior court to have stricken the petition for certiorari from the files, but the order overruling the certiorari and dismissing the petition, which accomplishes the same result, will not be disturbed.

It is contended, however, that the fact as to the payment of the fine was no proper part of the answer of the recorder, and should not have been considered by the superior court, and that this court ought to inquire into the merits of the case, without reference to this question. The writ of certiorari directs the respondent to "certify and send up all the proceedings in said cause to the superior court." Civ. Code 1895, § 4637. It would seem from this that all papers and records which are material in the determination of the questions raised by the petition for certiorari should be sent up to the superior court with the answer of the respondent. It was doubtless matter of record in the recorder's court that the fine imposed upon the accused had been paid, and the recorder might very properly have sent up a copy of such record. It makes little difference that, instead of doing this, he simply stated in his answer the fact of the payment of the fine. At any rate, there was no traverse or motion to strike that part of the answer, nor was there any denial of the fact therein stated. The matter might have been brought to the attention of the superior court by affidavit, or in other proper way, just as the fact is brought to the attention of the Supreme Court that an act which is sought to be enjoined has been committed, in which case the court declines to pass upon the refusal to grant the injunction. Randolph v. Bruns. R. Co., 120 Ga. 970, 48 S. E. 396, and citations. If the fact stated by the recorder was true, the accused had no case to be reviewed; and, if it was not true, it was incumbent

upon him to deny the statement, and have the question determined in the superior court. Not having done this, the statement will be treated as true, and this court will decline to pass upon the merits of the case. The judge of the superior court having reached the right result, his judgment will be affirmed.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness, and LUMPKIN, J., not presiding.

(123 Ga. 507)

WATTS v. MAYOR, ETC., OF CITY OF FORSYTH.

(Supreme Court of Georgia. July 17, 1905.)

INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

Evidence that two jugs containing six or seven gallons of intoxicating liquor were found in the house of the accused, in a "dry" county; that she also had 15 or 20 empty jugs, which apparently had contained whisky, concealed in her house; that the accused admitted that the whisky in the jugs was hers; that certain parties stole a jug of whisky from the house of the accused during her absence; and that 19 persons at different times had given the accused sums of money, ranging from 50 cents to $2, "to order" whisky for them—was sufficient to authorize a finding that the accused had violated a municipal ordinance prohibiting the keeping of intoxicating liquors for the purpose of unlawful sale. See Tucker v. City of Moultrie, 50 S. E. 61, 122 Ga. 160.

(Syllabus by the Court.)

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Penny Watts was convicted of violating the liquor law, and brings error. Affirmed.

Persons & Persons, for plaintiff in error. Cabaniss & Willingham and O. H. B. Bloodworth, Sol. Gen., for defendant in error.

COBB, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 512)

ANDERSON et al., County Com'rs, v. NEWTON et al. NEWTON et al. v. ANDERSON et al., County Com'rs, et al.

(Supreme Court of Georgia. July 17, 1905.)

1. APPEAL — BILL OF EXCEPTIONS — ASSIGNMENT OF ERROR.

A bill of exceptions which sets forth a general complaint of the granting of an injunction will not be dismissed on the ground that it does not contain a legally sufficient assignment of error, if it be practicable for this court, looking to both the bill of exceptions and the transcript of the record, to ascertain what questions were passed on by the trial judge, and what rulings the plaintiff in error seeks to have reviewed.

2. INJUNCTION—CONTRACT OF COUNTY—SUIT BY TAXPAYERS.

The carrying out of a contract to build a courthouse should not be enjoined at the instance of taxpayers on the ground that the county authorities failed to observe the requirements of Pol. Code 1895, § 345, when it appears that there has been a substantial compliance with its provisions respecting an advertisement for bids, putting the public on notice of the "extent and character of the work to be done and the terms and time for payment."

3. COUNTY COMMISSIONERS — DISCRETION — ERECTION OF COUNTY BUILDINGS.

County commissioners have a broad discretion in passing upon the necessity of erecting suitable buildings for county purposes and selecting an appropriate site therefor, and the reviewing power of the judge of the superior court should be exercised with caution, and no interference had, unless it be manifest that the county authorities are abusing the discretion with which they are vested, or that the tax which they propose to levy to meet the cost of construction is exorbitant, and will therefore impose an unauthorized hardship upon the taxpayer. That he may be also subject to municipal taxation affords no reason for enjoining the collection of a county tax which is not itself exorbitant, inasmuch as the needs of the county are not to be suffered to go unsatisfied because of any independent burden upon the taxpayer, which he assumes by becoming a resident of a town or city.

4. SAME—ANNUAL EXPENDITURES—ISSUANCE OF BONDS—REVIEW BY COURT.

Whether the funds with which to meet the expenditure shall be raised by a tax for the current year, or by affording the voters of the county an opportunity to authorize the issuance of bonds at an election duly held for that purpose, is a matter solely for the determination of the county authorities; and their decision as to this matter is not subject to review by the judge of the superior court, who has no power to order an election or to delay action on the part of the commissioners till they refer to the voters of the county the question of the expediency of a bond issue.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Suit by J. T. Newton and others against R. S. Anderson and others, commissioners of Morgan county. From the judgment defendants bring error, and plaintiffs assign cross-error. Judgment on main bill of exceptions reversed. On cross-bill, affirmed.

On March 16, 1905, the commissioners of Morgan county advertised for bids to erect a new courthouse for that county, the costs of the same not to exceed $40,000, including furniture, if built on what was known as the "Jail Lot," or $46,000, including furniture, if erected on the present site of the courthouse. In the advertisement, the general character of the building to be erected, its size, and the materials of which it was to be built, were stated; and reference was made to minute plans and specifications of file in the office of the county commissioners, according to which the building was to be erected. The advertisement also provided that the construction of the building should commence on May 22, 1905, and that it should be completed by December 28th of that year; payments for the work and materials to be made to the contractor as the structure reached certain specified stages of completion; the last payment to be made

when the building was fully completed and was accepted by the architects and the county commissioners. A further stipulation was that each bidder should deposit with his bid a certified check for $1,000, payable to the county commissioners, as a guaranty that he would enter into a contract with the county upon the terms of his bid within 20 days after its acceptance, and give a bond with security for the faithful performance of his contract, in double the amount of the contract price of the building, and that, upon his failure to enter into such a contract and give such a bond, the check was to be retained by the county commissioners, and forfeited as liquidated damages. On April 20, 1905, the county commissioners awarded the contract to the Winder Lumber Company; its proposal to erect the new courthouse on the jail lot for $39,780, including all furniture called for by the specifications, being the lowest and best bid received. Upon the same day a written contract providing for the erection of the building was duly executed by the representatives of both contracting parties, but up to May 15, 1905, no bond was furnished by the contractor. On that day John T. Newton and other citizens and taxpayers of Morgan county instituted an equitable proceeding in the superior court of that county, the purpose of which was to restrain the county authorities from proceeding under this contract to build a new courthouse. The complainants alleged, among other things, that the advertisement for bids was legally insufficient, being too indefinite in certain particulars to put bidders and the public at large upon notice of the terms and conditions upon which the county commissioners proposed to award a contract for the building of a new courthouse; that the present structure, while not commodious, was in perfect repair, and was adapted to all immediate needs of the county; that its financial condition was not such as to warrant the expenditure necessary to procure a building of the kind which the commissioners proposed to erect, and to levy a direct tax sufficient to meet this expenditure would be so burdensome and oppressive as to amount to a confiscation of the property of the citizens of the county, nine-tenths of whom were opposed to the levy of a tax for this purpose; that the county commissioners did not in good faith intend to raise the necessary amount by a tax imposed for the current year, but to issue county warrants to the contractor, which would represent a "floating indebtedness" against the county, which its authorities could not legally create, but which they proposed to meet by ordering an election to vote on issuing bonds to provide the means of paying off this indebtedness after it was incurred, contrary to the provisions of the Constitution; and that in no event should the county commissioners be permitted to give effect to the bid of the Winder Lumber Company, it not being in accord with the terms of the advertisement nor advantageous to the county, and that company having forfeited its deposit of $1,000 by failing to enter into a written contract and give the required bond within the time limited, which forfeiture the county commissioners ought not to be allowed to waive. The complainants prayed that the county commissioners be enjoined from proceeding to build the proposed new courthouse till "bids shall be made and accepted after proper notice and advertisement, and until a vote for the issue of bonds to build said courthouse shall have lawfully been held," and that, "in the supervisory powers of the court, the levy of a direct present tax this year to pay for said courthouse be enjoined, as unnecessary and exorbitant, at least till said bond election shall have been held."

The Winder Lumber Company, which was made a party defendant, filed an answer in which it offered the following explanation of its failure to furnish a bond within 20 days after the contract was awarded: Immediately after its bid was accepted, on April 20th, its manager, J. B. Williams, was approached by the local agents of a guaranty company, who solicited the privilege of furnishing the bond, but for some reason failed to furnish him with the application therefor till April 26th, when he at once signed and returned it to them. On May 10th they notified him that their company could not write the bond, whereupon he promptly took steps to have a bond written by another company, which executed the required bond on May 16th, and the same was mailed to the board of county commissioners on May 18th; being received by the board three or four days before work was to be commenced on the building, and being still retained by the board. Williams was induced to procure this bond by the assurance of the chairman of the board that the bond would be accepted if tendered before the 22d of May, the day when work was to begin. The defendant company also alleged that it was ready and willing to comply with its contract, if permitted to do so, but stated very frankly that it was perfectly indifferent as to whether it was allowed to build the courthouse; the delay caused by the litigation having already damaged the company and worked a hardship upon it. The company prayed that the court decree that there had been no forfeiture of the deposit of $1,000, and that the board of county commissioners be required to return the check for that amount, as well as the bond furnished by the company; the board not having accepted the bond, nor indicated whether or not it proposed to do so.

The county commissioners filed an answer in which they took issue with the complainants as to the necessity of having a new courthouse, and wherein they insisted that the steps taken by the board to procure a suitable building were in all respects legal

and proper, especially in view of the fact that on January 18, 1905, an election had been held in the county for the purpose of determining whether bonds should be issued to raise the necessary funds with which to build a new courthouse, and the requisite number of votes to authorize the issuance of bonds had not been polled. The commissioners further answered that, while it was their intention to issue county warrants in payment for the building as the work thereon progressed, these warrants were all to be paid on or before December 28, 1905, out of funds to be raised by the levy of a tax sufficient to meet these obligations, and that no debt against the county such as is prohibited by the Constitution would be created, nor would the tax imposed amount to a confiscation of the property of the citizens, though doubtless the burden upon them would be less, were they willing to authorize the issuance of bonds. As to the failure of the contractor to furnish a bond within the time limited in the advertisement for bids, the commissioners replied that it was within their discretion to waive the forfeiture and allow the contractor to comply with the contract, though, owing to the restraining order served upon them, they had not undertaken to pass upon the sufficiency of the bond which had been mailed to them by the contractor before the date upon which work was to have commenced on the building, nor had they in any way waived any right of the county to insist upon the forfeiture.

At the interlocutory hearing much evidence was introduced, pro and con, as to the expediency of building a new courthouse, in view of the condition of the structure then in use, and its capacity to serve the present needs of the county. After considering the evidence bearing upon this and other issues involved, the court passed an order reciting that, in the opinion of the presiding judge, "the county commissioners have the right to decide whether a new courthouse should be built or not, and have the right to decide where the same should be located," as well as the "right, if it becomes necessary so to do, to levy a tax this year to pay for the same"; but the court is, "however, of the opinion that no such urgent necessity exists as to justify, under the circumstances of this case, the levy of such a tax before the people have had another opportunity to vote on bonds. While the court sees no irregularity [in] the making of a contract with the Winder Lumber Company which might not be waived, said company consenting in open court to setting the same aside, it is therefore ordered that any further prosecution of the same on the part of the parties thereto be enjoined and restrained, and that the said commissioners be enjoined from longer detaining the $1,000 and the indemnity bond deposited with said contract. It is further ordered that the said commissioners be restrained from entering into any contract to build said courthouse, or from levying any tax to pay for the same, until they shall have first submitted to the people, as provided by law, the question whether bonds shall be authorized to build said courthouse." To the granting of this injunction the county commissioners excepted, and by cross-bill of exceptions the complainants assign error upon the order of the court in so far as it sets forth the decision of the court that it was within the power of the county commissioners to determine the necessity of building a new courthouse and to choose the site thereof, as well as to levy a tax to raise the amount necessary to erect the building, and that there was no irregularity in the steps taken in advertising for bids and awarding the contract to the Winder Lumber Company.

George & Anderson, for plaintiffs in error. Willeford & Middlebrooks, S. H. Sibley, and C. H. Brand, for defendant in error.

EVANS, J. (after stating the facts). 1. On the call of the case in this court a motion was made to dismiss the main bill of exceptions on the ground that it contained no legally sufficient assignment of error. The plaintiffs in error therein complain, in general terms, that the court erred in holding (1) that there was no such urgent necessity as justified the levy of a tax before the people had been afforded another opportunity to vote on the issuance of bonds; and (2) for this reason the commissioners should be enjoined from carrying into effect the contract made with the Winder Lumber Company, notwithstanding there was no irregularity connected with that contract which the commissioners were not authorized to waive. While the exceptions to the judgment of the court may not be altogether orthodox, in that no specific reason is assigned why the rulings of the court were erroneous, yet we think they are legally sufficient, tested by the loose practice to which our General Assembly has lent its countenance. Civ. Code 1895, § 5569, declares that this court shall not "dismiss any case for any want of technical conformity to the statutes or rules regulating the practice in carrying cases to [this] court, where there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided." "In other words, an assignment of error will be sufficient if this court, viewing it in the light of the record, can ascertain substantially what questions the trial court passed on, and which are sought to be reviewed here." Turner v. Alexander, 112 Ga. 821, 38 S. E. 35. In an endeavor to follow this legislative mandate, this court, in Carter v. Jackson, 115 Ga. 679, 42 S. E. 46, laid down the rule that "a general exception to the judgment, and a specific as-

signment of error on the special ruling upon which the judgment was based, is sufficient to present for consideration the question whether the court erred in the special ruling complained of, and in entering the general judgment" in accordance with such ruling. In Atlanta Ry. Co. v. Atlanta Rapid Transit Co., 113 Ga. 481, 39 S. E. 12, the complaint made of the refusal to grant an injunction was that the judgment of the court was contrary to the law and evidence in the case, without assigning any reason why this was so, and still the assignment of error was deemed sufficient to withstand a motion to dismiss the writ of error. In Wyatt v. Crowder, 112 Ga. 168, 37 S. E. 380, this court was able to ascertain from the record that the refusal of an injunction was necessarily based upon the opinion entertained by the judge that the petition, taken as true, did not entitle the plaintiffs to the relief prayed for; and, this being so, a general complaint that the court erred in denying an injunction was held to be a legally sufficient assignment of error. Likewise, where the direction of a verdict has been characterized as erroneous, without any reason being assigned why the judgment of the court was wrong, we have retained writs of error upon the bare supposition that the plaintiff in error intended to attack the judgment on the ground that, in view of the pleadings and the evidence submitted in support thereof, the court committed an error of law in holding that the party in whose favor the verdict was directed was entitled to prevail. Phillips v. Railway Co., 112 Ga. 197, 37 S. E. 418; Howell v. Pennington, 118 Ga. 496, 497, 45 S. E. 272; Taylor v. McLaughlin, 120 Ga. 705, 48 S. E. 203. In the present case the pleadings disclose what issues of fact were presented for determination, and the bill of exceptions contains a brief of the evidence offered in support of the contentions of the respective parties. We are thus in a position to determine by what rules of law the presiding judge should have been guided in the exercise of his discretionary powers, and the written order which he passed sets forth his decision upon each of the several questions on which he undertook to pass. The county commissioners acquiesce in the correctness of some of the rulings therein made, but complain that the rulings made on some of the questions passed on were erroneous. We therefore are informed that they have a more or less definite consciousness that the rulings excepted to are wrong, and we are doubtless warranted in assuming that they are attacked on the ground that in view of the undisputed facts appearing on the trial, and the law applicable thereto, the court incorrectly held it was within its province to grant an injunction for the reasons set forth in the order which it passed. Upon this assumption, the motion to dismiss the writ of error is overruled, and we will upon this assumption endeavor to deal with what we conceive to be the actual grounds upon which the parties enjoined complain that their liberty of action in the premises has been interfered with.

2. The court correctly held the advertisement for bids to erect a new courthouse was not, for any of the reasons urged by the complainants, too uncertain and indefinite to put bidders and the general public on notice of the terms and conditions upon which the structure was to be built. The advertisement expressly provided that bids were to include the furnishing of furniture for the building, and referred to plans and specifications on file in the office of the board of county commissioners for minute information as to the character of the structure, and the kind and quantity of furniture with which it was to be fitted. That bids were invited for the construction of a courthouse on a given site, not to exceed a stated amount, and also for the erection of the building on a different site at a cost not exceeding another stated amount, did not render the invitation confusing. Separate advertisements asking for separate bids would not better have given notice of the intention of the commissioners to decide whether, after the cost of erecting the building on each of the sites mentioned had been ascertained, the contract would be let to the lowest bidder proposing to erect the courthouse on the jail lot, or to the lowest bidder proposing to erect the structure on the site on which stands the building now used as a courthouse. We cannot conceive that any bidder who had sufficient intelligence to erect such a building was deterred from bidding simply because he did not understand that the commissioners wished to ascertain before awarding the contract what would be the relative cost of erecting the new courthouse on the present site, as compared with the cost of erecting it on the jail lot. The times and the terms of payment of the contract price were stated with all necessary particularity. That full payment was to be made within the current year was stated beyond peradventure. County warrants were to be issued as the work progressed from one stage of completion to another, the same to be "due and paid on or before Dec. 28, 1905." Presumably it was contemplated that these warrants would be paid promptly as issued. Certainly there is no suggestion to the contrary, but an express stipulation that they were to be paid "on or before" the date fixed for the completion of the building. A legal promise of payment is made, and it cannot be assumed that the commissioners had no intention of performing this promise. Though there might be no secret of the fact that the county owed certain outstanding indebtedness, and had little or no ready funds in its treasury, this circumstance in no way negatived the intention or ability of the commissioners to make the proposed payments. It was within at least their power to pay, for they were vested with authority to raise the

necessary funds by the levy of a direct tax. If any one was deterred from bidding because he doubted the fulfillment of the promise to pay, it must have been because he had reason to believe the county would be a debtor he feared to trust, and not because the advertisement inviting his trust and confidence was itself ambiguous or in any respect defective.

3. Equally clear is it that the court correctly held that the board of county commissioners was vested with discretionary power with respect to deciding whether or not the erection of a new courthouse was a present and urgent public necessity, and, if so, upon what site it should be built. The evidence authorized, if it did not demand, the further conclusion that the commissioners were acting within the powers conferred upon them by law in taking the steps which they pursued in carrying out their intention of providing the county with a suitable courthouse, by letting out the contract for the erection thereof to the Winder Lumber Company. Indeed, the proposed tax was not shown to be a burden which they could not lawfully impose upon the property owners of the county, nor was it shown that the court could properly, for any other reason, interpose and enjoin the carrying out of the project upon the idea that the county authorities were not acting wholly within the scope of the discretionary powers expressly conferred upon them by law. "The discretion vested in the county authorities must be, from the nature of the case, a broad one; and therefore the reviewing power of the judge of the superior court must be exercised with caution, and no interference had unless it is clear and manifest that the county authorities are abusing the discretion vested in them by law." Commissioners v. Porter Mfg. Co., 103 Ga. 617, 30 S. E. 549. The levy of an additional tax of 2 per cent. or less, when necessary to raise the amount required, cannot be considered an exorbitant assessment or unauthorized burden imposed on the taxpayer. Dyer v. Erwin, 106 Ga. 845, 849, 33 S. E. 63. The fact that he may also be liable to municipal taxation affords no ground for suffering the needs of the county to go unsatisfied. However burdensome municipal taxation may be, the necessity of providing the county with a suitable courthouse should be met, if this can be done by levying a county tax which is not itself exorbitant. The citizen must forego the luxury of city life, if unable to bear its incidental expense and still perform the obligations of a citizen which he owes to the county. Pol. Code 1895, § 396, conferring upon the judge of the superior court jurisdiction to review the action of the county authorities, does not contemplate that the extravagances of a municipal corporation shall defeat the power of such authorities to supply the wants of the county.

4. The presiding judge having properly declined to grant an injunction on the ground that the building of the new courthouse was unnecessary, or because the proposed tax was exorbitant, as claimed, it only remains to inquire whether it was within his province to determine the expediency of taking immediate action, or postponing action till the people could be afforded another opportunity of voicing their opinion as to the advisability of issuing bonds for the purpose of raising funds with which to erect the contemplated building. The county commissioners had the discretionary power to decide whether the requisite funds should be raised by a tax imposed for the current year, or by the issuance of bonds, provided authority to issue the same could be secured from the voters of the county at an election duly held in accordance with the provisions of the Constitution. Elliott v. Gammon, 76 Ga. 766. An election had previously been held, at which the people declined to authorize the issuance of bonds; and the commissioners doubtless exercised a wise discretion in determining to no longer delay the matter, but to presently meet the emergency by awarding a contract for the construction of the building, and levying a tax to meet the necessary expense. It was not within the power of the court to override their decision as to this matter, even though the judge may have been justified in his conclusion that the necessity of erecting a suitable building was not so "urgent" as to make improper the delay incident to holding another election. The only question he was called on to decide was whether the necessity existed, and, if so, whether the proposed tax would be exorbitant. The commissioners having determined to exercise their power to levy a tax, the court had no power to order an election, nor any authority to delay action on the part of the commissioners in order that the people might vote on the advisability of issuing bonds.

Judgment on main bill of exceptions reversed; on cross-bill, affirmed.

(72 S. C. 87)

MACKORELL v. LANCASTER & CHESTER R. CO.

(Supreme Court of South Carolina. July 4, 1905.)

CARRIERS—INJURY TO FREIGHT—RECOVERY OF PENALTY.

Civ. Code 1902, § 1711, providing for a penalty for failure of common carrier to pay loss or injury to freight, was repealed by Acts 1903, p. 81, so that the penalty provided therefor cannot be recovered.

Appeal from Common Pleas Circuit Court of Lancaster County; Watts, Judge.

Action by Jno. B. Mackorell against the Lancaster & Chester Railroad Company. From order of nonsuit, plaintiff appeals. Affirmed.

J. Harry Foster, for appellant. T. Y. Williams, for respondent.

GARY, A. J. This is an appeal from an order of nonsuit. The complaint contained two causes of action. The allegations of the first cause of action are, in substance, that in September, 1902, the defendant undertook to transport and deliver to the plaintiff, at Lancaster, S. C., 300 pounds of candy shipped to the plaintiff from Tennessee, and delivered to the defendant for transportation at Chester, S. C.; that the defendant failed to deliver nine pounds of the said candy, of the value of $1.15, and the plaintiff filed with the defendant on the 16th of September, 1902, a claim for said loss, and demanded payment, but the defendant failed to settle the same or any part thereof. In addition to these allegations, it is alleged in the second cause of action that, although more than 60 days had elapsed since the filing of said claim, the defendant has not paid or refused to pay the same, and thereby became liable to the penalty of $50 provided in the act of 1897, now section 1711 of the Code of Laws 1902.

The defendant demurred to the complaint on several grounds, one of which was that the act of 1897 has been repealed. The demurrer was overruled. The plaintiff introduced in evidence the said claim, which was as follows:

Lancaster, S. C., Sept. 16th, 1902.

Lancaster and Chester R. R. Co.,
J. B. Mackorell,

To 9 lbs. Choc. drops short at 12 cts. per lb.....	$1 08
Freight on same.....	07
	$1 15

He also introduced in evidence the invoice of the goods lost, showing the price thereof to be 12 cents per pound, free on board, Knoxville, Tenn. "The rate of freight from Knoxville, Tenn., to Lancaster, S. C., is in cents, if fourth class, 58 per hundred pounds."

At the close of plaintiff's testimony the defendant made a motion for nonsuit on the ground that, as the act of 1897 had been repealed, the penalty could not be recovered, and on the further ground that the penalty could not be recovered by reason of the fact that the claim which the plaintiff filed included a charge for freight. His honor the circuit judge refused the motion on the first ground, but granted it on the second ground, saying, "I am of the opinion that this act has to be strictly construed, and it only requires a railroad company to pay for or refuse to pay for loss, breakage, or loss or damage by plaintiff for any goods shipped over the line, and that does not include freight." The jury rendered a verdict in favor of the plaintiff for $1.15. The plaintiff appealed from the order of nonsuit on the ground that the presiding judge erred in ruling that the defendant was not liable for the penalty, by reason of the fact that a charge for freight was included in the claim which was filed.

Section 1711 of the Code of Laws of 1902 is as follows: "All common carriers doing business in this state shall be required to pay for or refuse to pay for all loss, breakage, or damage from breakage, damage or loss of articles shipped over the lines of said common carriers within sixty days from the time a claim for the said articles so lost, broken or damaged shall be made. In case the said common carrier shall not pay or refuse to pay said claim for said loss, breakage or damage as set out in this section within the sixty days therein provided for, then said common carrier shall be liable for the sum of $50 for each offence as penalty, in addition to the amount of said loss or damage, to be collected by the claimant in any court having jurisdiction of the same." While in the act of 1903 (page 81) there is a proviso "that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest," there is no such provision in the act of 1897. It may be that the presiding judge erred in applying this principle to the case in hand, especially as the verdict of the jury showed the plaintiff was entitled to the full amount claimed. But under the views hereinafter expressed, this becomes merely a speculative question. The defendant gave notice that it would ask that the order of nonsuit be sustained upon the additional ground, among others, that the presiding judge erred in refusing to grant the nonsuit on the ground that the repeal of the act of 1897 prevented the recovery of the penalty in this action. This question has been recently considered in the case of Johnson v. Ry., 69 S. C. 322, 48 S. E. 260, and, as this court is satisfied with the principles therein announced, we deem it only necessary to refer to that case, to show that the motion for nonsuit should have been sustained on this ground.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 47)

POLLOCK et al. v. PEGUES.

(Supreme Court of South Carolina. June 30, 1905.)

ESTOPPEL—EVIDENCE—SALE OF LAND.

An owner of land sold a small portion by a parol agreement, and the vendee entered into possession, paying a small part of the price. The vendor, desiring to sell the remainder of the tract, found a purchaser who would take, provided he could also acquire the small portion previously sold. The vendee authorized the agent of the vendor to sell the land, agreeing to arbitrate any claim he might have for damages, and the subsequent purchaser bought with knowledge of such agreement. *Held*, that the original vendee was estopped from setting up any claim to the land as against such purchaser.

Appeal from Common Pleas Circuit Court of Chesterfield County; Aldrich, Judge.

Action by Carrie E. Pollock and others against James W. Pegues. From the decree, defendant appeals. Affirmed.

The cause was referred to R. T. Caston, who made the following report:

"It appears that the plaintiff W. P. Pollock, acting as agent and attorney in fact for the plaintiff Carrie E. Pollock, who is his sister, and by whom he was given such authority, had in his charge 400 acres of land, fully described in complaint, which was owned by her. In the early part of year 1902 he made for her a contract and agreement with the defendant, James W. Pegues, the terms of which were that Pegues was to rent the land at a stipulated rent, and to purchase thirty-five acres of it at $8 per acre; the thirty-five acres being described in the testimony by boundaries. Under such agreement Pegues went into possession of entire tract, under contract to purchase the thirty-five acres, and to pay rent upon remainder—the uplands at a stipulated amount, and the low grounds at one-fourth the crops raised. According to the testimony of Mr. Pollock, the rent for the uplands was agreed upon as $150 per annum; and according to the testimony of Mr. Pegues, as two bales of cotton, each weighing 500 pounds. The defendant was given his own time in which to pay for the thirty-five acres, and made only one payment of $20 on the 14th day of February, 1902, for which he was given receipt in evidence, marked 'Exhibit D.' At the close of the year 1902 a settlement of rent was made, leaving the defendant indebted upon this account in sum of $12. This, the defendant claims, was paid subsequently by him, by hauling plaintiff's share of the lowland crop to Cheraw. Plaintiff denies this, although admitting that same crop was so hauled; but he did not agree to pay for hauling, nor was hauling worth so much. For year 1903, defendant paid $100 rent, which, according to defendant's contention, was full amount due, but which, according to the testimony of plaintiff, left $50 still due. From the testimony of all the witnesses in the case, it appears to me that $150 was a reasonable rent for the place, exclusive of the thirty-five acres and the low grounds. The determination of the actual terms of renting is not as important, however, under the view taken by me.

"Near the close of the year 1903 the plaintiff W. P. Pollock received an offer of about $8 per acre for the entire tract, which he testifies had been on the market for some time, and which he had up to this time failed to get taken at a fair price. As the would-be purchaser refuses to trade without getting the thirty-five acres bargained to James W. Pegues, Mr. Pollock on more than one occasion saw Mr. Pegues; and endeavored to get him to release his claim thereon, which Mr. Pegues was unwilling to do. Thereafter, on the first Monday in January, 1904, they met at Chesterfield, and W. P. Pollock made James W. Pegues several offers to induce him to release; offering him compensation for such damages as he might sustain thereby. Mr. Pollock testifies that Mr. Pegues did so agree, and that, acting upon such agreement, he came to Cheraw that evening, and stated to Mr. M. H. Stacy that release had been made, and that there and then Mr. Stacy bought the entire tract, paid the purchase money, and took title, relying upon the release of Mr. Pegues. Mr. M. H. Stacy soon thereafter conveyed to L. E. Stacy, the plaintiff, for whom he was acting in making original purchase. Mr. Pegues positively denies making such agreement. It is difficult to reconcile the testimony of these two witnesses, both of whom, I am satisfied, are honest in their statements. It becomes necessary, therefore, to take the statements of both of them, and compare them with the surrounding circumstances. Mr. Pollock testifies that he proposed to Mr. Pegues to go ahead that evening and sell to Stacy the entire place. 'You [J. W. Pegues] come down and see me, and if you and I cannot agree on what, if anything, is right for me to pay you, then you appoint a man, I will appoint one, and these two appoint a third, and whatever any two of these say, I will pay you.' * * * 'He said he would do it.' Mr. Pegues says that such a mode of settlement was proposed of the valuation of the house on the thirty-five acres, not included in first trade, but which Mr. Pollock had agreed to sell him at a reasonable price. He says he did consent to such settlement of the valuation of house, but not to a release of his claim upon the thirty-five acres of land. He also says: 'I told him I would not do it, and he said he did not think I was treating him right. * * * He then told me that he would sell the land anyway, and I could sue him. * * * He asked me then what I would do if he did it. I told him I would have nothing more to say about it myself. I meant I would get some one to look after it for me.' There is other testimony upon this subject. The next morning Mr. Pegues comes to Mr. Pollock's office and asked him

what he had done about the land, and was told it was sold, and deed delivered. He then says, 'I then said nothing for some time, and then told him, of course, I had no more to say.' He did, however, in a conversation, offer to take $1,000 in settlement. It appears that Mr. Pollock was determined to close this matter with Mr. Pegues at conversation on Monday, as the purchaser was to meet him in Cheraw Monday evening, and the sale depended upon his acting promptly. Mr. Pegues was told of this. Mr. Pollock certainly understood Mr. Pegues to consent to release, or else he acted with almost insane recklessness in selling to Stacy Monday evening. Stacy was so informed, and acted upon such information. Was Pollock justified in his understanding? Mr. Pegues says the arbitration which was agreed to related to the value of the house. Mr. Pollock says this was not mentioned. Certainly the object in view was the release, not the valuation, of the house. There was no occasion for Mr. Pollock to submit the valuation of the house to arbitration, as it was for Mr. Pegues to buy or refuse to buy at price offered by Mr. Pollock, who had the authority to sell. It is not customary for contemplated buyers and sellers to leave the valuation of the property in view to arbitration. Mr. Pegues testified that, when Mr. Pollock told him he was going to sell anyway, he replied, 'I told him I would have nothing more to say about it myself,' and further states that he meant that he would get some one else to look after it for him, but he did not so tell Mr. Pollock. At best, Mr. Pegues did not, as a prudent man, make his refusal to release clear and explicit. I therefore find that Mr. Pegues left Mr. Pollock under the impression that he had consented to release, and that, under the circumstances, Mr. Pollock had a right to so understand him. It was the fault of Mr. Pegues in not making his refusal clear and explicit, and he is therefore responsible for the consequences which followed. This, however, would not estop Mr. Pegues from standing upon his contract to purchase, had the rights of others not intervened. Mr. Stacy, the plaintiff, was thereby induced to part with his money and alter his position, as he would not otherwise have done. 'It is a well-established principle that when the true owner of property holds out another or allows him to appear as the owner of, or as having full power of disposition over, the property, and innocent parties are thus lead into dealing with such apparent owner, they will be protected.' Big. on Estoppel, 434; Dunlap v. Gooding & Elliott, 22 S. C. 550, and other South Carolina cases; and also volume 11 of En. of Law (2d Ed.) pp. 422, 429. I therefore find that Mr. Pegues is now estopped from denying the title of the plaintiff L. E. Stacy to the thirty-five acres of land.

"The value of the house upon the land, in view of my other findings, becomes of little importance. I will state, however, that from its location and condition, as testified to, it appears to be worth $100.

"There is no doubt the thirty-five acres in controversy is now worth more than when it was bargained to Mr. Pegues, both from improvements made, and the rapid advance in real estate which this section has recently experienced. It also appears that it is worth more per acre, naturally, than the remainder of tract. The witnesses value it at from $10 to $30 per acre. Most of the witnesses place its value at $30, and, including that of the house thereon, I find this to be its present value.

"As all matters arising in the pleadings are before me, the damages sustained by Mr. Pegues by reason of his release of his contract to purchase should be determined and adjusted in this cause. He is certainly damaged to the amount of the present value of the thirty-five acres (exclusive of the house, of course), less the balance of purchase money he was to pay, with interest thereon, and such rents as he may still owe, up to January, 1904. The rent for current year does not come into issue, as this matter can be adjusted between the parties at the proper time. Without going into an exact calculation of such damages, I assess same at the sum of $250, less the costs of this case, which should be paid by the defendant. Upon the payment of such sum by the plaintiff Carrie E. Pollock, or W. P. Pollock, her agent, less the costs of this case, to the defendant, James W. Pegues, the title of the plaintiff L. E. Stacy in and to the said thirty-five acres contracted to be sold to the said James W. Pegues should be confirmed, and the agreement heretofore made with James W. Pegues to sell said thirty-five acres to him be abrogated."

The plaintiffs excepted to this report as follows:

"First. The referee erred in not finding clearly, expressly, and distinctly that the defendant James W. Pegues agreed and consented that W. P. Pollock, one of the plaintiffs, should sell the entire premises described in the complaint to L. E. Stacy, leaving the adjustment of the differences between him and Pollock to be settled by arbitration, if they could not agree, and that that fact and agreement was communicated to said Stacy, and that Stacy acted on it.

"Second. The referee erred in not finding clearly, expressly, and distinctly that Stacy refused to buy the premises unless Pegues would release his claim to the thirty-five acres theretofore bargained to him; that that fact was communicated to Pegues; that Pegues thereupon agreed to release his claim to same, and consent for the entire tract to be sold to Stacy; and that, acting on Pegues' verbal release, Stacy paid out his money and took title to the place, and W. P. Pollock, for himself and C. E. Pollock, acting on same, conveyed the land to Stacy.

"Third. The referee erred in not finding

clearly, expressly, and distinctly that Pegues knew that Stacy's trade with Pollock depended on his release of his claim to the thirty-five acres, and, knowing that, he agreed to release same; thus induced Stacy to put out his money, and Pollock to make the conveyance.

"Fourth. The referee erred in not finding clearly, expressly, and distinctly that Pegues was estopped from disputing Stacy's title, which he, by his express consent and agreement, had induced him to take and pay out his money for, and from disputing Pollock's right to make such conveyance.

"Fifth. The referee erred in finding the value of the thirty-five acres to be $20 per acre, when the preponderance of the evidence showed it to be much less.

"Sixth. The referee erred in finding that Pegues was damaged by reason of the conveyance by Pollock to Stacy in the sum of $250, whereas he should have found that, if he was damaged at all, it was in a much smaller amount."

The defendant excepted to this report, as follows:

"First. The referee erred in finding that it appeared from the testimony that $150 was a reasonable rent for the uplands described in the complaint, whereas the question was not what was a reasonable rent, but what was the contract between the parties. And he erred in not holding that the contract between the parties was for two 500-pound bales of lint cotton.

"Second. He erred in finding that the arbitration proposed and discussed between the parties was regarding the release by Pegues of this purchase, and did not refer to the value or price of the dwelling house on the land.

"Third. He erred in finding that the defendant did not make his refusal to release or sell clear and explicit, that he was in fault thereby, and that he was responsible for the consequences which followed, causing the sale of the land to the plaintiff Stacy.

"Fourth. He erred in finding that Mr. Pegues left Mr. Pollock under the impression that he had consented to a release, and that, under the circumstances, Mr. Pollock had a right to so understand him.

"Fifth. The referee erred in holding that, since the defendant did not make his refusal to release the land he had purchased clear and explicit to Mr. Pollock, he was legally bound by the act of Mr. Pollock, based upon his alleged understanding of what Mr. Pegues agreed to.

"Sixth. He erred in holding that the defendant is estopped from denying the title of the plaintiff L. E. Stacy.

"Seventh. He erred in holding that the defendant was estopped from denying that he released his land because the rights of a third party (L. E. Stacy) had intervened, in that the defendant had held out another (Mr. Pollock), or had allowed him to appear, as the owner of, or as having full power of disposition over, the property; it being error (1) in that there was no competent evidence that the plaintiff L. E. Stacy or his agent had any information or communication from the defendant, Pegues, and he necessarily admitted the verbal statement of Mr. Pollock, that he communicated to Stacy, that Pegues authorized him to sell; (2) in that there were no facts which could have misled Stacy, it not being contended that the defendant communicated any to him; (3) in that the facts relied on by Stacy, according to the referee, were contrary to the statute of frauds, and therefore Stacy could not be misled by them, being charged with knowledge of the law relative thereto.

"Eighth. The referee erred in not holding that the alleged contract between Pegues and Pollock was nudum pactum, and could not be relied on.

"Ninth. In not holding land was worth $20 an acre without the house, and in holding that Pegues was damaged only $250, and that he should pay the costs of this suit.

"Tenth. He erred in admitting the testimony of Mr. M. Stacy that Mr. Pollock told him that Mr. Pegues had agreed to the trade and consented to release his interest, when the same was mere hearsay, and a declaration of Mr. Pollock in his own favor, and contrary to the statute of frauds.

"Eleventh. He erred in admitting the evidence of Mr. Pollock that he told M. H. Stacy that Pegues had agreed to release him from his trade, for the reason that the same was hearsay, a declaration in witness' own favor, and a violation of the statute of frauds.

"Twelfth. He erred in holding that the defendant was bound by a contract which Mr. Pollock thought was made, but which he did not find to become a contract by the meeting of the minds of the parties thereto.

"Thirteenth. He erred in holding that plaintiff Stacy could rely on an alleged contract, which he must have known was void under the statute of frauds and for want of consideration, on which to base an estoppel, when, if he knew all the facts which he states, he must have known, or be presumed to know, the contract was void.

"Fourteenth. He erred in holding that Mr. Stacy is in such position as to be caused loss by the failure to get the whole tract of land, when it is admitted that Mr. Stacy still owes $2,200 on the purchase money, out of which he can be made whole for any loss he may suffer by the inability of Mr. Pollock or his principal to make title to the whole.

"Fifteenth. He erred in not decreeing that plaintiffs execute to J. W. Pegues a good and lawful title to the land in question on payment of the amount due by him into court."

The circuit decree is as follows:

"This action was begun in February, 1904, and now comes before me upon the pleadings, testimony, report of R. T. Caston, Esq., exceptions thereto, and argument of counsel. The pleadings and testimony, also the report of the referee, and exceptions thereto, must be read as a part of this decree.

"Miss Carrie E. Pollock in 1901 owned about 400 acres of land in Chesterfield county, bounded on the north by Pegues land, east by Great Pee Dee river, south by Britt lands, and on the west by public road leading from Cheraw, S. C., to Wadesboro, N. C. Late in 1901 W. P. Pollock, Esq., as agent and attorney for Miss Carrie E. Pollock, rented this land for an indefinite time to James W. Pegues, the defendant, for $150 per annum for uplands, and one-fourth of all crops made on the lowlands. About the same time W. P. Pollock, as agent and attorney for his sister Miss Carrie E. Pollock, agreed orally with the defendant to sell to him thirty-five acres of said land at $8, with interest, per acre; and if this land, as laid off, embraced buildings on the place, defendant was to pay for them whatever the said W. P. Pollock charged, provided his charges were reasonable. Defendant was let into possession of the premises. Defendant paid $20 on his purchase of the thirty-five acres of land on February 14, 1902. Near the close of the year 1903 W. P. Pollock, Esq., received an offer of about $8 per acre for the entire tract, but the purchaser would not buy unless he could get the thirty-five acres sold the defendant. Mr. Pollock saw the defendant on several occasions, and finally he consented for Mr. Pollock to sell to Mr. Stacy. The referee found substantially in favor of the plaintiffs. Both sides have appealed.

"The first, second, third, and fourth exceptions of the plaintiffs are sustained, and must be read as a part of this decree.

"The plaintiffs' fifth and sixth exceptions are not sustained, and are overruled, except as hereinafter they may be modified in this decree and judgment.

"The defendant's first exception, if well taken, should be sustained. I think that the referee meant to say the contract for rent to be paid by defendant to Miss Pollock, was $150 for the uplands. Such a conclusion is sustained by the evidence, and I so find.

"Defendant's second exception is overruled.

"The defendant's third exception is overruled. The referee, in passing upon issues between gentlemen, evidently tried to use as mild and gentle language as he could. No judicial officer is unnecessarily harsh. As I read the report, the referee meant to decide in favor of the plaintiffs. That is my conclusion, and I so hold.

"The defendant's fourth, fifth, and sixth exceptions are overruled.

"The defendant's seventh exception is overruled. That is the important exception in the case. The referee has discussed the statute of frauds, estoppel, and the law generally. I can add very little to what he has said, and only cite authorities. The defendant was the uncle of Miss Pollock, who was anxious to sell this large tract of land. She had, by her agent, let the defendant have thirty-five acres at a small price and on an indefinite credit. He had paid but $20 on the purchase money. A purchaser (Mr. Stacy) presents himself, and offers to buy all of the land at a good price. He knows of the agreement with defendant, or has heard of it, and will not buy any of the land unless he can get it all. Defendant hesitates, but finally consents for Mr. Pollock to sell all of the land, after arranging how he can be compensated for his losses, if any. Mr. Stacy is told this, and he concludes his trade, and pays a large cash payment on the purchase money. This estops defendant from now refusing to acknowledge what he said to Mr. Pollock, what was told to Mr. Stacy, and upon which he acted and paid out his money.

"The eighth exception is overruled.

"Defendant's ninth exception is overruled.

"Defendant's exceptions Nos. ten (10) eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15) are overruled. These exceptions are intended to reopen the entire case, and I cannot add much to what the referee has said, and I do not think that it is necessary for me to restate and discuss the entire case in its details.

As to the defendant's damages: The referee finds that the house was worth $100, but he considered the house and the thirty-five acres sold to defendant together, and valued them at $20 per acre, or $700. Defendant owed the plaintiff $280 for the land, and $100 for the house, less $20 paid, making a total of $360, principal, and interest thereon to January 1, 1904, and the rent due by defendant; and we have the amount defendant is due the plaintiff. The thirty-five acres sold to defendant, including the house, was worth, as found by the master, $700. He reports that the plaintiff should pay the defendant, as damages, $250, less the costs of this action. That is about the actual damage or loss the defendant has sustained, and I concur in that finding."

Stevenson & Matheson, for appellant. Edward McIver, for respondents.

POPE, C. J. This is an appeal from a decree of his honor Judge James Aldrich. In order to understand the issues here involved, the pleadings will be reproduced, and are as follows:

"The complaint of the plaintiffs shows:

"(1) That in the year A. D. 1901 the plaintiff Carrie E. Pollock was lawfully seised and possessed of all that certain piece, parcel, or tract of land in Chesterfield county, S. C., containing 400 acres, more or less, bounded * * * the said land having been sold under foreclosure or mortgage held by

the said Carrie E. Pollock, and bid off by the plaintiff W. P. Pollock, as attorney (but no deed made), and the said Carrie E. Pollock being in possession thereof.

"(2) That in the fall of the said year 1901 the said W. P. Pollock, as agent and attorney for the said Carrie E. Pollock, contracted orally with the defendant to lease or rent unto him the said plantation at a yearly rental of $150 per annum and one-fourth of all crops made on the low grounds, the said lease being for an indefinite term of years; and at the same time the said W. P. Pollock, as agent and attorney as aforesaid, agreed orally with the said James W. Pegues to sell unto him twenty-five acres of land in the southwest corner thereof, bounded by the Britt lands, the said public road, and the plantation road leading through said plantation, provided that the same should not take in any buildings on said place, and later agreed orally with said defendant to sell unto him thirty-five instead of twenty-five acres, at $8 per acre, with interest, and, in addition, if said thirty-five acres of land, as laid off between the boundaries above given and a line parallel with said public road, embraced the buildings on the place, the said James W. Pegues was to pay whatever the said W. P. Pollock charged for the said buildings; the said W. P. Pollock simply agreeing to charge a reasonable amount for such buildings, with interest.

"(3) That, in pursuance of all the foregoing, the said James W. Pegues went into the possession of all the said plantation, and for the year A. D. 1902 he paid only about $88 on the rent—the said W. P. Pollock having consented to reduce the rent for said year to $100 on account of the poor crop made—and there is a balance due the plaintiff Carrie E. Pollock of about $12 on said rent for said year. That some time during the winter of 1902–03, or the spring of 1903, the said James W. Pegues paid unto the plaintiff W. P. Pollock, as agent and attorney, the sum of $25, and requested that it be credited on the purchase of said thirty-five acres of land, which said amount is all the said defendant has ever paid on account of the purchase of said land; and for the year A. D. 1904 the said James W. Pegues only paid about $99.50 on the rent for said place for said year of $150, thereby leaving a balance due thereon of about $50.50.

"(4) That in the late fall of 1903 the plaintiff W. P. Pollock, as attorney and agent as aforesaid, went to the said James W. Pegues, and proposed to him that, inasmuch as he had an opportunity of selling the whole plantation, and the said defendant had not paid all rent due, and had paid practically nothing on the purchase price of said thirty-five acres of land, that he would like the said defendant to agree to give up all claim to the land and consent for said W. P. Pollock to convey same to another, and proposed, if he would do so that he would cancel all indebtedness for rent, and give the said Pegues the free use of as much of the land as he cared to cultivate for the year 1904, and finally to give him $50 in cash in addition. That the said defendant, after more than one conference with said W. P. Pollock, declined said proposition. Thereupon said Pollock demanded of said Pegues payment for said thirty-five acres of land at $8 per acre, to wit, $280, and payment for the buildings thereon, which are embraced in said thirty-five acres the sum of $150, which is very reasonable, if not very low, price for same, and interest thereon, less the $25 paid, and the balance due on rent, and offered to at once make deed to said defendant to said land; but the said defendant positively refused and failed to pay same, and said he would not and could not pay more than $280—that is $8 per acre for the thirty-five acres. The said W. P. Pollock then proposed that he would go ahead and convey said place, and that said Pegues might sue this plaintiff, and whatever amount he might get judgment for would be promptly paid, which proposition was declined. Thereupon the said W. P. Pollock proposed that he would convey said lands to another, and the said J. W. Pegues should yield possession thereof, and, if he and said Pegues could not agree on an amicable settlement, that they would each appoint a disinterested person, and those two could appoint a third person, who should fix the amount, if anything, which should be paid to said Pegues; and the said Pegues agreed to the said proposition, and agreed for said Pollock to convey said lands.

"(5) The said W. P. Pollock, as agent and attorney for said Carrie E. Pollock, for the sake of convenience, had the clerk of court to make title to him, and, after the said agreement with the said Pegues, which he communicated to M. H. Stacy, he conveyed by warranty deed all of said tract of land to said M. H. Stacy, and the said M. H. Stacy by deed conveyed same to L. E. Stacy, who now holds the title thereto; but the possession was retained by W. P. Pollock, as agent and attorney as aforesaid, until the 1st of January, 1905.

"(6) That thereafter the said J. W. Pegues demanded of said W. P. Pollock the sum of $1,000, which was refused, and said W. P. Pollock proposed to leave the matter to three disinterested parties, as was the agreement; but the said Pegues refused to do so, notwithstanding that he had agreed that he would do so, and he now unlawfully withholds possession of said thirty-five acres and the buildings.

"(7) That the original agreement between the parties has been broken by the said defendant, and in addition thereto the same has been superseded by the subsequent agreement above set forth, but the claim of the defendant is a cloud on the title.

"Wherefore plaintiffs pray judgment that the original agreement between parties be

canceled and set aside, and for such other and further relief as to the court may seem meet and proper, and for costs."

"The defendant, answering the complaint herein, says:

"First. For a first defense:

"(1) That he admits the allegations contained in the first paragraph of said complaint.

"(2) That he denies the allegations of the second paragraph of the complaint as to the rental of the plantation being for $150 per annum, and alleges that the rent to be paid for that part of the plantation not bought by this defendant was to be two bales of cotton, 500 pounds weight each, and one-fourth of all the crops made on the low grounds, except such crops as were planted in the low grounds by this defendant. This he was to have free of charge for looking after the other crops made on the low grounds for W. P. Pollock. And he alleges that the said Pollock received one-fourth of all such crops. And he denies, also, that he was to pay for the house what the said W. P. Pollock charged for the said building, and alleges, on the contrary, that he was to pay a reasonable charge for the buildings, if they were embraced in the lands bought, when they were marked out.

"(3) He alleges that, in so far as the allegations in the third paragraph are concerned, he denies that he only paid $88 on the rent, and denies that there is a balance due of $12; but he alleges, on the other hand, that he paid two bales of cotton, which, on account of shortage in the weight, left a balance of $12, which W. P. Pollock agreed to allow him for hauling the rents received from the low grounds to Cheraw for him; and he denies, further, that he ever agreed to pay anything else as rent for the lands not purchased, either for the years 1903 or 1902, than two bales of cotton, of 500 pounds weight, and he alleges that he has paid and discharged all sums due for rent for said lands. He denies also that the payment which he made upon the land was at the date or of the amount alleged in said paragraph.

"(4) He admits, in so far as the fourth paragraph of the complaint is concerned, that the plaintiff W. P. Pollock did endeavor to get this defendant to surrender his rights, and alleges that he offered him so much of the land as he cared to cultivate for the year 1904, and $100 in cash, but that said proposition was declined, and that he offered to pay the amount of the purchase money, to wit, $8 per acre, and offered further to pay what was reasonable for the building, but was not willing to pay $150, which was more than double the value of the said building when defendant received it. He denies further and most positively that he ever agreed to consent to a sale by the plaintiffs, or either of them, of this land to a third person, and to hold possession thereof pursuant to such sale, or to leave the damage which he should suffer thereby to disinterested persons, or that he would sue the said W. P. Pollock for his damages, but, on the other hand, he positively declined to allow such sale, and they failed to agree to any such proposition. He further alleges that he has always been ready and willing to pay for the tract of land under the contract specified, and he is now ready and willing to do so, and take his title according to said contract, and he is ready to pay for the building, which he has improved and added to and made habitable, at whatever it was reasonably worth when he bought it; and he is ready to bring the money into court, if so ordered, and take his title according to the contract under which he has gone into possession of said property and has improved the same.

"(5) That defendant has not sufficient information on which to base a belief as to the fifth paragraph of the complaint, and demands strict proof thereof.

"(6) That defendant admits that he asked $1,000 for his land, which he had purchased and gone into possession of and had improved under a contract for a title, out of which $1,000 he was and is ready and willing to settle any sums which he may be owing the plaintiffs, or either of them; but he denies that he had agreed that he would yield possession, or that the said land might be sold, or that he withholds unlawfully the said possession of said tract.

"(7) He denies that the agreement had been broken by himself, but alleges that it has been broken by the plaintiff W. P. Pollock; and he denies that it has been superseded by any subsequent agreement, or that any such agreement subsequent thereto has been entered into by him. And he alleges that he has gone into possession of the land so described under a valid contract to purchase, that he has improved the same in many particulars, and that he is ready and willing to carry out his contract and pay for the same according to the contract, and he desires that the title shall be made to him; and he alleges that all the plaintiffs herein had full notice of his rights before any of the transactions relating to the sale to other parties occurred.

"Second. For a second defense:

"(1) The defendant alleges that the said contract which the plaintiff sets up in paragraph 4 of the complaint, which contract this defendant denies, is a contract relative to an interest in lands, and no memorandum thereof has been made in writing, signed by this defendant or either party thereto, and therefore the same is void under the statute of frauds.

"Wherefore this defendant demands that the plaintiffs, or whichever one of the plaintiffs has the legal title, be required to execute to him a good and indefeasible title in fee simple, that the amount that is due and owing by this defendant under the contract made for said lands be ascertained and de-

termined by this court, and that he be permitted to bring same into court, and to receive the title agreed upon in the original contract, and for such other and further relief as to this court seems meet and proper."

As may be recalled from reading the pleadings herein, the issue paramount to all others is that of the alleged estoppel of the defendant, J. W. Pegues, from asserting an equitable claim upon 35 acres of land now embraced in the deed of 412½ acres conveyed to M. H. Stacy by Miss Carrie E. Pollock on the 4th of January, 1904. The alleged estoppel grows out of this state of facts, to wit: Carrie E. Pollock in 1901, through her attorney, W. P. Pollock, made a parol sale of 35 acres, a part of her 412½ acres, at $8 per acre; and, it not being known whether the 35 acres so sold would embrace the dwelling house, it was agreed that, if such dwelling house should afterwards be discovered to be located on the said 35 acres, James W. Pegues would pay the sum which W. P. Pollock, as attorney for said Carrie E. Pollock, might reasonably require therefor. Thereafter, on the 14th of February, 1902, J. W. Pegues paid the sum of $20, as part of the purchase money of said lot of land, and no other payment has ever been made by him. Near the close of the year 1903, after repeated efforts to sell, W. P. Pollock, as attorney for Carrie E. Pollock, began a negotiation with M. H. Stacy, a citizen of the state of North Carolina, looking to the sale of Miss Pollock's land, Stacy offering $3,300 for the entire tract, including the 35 acres of land bargained to J. W. Pegues. The said M. H. Stacy positively refused to buy any part of Miss Pollock's land unless he could obtain the land bargained to J. W. Pegues. These facts were communicated by W. P. Pollock to the said J. W. Pegues, and inducements were offered by W. P. Pollock to the said J. W. Pegues in order to induce him to relinquish his claim to said 35 acres of land. Interview after interview was held by Pollock with Pegues without accomplishing any result. Finally M. H. Stacy agreed to meet W. P. Pollock in his office, at Cheraw, on the evening of the 4th day of January, 1904, to hear what had been the result of his negotiations with Pegues, and, if fortunate, to close the trade. These facts were fully communicated by W. P. Pollock to J. W. Pegues at an interview at Chesterfield Court House on the afternoon of the 4th of January, 1904. As a final outcome of those negotiations, it was agreed by Pegues with Pollock that he should convey his 35 acres, along with the other lands, to M. H. Stacy, at the price of $8 per acre for the whole tract, and that J. W. Pegues would come to Cheraw on Tuesday, the 5th day of January, 1904, to see Pollock as to what amount of money should be paid the said Pegues for his surrender of his claim on the 35 acres of land which Pollock was to convey to M. H. Stacy. M. H. Stacy and Pollock met the evening of January 4, 1904, whereupon Stacy paid $1,100 in cash, and executed his bond and mortgage for $2,200 to W. P. Pollock, and Pollock thereupon conveyed the 412½ acres to the said M. H. Stacy, and thereafter the said M. H. Stacy conveyed the entire tract to L. E. Stacy, as whose agent he had purchased the same. On the next morning the said J. W. Pegues demanded $1,000 for his interest, which Pollock declined to pay, but offered to leave it to the award of the three arbitrators, as had been previously agreed upon by Pollock and Pegues, but this Pegues declined to do, retaining possession of the land; hence this action.

By agreement of the parties, an order was passed by Judge Watts, wherein all the issues of law and fact were referred to R. T. Caston, Esq., as special referee. A great deal of testimony was offered by both parties to the issues raised by the pleadings. The report of said special referee was made, wherein he found that Pegues was bound by the representations he had made to Pollock, and which Pollock had repeated to M. H. Stacy, and that he was thereby estopped from alleging any claim to the thirty-five acres of land which said Pegues had bargained to purchase from said Carrie E. Pollock. To this report both parties (plaintiffs and defendant) filed exceptions. The whole then came on to be heard by Judge Aldrich, who rendered his decree, January, 1905, wherein he sustained some of the exceptions of the plaintiffs, overruling two of the same, but overruling all of the exceptions of the defendant.

As recommended by the report of the special referee, Judge Aldrich adjudged as follows:

"(1) That the plaintiff Carrie E. Pollock do pay to the defendant, James W. Pegues, the sum of $250, less the costs of this action, to be taxed by the clerk of this court.

"(2) That the clerk of the court do tax the costs of this action, after legal notice of such taxation to the parties here, and that the plaintiff do pay such costs, and the remainder of the $250 found above as damages to the defendant.

"(3) That upon the payment of the aforesaid by the plaintiff Carrie E. Pollock, or her attorney, to the defendant, the title of the plaintiff L. E. Stacy i and to the thirty-five acres described in the pleadings herein as having been contracted to be sold by Carrie E. Pollock or her attorney, W. P. Pollock, to the defendant, James W. Pegues, be, and hereby is, affirmed, and the said James W. Pegues be, and hereby is, forever estopped from in any manner distributing the title and possession of the said L. E. Stacy.

"(4) This decree stops with the rent, or accounting for rents, on January 1, 1904, and nothing after that date is included herein."

Let the report in this case contain a copy

of the referee's report, and the exceptions thereto, and the judge's decree.

The defendant alone appealed from the decree of Judge Aldrich, on nine grounds, which we will hereafter consider.

The first and second grounds of appeal are as follows:

"(1) In that the judge erred in holding competent and considering the testimony of M. H. Stacy that W. P. Pollock told him he had arranged the matter of the surrender of the place with J. W. Pegues, and told him the particulars of it; this being mere hearsay, and incompetent and irrelevant.

"(2) Because he held competent and considered the testimony of Mr. Pollock that he had told said M. H. Stacy that the said matter was arranged, and also considered and held competent the details of said conversation; same being hearsay, a declaration in his own favor by the witness in the absence of the defendant, and incompetent."

And the third, fourth, fifth, sixth, seventh, eighth, and ninth are as follows:

"(3) Because the court erred in finding as a matter of fact that the defendant agreed to give up the land and arbitrate the damages.

"(4) Because the court erred in holding that the defendant was bound by such agreement, if made; the same being with reference to an interest in land, and void under the statute of frauds.

"(5) Because the judge erred in holding that the defendant was estopped by reason of the fact that M. H. Stacy had knowledge of such an agreement; the same being error (a) because defendant made no such communication to said Stacy; (b) because, if he had done so, Stacy is charged with knowledge of the law, that such an agreement must be in writing to bind the defendant, and his knowledge was such that he could not have been misled as to the legal effect of such an agreement, and there is no estoppel where the party invoking it is not misled.

"(6) Because it appears as an admitted fact that L. E. Stacy had traded for the land on Friday before the conversation invoked as an estoppel occurred on Monday; hence he could not have been misled by that conversation.

"(7) He erred in holding that, by applying the doctrine of estoppel, the statute of frauds can be avoided in transactions relative to real estate.

"(8) He erred in not holding that the plaintiff Stacy was fully protected, and could not invoke the doctrine of estoppel, for the reason that he still owed far more than the amount of land which was lost, and could get an abatement of price to protect him from loss.

"(9) He erred in not holding that the agreement alleged by W. P. Pollock and denied by J. W. Pegues—that Mr. Pegues agreed to allow Mr. Pollock to sell the land in dispute to L. E. Stacy—was void for want of consideration."

We first pass on the sixth exception. We do not agree that the testimony establishes that L. E. Stacy had traded for the land on the Friday before the Monday, the 4th day of January, 1904. On the contrary, the trade was not made until the latter date This ground of appeal is overruled.

It may not be amiss at this juncture to ascertain what estoppel means. In 16 Cyc., at page 679, it is held: "In the broad sense of the term, 'estoppel' is a bar which precludes a person from denying the truth of a fact which has, in contemplation of law, becomes settled by the facts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing, or by representations, expressed or implied, in pais." Or as is said in Greenleaf's Evidence, c. 4: "An estoppel arises where a man has done some act which the policy of the law will not permit him to gainsay or deny." In 11 A. & E. Ency. p. 429, it is said: "Also it seems to be well established, as a general rule, that if a man knowingly suffers another to purchase and expend money on land under an erroneous opinion of title, though he does it passively by looking on, without making known his claim, he shall not afterwards be permitted to exercise his legal right against that person. This rule is especially applicable where the owner has encouraged the parties to deal with each other in such sale and purchase." By the same author just quoted, at page 424, it is said: "To constitute an estoppel by misrepresentation or concealment of facts certain prerequisite facts must be proved. As fraud is not presumed, but, when charged, must be strictly proved, the authorities uniformly hold that the evidence to establish the essential elements of an estoppel by conduct or misrepresentation must be clear, precise, and unequivocal. And it has been held that this rule should be strictly applied where the estoppel is invoked against a claim to real estate. The doctrine is opposed to the letter of the statute of frauds and would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light and doubtful character. It is held that the facts necessary to work an estoppel must appear affirmatively." To the same effect, 2 Pom. Eq. Jur. § 803. Also in section 807 of the same author it is said: "The general rule is that, if a person interested in an estate knowingly misleads another in dealing with the estate as if he were not interested, he will be postponed to the party misled, and compelled to make his representations specifically good. It applies to one who denies his own title or incumbrance when inquired of by another who is about to purchase the land, or to loan money upon it as security, to one who knowingly suffers another to deal with the lands as though it were his

own, to one who suffers another to expend money in improvements without giving notice of his own claim, and the like; this equity being merely an instance of fraud, which is evidence of an intent to deceive." Continuing the same quotation, the author says: "It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character." Our own decisions fully sustain this doctrine, as will be seen by Chambers v. Bookman, 67 S. C. 432, 46 S. E. 39; Bethune v. McDonald, 35 S. C. 88, 14 S. E. 674; Gaston v. Brandenburg, 42 S. C. 348, 20 S. E. 157; Dunlap v. Gooding and Elliott, 22 S. C. 548. The tenor of these decisions and quotations from eminent authors abundantly shows that the seventh ground of appeal must be overruled.

Having determined the law relating to estoppel, we will now discuss the facts here involved; always remembering, however, that the circuit judge has decided adversely to the defendant in his construction of the testimony, and it will require the appellant to advance testimony sufficient to overcome this finding of the circuit judge.

In the first place, it may be observed, as to the admission of the testimony by parol, inasmuch as fraud may be said to be herein involved, the admission of such testimony was a necessity. It may not be amiss to remind parties to this action that, of all gross carelessness relating to titles of real estate, the conduct of W. P. Pollock and James W. Pegues furnishes an instance. In 1901, when the 35 acres were bargained by W. P. Pollock, no minute of this transaction was made. There was no plat of said lands made by a surveyor. Indeed, the only evidence of a written character was the receipt of $20 paid on the 14th of February, 1902, long after the trade itself was made. It was not known whether the dwelling house was on the 35 acres of land. The minds of these men never met as to what value should be placed on the dwelling house, and at this date that condition of things exists; one claiming it is worth $50, and the other at least $150. The same uncertainty existed in the minds of the parties as to what the rent should be. These matters are mentioned to show that parol testimony was absolutely necessary to fix the status of this 35 acres of land, as between Mr. Pollock and Mr. Pegues. There being nothing in writing, all testimony was by parol, but now what shall we say? The rights of W. P. Pollock are not involved, because he has transferred the legal title to all these lands to M. H. Stacy, who has in turn, deeded them to L. E. Stacy, both of whom are innocent parties. The question now comes as to whether the witness M. H. Stacy may testify, giving a detailed statement of W. P. Pollock's representation of J. W. Pegues' authority to him to sell the 35 acres of land. James W. Pegues had an equity arising out of a parol agreement respecting the 35 acres of land. Stacy would not purchase any of the land unless he could obtain the 35 acres in the possession of J. W. Pegues. This fact was known to both Pegues and Pollock. Stacy knew that Pollock had gone to see Pegues on Monday, just before he received his title. It is a part of the history of the transaction for Stacy to be able to tell what representations Pollock made to him as coming from J. W. Pegues. W. P. Pollock insists that every word that he detailed to Stacy was uttered by J. W. Pegues a few hours before he met Stacy. It is true, Pegues now denies that he uttered such words to Pollock on that day. We have given this matter a most careful consideration, and must say that, as the result of that investigation by us, we have reached the deliberate conclusion that W. P. Pollock has told the exact truth in what he states, and that, on the contrary, J. W. Pegues is more than mistaken in what he states as to the agreement between himself and W. P. Pollock. It was no part of Pollock's mission to Chesterfield Court House on Monday, January 4, 1904, to ascertain what J. W. Pegues should pay for the dwelling house on the 35 acres. He was seeking to protect the estate in land of his young sister, involving several thousand dollars. It was to see about the sale of his sister's lands that he sought this interview with J. W. Pegues. What W. P. Pollock has represented as coming from J. W. Pegues is sustained by the fact that, on the train on his way from Chesterfield Court House to Cheraw, he told his friend Mr. Matheson all that he testifies that he told Stacy. And when he reached Cheraw that evening he told M. H. Stacy the same state of facts. And he is further sustained by J. W. Pegues himself, who said in his testimony: "I had promised Mr. Pollock that I would see him that morning, which was Tuesday, the 14th day of January, 1904. In that interview, after a while, I said, 'Willie, what have you done about that land?' He said, 'I have sold it, and made the deeds.' I didn't say anything for some time, and then I told him, of course, I had nothing more to say. He asked me what I would take for the land, and I told him $1,000." From Mr. Pollock's testimony the following is extracted: "To show further that I cannot be mistaken as to its being exactly as I stated, when he came down the value of the house was not mentioned, but I asked him what he would be willing to take to close the matter up; that I had gone ahead and sold upon our understanding; and he said $1,000." If James W. Pegues did not authorize William P. Pollock to make the representation to M. H. Stacy that he did, then there was a fraud perpetrated by him; but, on the contrary, if James W. Pegues did authorize W. P. Pollock to convey the 35 acres to M. H. Stacy, including his claim of the 35 acres, and denies it, as he now does, then

he is guilty of a fraud. We are satisfied that W. P. Pollock has been guilty of no fraud, but that James W. Pegues did make the agreement as charged by Pollock, and that Stacy did purchase upon the representation repeated as coming from James W. Pegues; that he would not have made the purchase, except for his reliance upon the representation made by James W. Pegues; that Stacy thereby was misled to his prejudice by James W. Pegues; that the testimony of Stacy and of Pollock was necessary to uncloak this wrong; hence such testimony was admissible. We must therefore overrule the first and second exceptions.

From a careful examination of the testimony, we find that the defendant did agree to give up the land and arbitrate the damages. The third ground of appeal is therefore overruled.

We find that the circuit court did not err in holding that the defendant was bound by his agreement, although it was with reference to an interest in land, and it was not void under the statute of frauds. We find that the agreement was clear and explicit, and would be a fraud upon the rights of Stacy if not upheld. The fourth ground of appeal is therefore not sustained.

As to the fifth ground of appeal, we cannot sustain the same, on the grounds already advanced by us. It is therefore overruled.

We cannot hold that Stacy could be fully protected by reason of the fact that he still owes $2,200 on the land. He was fully entitled to every acre of the 412½ acres. He refused to buy except as an entirety. This ground of appeal is unsustained.

Lastly, we cannot agree to the ninth ground of appeal, for there was a full consideration, even as to James W. Pegues. This ground of appeal is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J. I concur in the conclusion that the defendant was estopped from claiming any interest in this land against the plaintiffs M. H. Stacy and L. E. Stacy by his agreement, communicated to them under authority from him, and upon which they acted in purchasing, that he would claim no interest in the land, and would look to W. P. Pollock, Esq., for compensation. Moore v. Trimmier, 32 S. C. 525, 11 S. E. 548; Shuford v. Shingler, 30 S. C. 612, 8 S. E. 799; Williamson v. Jones, 4 Am. & Eng. Dec. in Equity, 299, notes 24, 25, 26.

JONES, J., concurs in the result.

GARY, A. J. The agreement entered into between J. W. Pegues and W. P. Pollock was not executory or conditional, in so far as it conferred upon W. P. Pollock the right to sell the land to M. H. Stacy, which could be exercised immediately after the agreement. The fact that the agreement was executory as to the amount of compensation to be paid J. W. Pegues did not prevent W. P. Pollock from conveying the land before the amount of compensation was ascertained. As the conduct of J. W. Pegues induced others to deal with the land, he was thereby estopped from setting up the plea that the agreement was void under the statute of frauds.

For these reasons, I concur in the result announced in the opinion of Mr. Chief Justice POPE.

(72 S. C. 63)

REYNOLDS v. PHILIPS.

(Supreme Court of South Carolina. June 27, 1905.)

MAGISTRATE—JURISDICTION.

An action for possession of chattels of the value of $100, and for $75 damages, or, if they cannot be returned, for a judgment for $175, is, under Const. art. 5, § 21, in excess of the jurisdiction of a magistrate.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 149–172.]

Appeal from Common Pleas Circuit Court of Richland County; Gary, Judge.

Action by Jim Reynolds against E. E. Philips and others. From an order of the circuit court dismissing a magistrate's judgment for plaintiff, he appeals. Affirmed.

De Pass & De Pass, for appellant. P. T. Youmans and H. P. Green, for respondent.

GARY, A. J. This appeal raises the question as to the jurisdiction of a magistrate in claim and delivery proceedings. The action was commenced in a magistrate's court to recover the possession of certain chattels, or, if a return thereof could not be had, then for $100, the alleged value thereof, together with $75 damages. The trial resulted in a verdict for the plaintiff against the defendant for the possession of the property, or, in case a return thereof could not be had, for $100, the value thereof, and $50 damages. The defendant appealed to the circuit court on the ground that the magistrate did not have jurisdiction, as the amount claimed exceeded $100. This ground was sustained by the circuit judge, and the plaintiff appealed from his ruling. Section 21, art. 5, of the Constitution, provides that "magistrates shall have jurisdiction in such civil cases as the General Assembly may prescribe: provided, such jurisdiction shall not extend to cases where the value of property in controversy or the amount claimed exceeds one hundred dollars." The proviso sets forth two classes of cases as to which the jurisdiction of magistrates shall not extend: (1) Where the value of property in controversy exceeds $100; and (2) where the amount claimed exceeds $100. The plaintiff claimed, first, the

return of the property, together with $75 damages, and, second, $100, the value of the property, and $75 damages for its unlawful detention, in case a return thereof could not be had. The question of jurisdiction is to be determined by the amount claimed, and, as the amount claimed in this action exceeds $100, the magistrate did not have jurisdiction. Catawba Mills v. Hood, 42 S. C. 203, 20 S. E. 91; Corley v. Evans, 69 S. C. 520, 48 S. E. 459. This conclusion is strengthened by bearing in mind the characteristics of the action in claim and delivery. The statutory action of claim and delivery is practically a combination of the former actions of replevin and trover. Replevin was an action to recover the possession of specific chattels, together with damages for their unlawful detention. Trover was an action for damages arising out of the unlawful conversion of personal property. In so far as the plaintiff's action sought to recover the possession of the chattels it partook of the nature of replevin, but in so far as it claimed the value of the property and damages it resembled the action of trover. The action of claim and delivery is even more assimilated to the action of trover than to the action of replevin. Tittle v. Kennedy, 71 S. C. 1, 50 S. E. 544. The complaint, in effect, states two distinct causes of action, though in the alternative. The dual nature of the action finds expression in the judgment which the plaintiff is entitled to recover in such action. The alternative judgment for the value of the property will be enforced as effectually as the judgment for the recovery of the possession of the chattel. Archer v. Long, 47 S. C. 556, 25 S. E. 84. The plaintiff has the right to elect whether he will bring his action to recover possession of the specific chattel, or for damages for the unlawful conversion. Richey v. Du Pre, 20 S. C. 6. Not only is he entitled to exercise this right before commencing his action, but he may make his election thereafter. It may even be made in the circuit court when there is an appeal from the judgment rendered in the magistrate's court. Joplin v. Carrier, 11 S. C. 327; Williams v. Irby, 16 S. C. 371. The reason why the plaintiff is permitted to waive or withdraw one remedy and still recover upon the other is because they are distinct and independent. If the plaintiff had simply brought his action for $100, the value of the property, and $75 damages, the magistrate could not have entertained jurisdiction. The fact that he also claimed the return of the property, valued at $100, together with $75 damages, was an additional reason why the magistrate could not try the case, and it could not be successfully urged as conferring jurisdiction. It would be anomalous to hold that an additional claim had the effect of reducing the amount in controversy so as to bring it within jurisdictional limits.

It is the judgment of this court that the order of the circuit court be affirmed.

(72 S. C. 74)

STATE v. DEAN.

(Supreme Court of South Carolina. July 1, 1905.)

1. CRIMINAL LAW—INSTRUCTIONS.
Where a charge as given substantially includes requests, refusal to give them is not error.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

2. WITNESS — REFRESHING MEMORY — EVIDENCE ON FORMER TRIAL.
A witness may refresh his memory from notes taken by counsel or other persons at a former trial, or from his own testimony at such trial, or from a copy of the same.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 885.]

3. HOMICIDE—DECLARATIONS OF DEFENDANT.
On trial for homicide, declarations of defendant made before the homicide as to what he intended to do are inadmissible in his defense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 928.]

4. SAME—REPUTATION OF DECEASED.
On trial for murder the reputation of deceased for violence cannot be shown by evidence of specific acts of violence, with which defendant was not connected.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 314, 317.]

5. SAME—INSTRUCTIONS—SELF-DEFENSE.
A modification of a request of defendant on trial for homicide that a man is not bound, if his life is in danger, to wait until he has received a fatal wound or some great bodily injury before he takes the life of his assailant, by adding that the law would not require a man, before he could act in self-defense, to wait until he was shot down or wait until he was hit, was merely explanatory, and did not materially change the request.

6. SAME.
A request as to the law of self-defense not including the principle that defendant cannot set up such plea unless she was without fault in bringing on the difficulty was properly refused.

Appeal from General Sessions Circuit Court of Spartanburg County; Gary, Judge.

Harry Dean was convicted of murder, and appeals. Affirmed.

The following are defendant's exceptions:

"(1) That his honor erred in permitting the witness J. W. Smith, while testifying, to read his testimony given at the former trial; the court holding that he had a right to do so for the purpose of refreshing his recollection as to the correctness of what he was testifying to in this trial. The error being that the witness had no right to be allowed access to that testimony while on the stand; the state thereby improperly and illegally getting to the jury the testimony of their witness given at the former trial, which was more to its liking, and thereby also, in effect, contradicting their own witness, in violation of the rules of evidence.

"(2) That his honor erred in not permitting the witness Lewis McMillan to testify as to the declaration made to him by the defendant as he was leaving home that day upon the trip which ended in the homicide.

The error being that such declaration was permissible as being explanatory of the defendant's conduct, made contemporaneously with his departure from home.

"(3) That his honor erred in excluding the following from the statement of what Mrs. McMillan would testify if present, to wit, 'that the defendant stated upon leaving home, about half an hour before the shooting of Miller McKinney, that he was going to Sam Nesbitt's to get some watermelons, and that then he was going to help his father on the farm.' The testimony being properly admissible as being the expression of the defendant, indicating the purpose of his movement about one-half hour before homicide, indicating a peaceable purpose.

"(4) That his honor erred in not permitting the witness Martha Dean to testify to acts of violence committed upon her by the deceased a few months before the homicide, notwithstanding the defendant knew of those acts of violence before and at the time of the homicide; his honor holding that the rule is that only the general character for violence of the deceased can be proven, and not any specific acts of violence, even if the defendant knew of them. Such ruling is directly opposed to the decisions of courts of appeal in this state, beginning with the case of State v. Smith, 12 Rich. Law, 430.

"(5) That his honor erred in not allowing the defendant to testify as to the particulars of the difficulty which he had heard, prior to the homicide, had taken place between the deceased and Martha Dean; his honor erroneously ruling that it was not competent to go into the particulars of any previous difficulty which the deceased had had with any one, even if such particulars were known to the defendant prior to the homicide, thereby overruling the decisions of the Court of Appeals and the Supreme Court of this state.

"(6) That his honor erred in making the same ruling in reference to the difficulty between the deceased and C. S. Jones, and in not permitting the defendant or said C. S. Jones to testify in reference to it, notwithstanding the fact that said defendant was informed of the particulars of said difficulty prior to the homicide, and which difficulty was a recent occurrence. The error being the same as in the last exception.

"(7) That his honor erred in making the same ruling in reference to the difficulty between the deceased and W. L. Clyde, and in not permitting the defendant or said W. L. Clyde to testify in reference to it, notwithstanding the fact that said defendant was informed of the particulars of said difficulty prior to the homicide, and which difficulty was a recent occurrence. The error being the same as in the last exception.

"(8) That his honor erred in excluding the following portion of A. J. Suttles' testimony: 'Was present at Sloan's store when the difficulty arose between Clyde and the deceased. Clyde and McKinney had been engaged in playing crackaloo. McKinney was sitting on a box. He and Clyde were cursing each other. McKinney suddenly drew his pistol from his pocket and tried to shoot Clyde, but was prevented by witness and others from shooting him. Clyde was unarmed and drunk.' The error being that the same was admissible under State v. Smith; the defendant having testified that he had heard of that difficulty, and the same having been a recent occurrence.

"(9) His honor erred in not charging defendant's fifth request, to wit, 'A man is not bound, if his life is in danger or peril, to wait until he has received a fatal wound, or has some great bodily injury inflicted upon him, before he can take the life of his assailant,' and by adding thereto this modification, 'The law would not require a man, before he could act in self-defense, to wait until he was shot down—wait until he was hit.' The error being that the modification indicated to the jury that the defendant would have to wait until just a moment before being himself shot or hit before he himself could shoot, such modification being a serious abridgment of the right of self-defense of one in imminent danger.

"(10) That he erred in refusing to charge defendant's sixth request, to wit: 'The right of self-defense is founded on the law of nature, and is not superseded by the laws of society. It is a right which every one brings into society, except so far as the laws of society have curtailed it. Every man has a right to defend himself from an attack threatening him with death or serious bodily harm.' The error being that said request was not objectionable, and a declaration of the law approved by this court, and applicable to this case.

"(11) That he erred in not charging defendant's nineteenth request, to wit: 'The right of self-defense is recognized by the law. A man's duty is to defend himself, and he is not bound to endanger himself by retreating, but, if there is any reasonably safe way of escape, the law says he ought to do that, and not take the life of his fellow man. I don't mean by that, he has got to go away from the place because his adversary is there. He is not bound to turn out of his way; but, after the immediate conflict is commenced, it is his duty to retreat from it, avoid taking a man's life—to retire if he can do so safely—but not bound to do so otherwise, because he has the right to defend himself.' The error being that such request was a correct statement of the law defined by this court, and applicable to the facts of this case.

"(12) That he erred in not charging defendant's twentieth request, to wit: 'The mere fact that A. seeks B., whom he kills, is not of itself sufficient to deprive him of his right of self-defense. His intention in seeking such person may have been perfectly lawful. If A. seeks B., and finds him, with no felo-

nious intent or malice, or premeditated purpose to injure, and a difficulty results by a quarrel brought on by B., then A. is not deprived of his right of self-defense. By the words "aggressor," "being in fault," or "provoking the difficulty," the law means that there should be an intent to bring on the difficulty.' The error being that it is a correct statement of the law, applicable to the facts of this case, and vitally important to the defendant.

"(13) That he erred in not charging defendant's twenty-first request, to wit: 'No matter what the purpose of A. may be in seeking B., if, when he meets him, he does nothing to provoke the difficulty, and the deceased, B., assaults him, so as to endanger his life or threaten him with serious bodily harm, A.'s right of self-defense is protected. Nor is this rule changed even if A. has a dangerous weapon, and uses it.' The error being that it is a correct statement of the law applicable to the facts of this case, and vitally important to the defendant.

"(14) That he erred in not charging defendant's twenty-second request, to wit: 'If A., in order to meet B., for no unlawful purpose, waits for him at any point, and if, when he sees him coming, goes out to meet him for such lawful purpose, that does not deprive him of the right of self-defense, as above charged.' The error being that it is a correct statement of the law applicable to the facts of this case, and vitally important to the defendant.

"(15) That he erred in charging the jury as follows: 'Self-defense is based upon necessity. That is the basis of self-defense, and it means that it was necessary to kill him to keep him from killing you or doing you some serious bodily harm. Then ask yourselves this question: Was it necessary for the defendant to have shot the deceased, as he described, to have prevented the deceased from killing the defendant or doing the defendant some serious bodily harm? If it was not, then you should find him guilty.' The error being that he thereby reduced the defense to one of actual necessity, instead of apparent necessity, and thereby also excluding a verdict of manslaughter.

"(16) That he erred in charging as to manslaughter as follows: 'To illustrate: If two people are walking along the street, and suddenly meet and enter into a conversation, and get into words, and from words into blows, and one, without intending to kill the other, strikes him—and from the effects of that, while he is mad, strikes him—and death results, the law would not call that murder, because there was no malice aforethought. They got into a quarrel. They were in a dispute. They got into a fight. He didn't intend to kill him. He hit the lick while he was mad that resulted in death. The law says: "You ought not to have killed him; you ought not to have had a fight, but you did it while you were angry and in hot blood; and the law throws that veil of charity around your action, and does not hold you to strict accountability, and reduces the killing from murder to manslaughter."' The error being that in a sudden mutual combat, arising from a sudden quarrel, the defense is or may be manslaughter, even if the defendant did strike the blow, intending to kill. By this charge his honor practically prevented the jury from finding the defendant guilty of manslaughter, if the jury believed that the defendant intended his shots to have fatal effect, even though they should be of the opinion that the shots were fired in hot blood, in mutual combat arising from a sudden quarrel."

Stanyarne Wilson, A. H. Dean, and T. P. Cothran, for appellant. Townsend, Asst. Atty. Gen., T. S. Sease, Sol., and Evans & Finley, for the State.

GARY, A. J. The defendant was indicted for the murder of Miller McKinney, and the jury rendered a verdict of "guilty, with recommendation to the mercy of the court." The defendant appealed from the sentence of the court upon exceptions which will be set out in the report of the case. The exceptions will be considered in their regular order.

First exception: The ground of objection was not stated; but, waiving this objection, the following authorities show that the ruling of the presiding judge was free from error: Berry v. Jourdan, 11 Rich. Law, 67; State v. Collins, 15 S. C. 378, 40 Am. Rep. 697; Hicks v. Ry., 63 S. C. 559, 41 S. E. 753. In section 866, vol. 2, of the recent and exceedingly able publication, Elliott on Evidence, the rule is stated that a witness may refresh his memory from notes taken by counsel or other persons at a former trial, or from his own testimony at a previous trial, or from a copy of the same.

Second and third exceptions: These exceptions will be considered together. In the case of State v. Adams, 68 S. C. 421, 47 S. E. 676, it is said: "The rule is that a defendant cannot introduce in his defense his own statements made to others." The rule is thus stated in 9 Enc. of Law (1st Ed.) 692: "Declarations and statements made by defendant before the homicide regarding matters connected therewith are not admissible in his defense unless they form a part of the res gestæ, but where they tend to show motive for committing the homicide, or malice in its commission, they may be proved by the prosecution." The declarations were not a part of the res gestæ. State v. Lindsey, 68 S. C. 276, 47 S. E. 389; State v. McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661. These authorities likewise show that the question whether certain facts are embraced within the doctrine of res gestæ must be left in large measure to the sound judicial discretion of the presiding judge.

Fourth, fifth, sixth, seventh, and eighth ex-

exceptions: These exceptions present the same question, and will be considered together. The appellant relies upon the case of State v. Smith, 12 Rich. Law, 430, 440, to sustain the assignments of error. The court in that case thus stated the facts relative to the first ground upon which the new trial was granted: "It appears from the report of the trial that when Daniel Fogarice, a witness for the defense, was on the stand, Mr. Simons, the prisoner's counsel, proposed 'to show by this and other testimony that the deceased was a turbulent and violent man, and carried arms about him, and that this was generally known,' which 'evidence as to deceased was ruled out.'" The testimony proposed for the purpose of showing that the deceased was a turbulent man, and that this was generally known, was the same in effect as if there had been an offer to introduce testimony to establish the fact that the general reputation of the deceased for violence was bad. The testimony was therefore competent. The facts upon which the second ground for a new trial was sustained were stated as follows: "When Michael McFeeny was sworn for the prisoner, Mr. Simons said: 'I propose to show that on the day before this occurrence [the death of Saffron] the deceased and witnesses were employed together, and that this witness was with them; that the deceased then exhibited a quarrelsome and violent disposition, and attacked the witness; and that on this occasion the prisoner interposed and separated them; and that the deceased had threatened the prisoner.'" The testimony was excluded, and the ruling of the presiding judge was reversed. It will be observed, first, that the occurrence took place only a short time (the preceding day) before the homicide; second, that the prisoner had personal knowledge of, and connection with, the difficulty; and, third, that the deceased threatened the prisoner. The facts of the case under consideration are different from those in State v. Smith in at least the second and third particulars just mentioned. The defendant, Dean, was in no wise connected with the acts of violence described in the exceptions, except 'n so far as they may have been the basis of the general reputation of the deceased for violence. In the case of State v. Turner, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706, the exceptions assigned error in not allowing certain witnesses to testify as to the general reputation of the deceased for violence. The exceptions were sustained. The case of State v. Merriman, 34 S. C. 16, 12 S. E. 619, cited with approval in Sweet v. Gilmore, 52 S. C. 530, 30 S. E. 395, decides that the proper mode of attacking character for violence is by testimony of general reputation, and not by proving particular acts of violence. In the case of State v. Dill, 48 S. C. 249, 26 S. E. 567, exceptions similar to those under consideration were overruled, and the court pointed out the confusion that would arise from allowing testimony as to particular acts of violence for the purpose of showing that the party whose character was attacked was of a turbulent disposition. The case of State v. Dill, supra, is cited with approval in State v. Thrailkill, 71 S. C. 136, 50 S. E. 551. The rule in this state is in accord with the weight of authorities elsewhere. 5 Enc. of Law, 875.

Ninth exception: The modification was merely explanatory, and it did not materially change the request.

Tenth exception: The request was too sweeping in its language, as it failed to recognize the principle that a party has not the right to set up the plea of self-defense unless he was without fault in bringing on the difficulty.

Eleventh, twelfth, thirteenth, and fourteenth exceptions: These exceptions will be considered together. The record does not disclose the fact whether the nineteenth request was charged or refused. Immediately after the request we find the following words used by the presiding judge: "I do not see the use of reading any further on this question of self-defense." He did not charge the twentieth, twenty-first, and twenty-second exceptions. The charge was full upon the law of homicide, and substantially covered all the phases applicable to the case, embracing the propositions embodied in the requests.

Fifteenth exception: The presiding judge charged the law specifically and clearly as to the right of self-defense based upon apparent necessity; also as to manslaughter. Furthermore, when this portion of the charge is construed in connection with the entire charge, it will be seen that it was free from error.

Sixteenth exception: The presiding judge did not charge that the jury could not find the defendant guilty of manslaughter if the killing was intentional. On the contrary, his charge shows that his view of the law was otherwise.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 24)

EQUITABLE FIRE INS. CO. v. FISHBURNE.

(Supreme Court of South Carolina. June 24, 1905.)

APPEAL, FROM MAGISTRATE—DISMISSAL.

The circuit judge has power to dismiss an appeal from a magistrate for want of prosecution, and in so doing there is no abuse of discretion.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 640.]

Appeal from Common Pleas Circuit Court of Charleston County; Dantzler, Judge.

Action by the Equitable Fire Insurance Company against S. H. M. Fishburne. From an order granting a motion dismissing an appeal, defendant appeals. Affirmed.

Julian Fishburne, for appellant. Smythe, Lee & Frost, for respondent.

GARY, A. J. This is an appeal from an order dismissing an appeal. The case of State v. Johnson, 52 S. C. 505, 30 S. E. 592, shows that his honor the circuit judge had the power to grant such an order, and in so doing there was no abuse of discretion.

It is the judgment of this court that the order of the circuit court be affirmed.

(72 S. C. 42)

WESTERN UNION TELEGRAPH CO. v. TOWN OF WINNSBORO.

(Supreme Court of South Carolina. June 29, 1905.)

APPEAL—COSTS.

Civ. Code 1902, § 3098, providing that, on appeal to the Supreme Court, costs on argument, of $25, shall be allowed, authorizes such allowance of costs where a proceeding has been brought before a justice of the court for a restraining order, and an appeal is taken therefrom.

Motion by plaintiff to set aside taxation of costs.

For former opinion, see 50 S. E. 870.

Buchanan & Hanahan, for the motion. Ragsdale & Dixon, opposed.

PER CURIAM. The Western Union Telegraph Company, petitioner, applied to his honor Associate Justice Gary, at chambers, for an injunction restraining the town of Winnsboro from collecting a license tax. The application was refused, the petitioner appealed, and the decree of Associate Justice Gary refusing the injunction was affirmed by this court. 71 S. C. 231, 50 S. E. 870. Thereupon the clerk of this court, at the instance of attorneys for the defendant, taxed the costs of appeal. The petitioner now moves to strike from the taxation the two items—$25 for argument in Supreme Court, and $4.80 for printing argument.

Section 3098 of the Civil Code of 1902 provides: "When an appeal is taken to the Supreme Court of this state, the following costs shall be allowed in all classes of cases, legal or equitable: * * * On argument in the Supreme Court, twenty-five dollars." The petitioner insists this provision for costs applies only to appeals from an inferior tribunal to the Supreme Court, and that this was not such an appeal, but a proceeding in the original jurisdiction of the court. The fact that the petitioner appealed to the Supreme Court, under section 11 of the Code of Procedure, from an order made by a justice of this court, granted at chambers, and not from a judgment of the circuit court, does not affect the question. Section 3098 applies in either case. This must be regarded as an ordinary action for injunction, but, even if it could be considered a special proceeding, the result would be the same. Sease v. Dobson, 36 S. C. 555, 15 S. E. 703. It was held in Finley v. Cudd, 45 S. C. 88, 22 S. E. 753, that the expense of printing "points and authorities" may be taxed as a disbursement. The paper here termed "argument" is short enough to be regarded the "points and authorities," and it was proper to allow as a disbursement $4.80, the actual expense of printing it.

The motion of the petitioner, the Western Union Telegraph Company, is refused.

(72 S. C. 43)

BRISTOW v. ATLANTIC COAST LINE R. R.

(Supreme Court of South Carolina. June 30, 1905.)

1. NEW TRIAL—EVIDENCE.
Where the evidence sustains a verdict, it is not error to refuse a new trial.
[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 142.]

2. CARRIERS—DELIVERY OF FREIGHT—INSTRUCTIONS.
Error in an instruction that it was the duty of a common carrier to deliver goods shipped to the consignee was corrected by a subsequent instruction that it was the duty of a common carrier under the law, in 1899, after freight had been unloaded in its warehouse, to give the consignee a reasonable time to remove it, and, if it was then destroyed without fault of the consignee, the carrier would not be liable.

Appeal from Common Pleas Circuit Court of Darlington County; Aldrich, Judge.

Action by Sallie L. Bristow against the Atlantic Coast Line Railroad. From judgment for plaintiff, defendant appeals. Affirmed.

P. A. Willcox and W. F. Dargan, for appellant. Woods & Macfarlan, for respondent.

POPE, C. J. The plaintiff sued the defendant for the sum of $181.75, which she alleged was the value of the goods which were destroyed by fire on the 23d of September, 1899, while they were in possession of the defendant railroad. An interesting controversy was had before judge and jury as to when the goods were received by the railroad company, and as to whether the plaintiff had a reasonable time to remove the goods after the same were unloaded from the cars by the defendant. With slight variations, the judge's charge was clear and explicit. The verdict of the jury was in favor of the plaintiff for the sum of $247.80. After entry of judgment thereon the defendant appealed on three grounds. We will now consider those grounds of appeal in their order.

The first ground of appeal is as follows: "Because his honor the circuit judge should have held, on the motion for a new trial, that there was no evidence to support the verdict of the jury, and should have set the same aside." We have examined the testimony in the record, and find that there was testimony which, if accepted by the jury, would have supported the verdict. This being so, we cannot hold that the circuit judge erred when he refused a new trial. This ground of appeal is therefore overruled.

"Second. The defendant excepts to the charge of his honor the circuit judge, because he erred in charging the jury: 'It is the duty of the common carrier to carry these goods with all reasonable dispatch to their destination, and then the law requires it, as well as the contract, to deliver these goods, or perform its duty—to deliver those goods to the consignee, to the person to whom they were shipped;' and as follows: 'Were those goods stated in the itemized account? If so, were they brought to Darlington, and were they delivered?' It being submitted that the defendant was under no duty to deliver the goods, but performed its duty when it carried them to their destination, and the consignee had reasonable time to remove them." The excerpts were taken from the general charge of the circuit judge, which he was careful to correct in an after charge, made at the request of the defendant, as follows: "That after the arrival of the goods the plaintiff was entitled to reasonable time in which to inspect, accept the goods, and remove them from the depot or warehouse. But what is reasonable time is a question for the jury. But that, while reasonable time will depend to some extent on the circumstances of the case, yet reasonable time will not depend upon the peculiar circumstances in the situation of the plaintiff as affecting her own necessity or convenience." And as will be further seen from a consideration of the judge's charge of the seventh request of the plaintiff, which is as follows: "If the jury conclude from the testimony that the consignee or person to whom said goods are shipped has not failed to remove them within a reasonable time, the railroad company is liable as insurer of the property, and, if destroyed by fire, must pay the value to the consignee or owner." But most particularly do we refer in this connection to the language of the second of defendant's requests, which was in these words: "A common carrier was not required, under the law in this state, in September, 1899, to give the consignee notice of the arrival of goods, but after the goods had arrived, and were unloaded from the cars of carriage into a warehouse, the consignee had a reasonable time in which to remove them. If he failed to do so, and the goods were destroyed through no fault of the carrier, then the carrier would not be liable, and the verdict should be for the defendant." In charging this request the judge used the following language: "That is correct, and so I charge you. The special point to that request is this: that it is not the duty of the common carrier to notify the consignee—the person to whom the goods are shipped—of the arrival of the goods. That is the law in this state, and as the law I recognize and charge it to you." So that it is apparent that the judge has abundantly corrected his first mistake. There could not have been any misconception of the law on this point. Cohen v. Railway Co., 11 S. C. 158; also, Hipp v. Railway Co., 50 S. C. 129, 27 S. E. 623. This ground of appeal is now overruled.

"Third. Because his honor erred in charging plaintiff's first request to charge: 'A railroad company or common carrier of goods is an insurer of the property until such goods are delivered to the consignee,' with the modification: 'I charge you that that is correct, with this modification: until

such goods are delivered to the consignee, and he has had a reasonable time to remove the same;' it being submitted that it was not the legal duty of the defendant to deliver the goods to the consignee, but it performed its duty when it carried them to their destination, and the consignee had reasonable time to remove them." We feel sure that any error here was abundantly corrected by what is said in our consideration of the second ground of appeal. This ground of appeal is therefore overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 35)

BARR v. SATCHER.

(Supreme Court of South Carolina. June 27, 1905.)

1. SALES—STATUTE OF FRAUDS.
A verbal agreement to sell cotton at a specified price for future delivery is void, under Civ. Code 1902, § 2653.
[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 157.]

2. SAME—SALE OF COTTON—FUTURE DELIVERY.
A complaint alleging a verbal agreement to sell cotton at a specified price, to be delivered at a particular place on demand, sets up a contract within Civ. Code 1902, § 2310, providing that contracts for the sale of cotton shall be void unless the party contracting is at the time owner of such cotton, or authorized by the owner to sell, and a delivery is actually intended.
[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 22.]

Appeal from Common Pleas Circuit Court of Saluda County; Purdy, Judge.

Action by C. G. Barr against James A. Satcher. From an order granting a nonsuit, plaintiff appeals. Affirmed.

Barnard B. Evans, for appellant. Able & Blease, for respondent.

GARY, A. J. This is an appeal from an order of nonsuit. The complaint alleges:

"(1) That on the 30th day of November, 1903, at Ridge Spring, in the county and state aforesaid, the plaintiff and the defendant entered into an agreement, and thereby it was mutually agreed between them as follows: That the defendant should sell and deliver to the plaintiff on demand at Wards, in the county and state aforesaid, on or before the 2d day of December, 1903, twenty-one bales of lint cotton, in the aggregate weight of 10,500 pounds, and that the plaintiff should pay the defendant therefor upon delivery of said cotton at the rate of eleven and one-eighth cents per pound for each bale of said cotton.

"(2) That the plaintiff was ready at the time and place appointed to receive said cotton and to pay for the same according to the agreement, and requested the defendant to deliver the same, and otherwise has duly performed all the conditions thereof on his part.

"(3) That the defendant refused to deliver the said cotton, to the damage of this plaintiff in the sum of $393.75, the difference in the price at which plaintiff purchased the said cotton from the defendant and the price at which the said cotton is selling at the date of this action, to wit, fourteen and seven-eighths cents.

"(4) That plaintiff immediately resold the said cotton purchased from the defendant to other parties, and, in the defendant's refusal to deliver the same to the plaintiff, he has been unable to meet the demand on him for the same, and was compelled to make good the said demand by paying the difference in the price of the said cotton."

The defendant denied the allegations of the complaint, and set up as a defense that the agreement was void under the statute of frauds.

In granting the order of nonsuit, his honor the presiding judge said: "I grant the motion, first, upon the ground, as a matter of law, this action cannot be maintained under section 2653; if necessary to go further, on the further ground, from plaintiff's testimony, at the time of the commencement of the action he had not paid out any money."

The first exception is as follows: "Because his honor erred in holding that the allegations of the complaint came within the statute of frauds, and in the purview of section 2653 of the Civil Code of 1902." Section 2653 of the Code of Laws provides that "no contract for the sale of any goods, wares and merchandise for the price of fifty dollars or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." There was no testimony tending to show compliance with any of the requirements of this section, and the exception is overruled.

The second exception is as follows: "Because his honor erred in not holding that said agreement came within the purview of section 2310 of the Civil Code of 1902, and therefore not barred by the statute of frauds." Section 2310 of the Code of Laws contains the following provisions: "Every contract, bargain or agreement, whether verbal or in writing, for the sale or transfer at any future time * * * of any cotton * * * shall be void unless the party contracting, bargaining or agreeing to sell or transfer the same, is at the time of making such contract, bargain or agreement, the owner or assignee thereof, or is at the time authorized by the owner or assignee thereof, or his

duly authorized agent, to make and enter into such contract, bargain or agreement for the sale or transfer of such * * * cotton * * * so contracted for, or unless it is the bona fide intention of both the parties to the said contract, bargain or agreement, at the time of making the same, that the said * * * cotton * * * so agreed to be sold and transferred shall be actually delivered in kind by the party contracting to sell and deliver the same, and shall be actually received in kind by the party contracting to receive the same at the period in the future mentioned and specified in the said contract, bargain or agreement for the transfer and delivery of the same." The allegations of the complaint are not appropriate to an action under this section, and its provisions cannot be invoked by the plaintiff. In order to bring an action under this section, the plaintiff must allege "(1) that the party making the contract for the sale of cotton for future delivery was the owner or assignee thereof at the time the contract was made; or (2) that the seller was at the time authorized by the owner or assignee, or his duly authorized agent, to make such sale; or (3) that it was the bona fide intention of both parties—seller and buyer—at the time of making such contract that the cotton should be actually delivered and received in kind at the future period mentioned." Riordan v. Doty, 50 S. C. 537, 543, 27 S. E. 939, 941. There are no such allegations in this complaint. In the case of Gist v. Tel. Co., 45 S. C. 344, 364, 23 S. E. 143, 150 (55 Am. St. Rep. 763), the court says: "It is clear, upon the plainest principles of pleading, that if an action should be brought to enforce the performance of a contract for the future delivery of cotton, or to recover damages for the breach of such contract, it would be necessary to state all the material elements constituting such contract. If, therefore, in an action based upon contract for the future delivery of cotton, the complaint should simply state, as it does in this case, the making of the contract, without alleging that the plaintiff was the owner or assignee of the cotton at the time the contract was made, or was at the time authorized by the owner or assignee, or his duly authorized agent, to enter into such contract, or that it was the bona fide intention of both parties at the time of making said contract that the cotton should be actually delivered and received in kind at the future period mentioned, it is clear that such complaint would not state facts sufficient to constitute a cause of action, because it omitted these allegations material to the validity of the contract which constituted the basis of the action. Indeed, *such a complaint would state nothing more than a contract* expressly declared by statute to be void." (Italics ours.) But even if these material elements had been alleged in the complaint, the contract would have been obnoxious to the statute of frauds unless there was a compliance with the requirements of that statute.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 39)

DELLENEY et al. v. WINNSBORO GRANITE CO.

(Supreme Court of South Carolina. June 28, 1905.)

1. TRUSTS—DEATH OF TRUSTEE—LEGAL TITLE TO LAND.

Lands were conveyed to a trustee to secure the rents and profits for certain beneficiaries named, and distribute the land among them when the youngest attained majority. The trustee died, leaving a son, and he and the beneficiaries sued for damages to the land. *Held* error to grant a nonsuit on the ground that the holder of the legal title was not before the court; the son, under the common law, holding such title.

2. PARTIES — DEFECT — OBJECTION — HOW RAISED.

An objection that proper parties are not before the court must be raised by answer or demurrer, and not on motion for nonsuit.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 123.]

Appeal from Common Pleas Circuit Court of Fairfield County; Gage, Judge.

Action by Thos. E. Delleney and others against the Winnsboro Granite Company. From order granting nonsuit, plaintiffs appeal. Reversed.

Buchanan & Hanahan, for appellants. J. E. McDonald, for respondent.

GARY, A. J. This is an appeal from an order of nonsuit. The complaint alleges that the plaintiffs "are the legal owners and seised in fee and in possession" of the land therein described, and that the defendants committed certain acts of trespass upon said premises. It was admitted that Thomas W. Nelson purchased the land from J. R. Delleney, who had been in the possession thereof for more than 20 years before he conveyed to Thomas W. Nelson, and that Nelson conveyed to Rebecca R. Delleney in 1887. The premises of the deed were in the usual form, and the habendum clause was as follows: "To have and to hold, all and singular the said premises before mentioned, unto the said Rebecca J. Delleney, her successors and assigns forever in fee, upon the trust nevertheless, and to and for the uses, interest and purposes hereinafter limited, described and declared, that is to say, upon trust to secure the rents, issues and profits of the said premises, and apply the same to the use of the children of the said Rebecca J. Delleney, and upon further trust to divide the said premises equally and convey the same to the children of the said Rebecca J. Delleney surviving when the youngest child reaches the age of twenty-one years, to them and their heirs, executors, administrators and assigns forever: Provided, however, That in the event of the death before the period herein limited

of one or more of said children, leaving lawful issue, the share to which such child or children would have been entitled, if living, shall vest in and belong to such child or children."

Rebecca D. Delleney died in 1836, leaving the plaintiff John D. Delleney as her oldest male heir. Upon the trial the plaintiffs introduced in evidence the deed from Thomas W. Nelson to Rebecca D. Delleney. At the close of the plaintiffs' testimony the defendant made a motion for a nonsuit upon the ground thus set out in the record: "Defendant's Counsel: I move for a nonsuit upon the ground that the plaintiffs have failed to show any title to the land. They have introduced the deed. They alleged under the deed they are owners in fee and in possession of the land described in the complaint, and they have introduced the deed, which vests the legal title in the trustee; and we submit they are not entitled to recover in this case unless the trustee was a party, or unless the trustee brought the suit. The proof is that there has been no division, and the fact that the trustee dies does not change the title. The trustee should have brought this suit, if at all, and made these other people parties. We submit that the fee did not vest in the beneficiaries until the division was made. Upon that ground we move for a nonsuit. The trustee had a duty to perform—to collect the rents and profits and to divide the land." The nonsuit should not have been granted if the testimony tended to show that any of the plaintiffs held the legal title to the land. In the case of Martin v. Price, 2 Rich. Eq. 412, it was held that the statute of distributions has no application to the legal estate in trust property, and that, where an estate in fee simple is vested in a trustee, the estate descends on the death of the trustee to the heir at common law. At common law the plaintiff John D. Delleney, the oldest son of the trustee, would have been her heir. He was therefore, upon the death of his mother, vested with the legal title to the land. When the deed of trust was introduced in evidence, it tended to establish the allegation of the complaint that at least one of the plaintiffs was seised of the land in fee. Kerby v. Quinn, Rice, 264.

The ground upon which the motion was made for a nonsuit related to the pleadings, and not to the evidence. We may say in this case, as was said in Browning v. Huff, 2 Bailey, 174, 177: "The pleading does not question the plaintiff's character, but his right of recovery on the merits." Section 165, Code Civ. Proc. 1902, provides the remedy for taking advantage of a defect of parties plaintiff or defendant. When the defect of parties appears upon the face of the complaint, the proper remedy is by demurrer. If the defect does not appear upon the face of the complaint, the objection may be taken by answer. If such objection be not taken either by demurrer or answer, the defendant shall be deemed to have waived the same. The case of Shull v. Caughman, 54 S. C. 203, 32 S. E. 304, shows that this objection cannot be urged upon a motion for nonsuit. See, also, Blackwell v. Mortgage Co., 65 S. C. 105, 43 S. E. 395.

It is the judgment of this court that the order of the circuit court be reversed.

(72 S. C. 90)

RILEY v. TOWN OF GREENWOOD et al.

(Supreme Court of South Carolina. July 4, 1905.)

1. INJUNCTION — INVALID ORDINANCE — ENFORCEMENT.

In an action to restrain a town from enforcing an alleged invalid ordinance by removing a fence erected by plaintiff in a public alley, and requiring the mayor to remove any obstructions along the alley, it sufficiently appears that the ordinance was intended to prevent a fence along the alley at any point, so that a contention that the fence was on plaintiff's land, and that the ordinance did not provide for its removal as an obstruction, could not be sustained.

2. SAME—EQUITABLE RELIEF.

An action to have an ordinance declared ultra vires, and to have the town authorities enjoined from enforcing it, and alleging that by its enforcement plaintiff's property was injured, is not an action in tort, but for equitable relief.

3. MUNICIPAL ORDINANCE—VALIDITY.

An ordinance compelling the removal of a fence erected on plaintiff's land, which was not subject to the public easement, was illegal, as a taking of property without just compensation.

4. PROHIBITION—WHEN GRANTED.

Prohibition is not the proper remedy for relief from an ordinance which is an attempt to take private property without compensation and without due process of law.

5. INJUNCTION—CONTINUING TRESPASS.

Where an ordinance requires the mayor to remove any obstruction interfering with the free use of the alley, and under the ordinance he is about to remove a fence on the property of plaintiff, there is a continuing menace to the rights of plaintiff, authorizing equitable relief.

Appeal from Common Pleas Circuit Court of Greenwood County; Watts, Judge.

Action by S. J. Riley against the town of Greenwood and its town council. From a judgment overruling a demurrer, defendants appeal. Affirmed.

F. Barron Grier, for appellants. Johnstone & Cromer and McGhee & Richardson, for respondent.

GARY, A. J. This is an appeal from an order overruling a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The following statement appears in the record: "This action was instituted for the purpose (1) of having an ordinance of the town of Greenwood declared ultra vires, and enjoining defendants from undertaking to enforce the same; (2) to enjoin the defendants from undertaking to exercise any control over her land, on which she erected a fence as al-

leged in the complaint; (3) to enjoin defendants from interfering with the use and control of her land upon which the said fence was erected."

The complaint (omitting the formal parts thereof) alleges: "That an alley twelve feet wide, owned by the plaintiff, Durst & Matthews, and others, runs from the public square in an easterly direction back to her lot of land above described. That from the eastern terminus of this alley, 107 feet from the public square, a road of the same width and in the same direction leads across her said lands to her livery stables on the same, and that the said alley has for years been used by the tenants and customers of her said livery stables, and by the occupants of the adjacent property of Durst & Matthews and their customers. That prior to the date hereinafter stated, and for the purpose of maintaining and protecting her rights in her said property, and preventing the unauthorized use of the same by persons traveling to and from the rear of the store on the said lot of Durst & Matthews, owned by the defendant, J. K. Durst, and others, she erected a fence on her said lot, along the northern side of the road above described as leading from the terminus of the said alley to her livery stables; the said fence running from the terminus of the said alley, parallel with said lot of Durst & Matthews, but being solely on her said land. That on the 10th day of June, 1904, the said town council of Greenwood passed an ordinance as follows: 'Be it ordained by the town council of Greenwood: (1) That the public alleyway leading from the public square to the old stables owned by Mrs. S. J. Riley, in the town of Greenwood, is hereby required to be kept open and free from obstructions of any kind. (2) That the free use and enjoyment by the public of said public alleyway mentioned in section 1 hereof, must not be interfered with or obstructed in any wise, and any person or persons who shall obstruct the said alley in any way or interfere with the free use thereof shall be fined not less than $5 nor more than $100, or be imprisoned not less than three days nor more than thirty days. (3) The mayor of the town of Greenwood is hereby directed and required to remove any obstruction placed in said alleyway, or any obstruction along the same which tends to interfere with the free use thereof.' That the defendants, acting under authority attempted to be conferred by the said ordinance, unlawfully entered upon said land, and, by their servants and agents, with force and violence, tore down and destroyed her said fence. That the alley mentioned in the said ordinance is that described in the third paragraph of this complaint. That it has never been dedicated to the public, and the public has acquired no right to it by deed or otherwise. That it has not been subject to the control of the defendants or of the public, and that the fence was not in the alley, and did not obstruct the same. That the conduct of the defendants in passing the said ordinance and in destroying her fence was an arbitrary attempt to deprive her of her property without due process of law, and for the benefit of private individuals, and that the said ordinance is ultra vires and void. That the constant menace of the said ordinance, backed by the police authority of the defendants, denies to her the quiet and peaceable use and enjoyment of her said property guarantied by the Constitution, leaves her without any adequate remedy at law, and warrants the intervention of this court in her behalf."

The first ground of demurrer was as follows: "(1) The allegations of the complaint show that the alleged fence was not in or upon the alleged alleyway mentioned and referred to in the ordinance set out in the complaint; that the said fence is wholly upon the private property of the plaintiff in this action, and the ordinance of the town of Greenwood, set out in the complaint, shows upon its face that it refers entirely to an alleyway of the said town, without reference to any private property of the plaintiff; and the facts stated in the complaint therefore fail to show any connection whatever between the alleged action of the officers and agents of the said town and the said ordinance under which they are alleged to have acted." The ordinance assumes as a fact that the public alley extends all the way back to the plaintiff's stables, and it provides against obstructions in or along the alley at any point before it reaches the stables. The provision by which the mayor is "required to remove any obstruction placed in said alleyway, or any obstruction along the same, which tends to interfere with the free use thereof," clearly shows that the ordinance contemplated that the free use of the alley should include the right to turn aside from it. In short, it shows that it was intended to prevent such an obstruction as the plaintiff's fence along the alley at any point before reaching the stables, in order that the public might be enabled to turn aside from the alley. It cannot, therefore, be successfully contended by the appellant that the fence was on the plaintiff's land, and that there was no connection between the ordinance and the acts of its officers in removing the fence as an obstruction.

The second ground of demurrer was as follows: "(2) The complaint shows upon its face that the ordinance of the town required the alleyway to be kept free from obstructions, but fails to show that it in any wise authorized or required its officers or agents to interfere with the private property of this plaintiff; and, in alleging that its officers and agents did so interfere with said private property, the complaint charges a tort on the part of the said officers and agents, for which this defendant is in no wise responsible." It is only necessary to refer to the

statement hereinbefore mentioned, relative to the purposes of the action, to show that this is not an action for damages arising from tort, but for equitable relief. It is true, the destruction of the fence was connected with the plaintiff's alleged injury to her rights, but it was merely incidental, and was not relied upon as the foundation of her action.

The third ground of demurrer was as follows: "The allegations of the complaint show a tort on the part of certain individuals, for which this defendant is not responsible." This ground is disposed of by what was said in considering the other grounds.

The fourth ground of demurrer was as follows: "The ordinance set out in the complaint shows on its face that it is a valid ordinance, properly passed, and relates to a public alleyway of the town of Greenwood, over which the defendant has full control." If the facts alleged in the complaint are true —that the plaintiff is owner of the land upon which the fence was erected, and that it was not subject to a public easement—then the ordinance was illegal, on the ground that it, in effect, undertook to acquire an easement without just compensation being first made therefor, as required by the Constitution (article 1, § 17), and was likewise inimical to article 1, § 5, of the Constitution, which provides that a person shall not be deprived of his property without due process of law.

The fifth ground of demurrer is as follows: "The allegations of the complaint show that the plaintiff has a full, complete, and adequate remedy at law for all of the acts complained of and set out in the said complaint." It is contended by the appellant that prohibition was the appropriate remedy, under the facts alleged in the complaint. The alleged vice in the ordinance was not based on the ground that the municipality did not have power and jurisdiction to enact ordinances generally in regard to the streets and alleys, but on the ground that the ordinance in question was illegal, as an attempt on the part of the appellant to take the property of the plaintiff without compensation, and to deprive her of her property without due process of law. Under such circumstances, prohibition is not the appropriate remedy. State ex rel. Gibbes v. Kirkland, 41 S. C. 29, 19 S. E. 215.

The sixth ground of demurrer was as follows: "The allegations of the complaint show a trespass on private property by the officers and agents of this defendant, for which it is not liable, and do not connect the alleged acts in any wise with the ordinance of this defendant." This ground has already been disposed of.

The seventh ground of demurrer was as follows: "The facts stated in the complaint fail to show any equity whatever, and plaintiff's complaint is without equity, and does not entitle plaintiff to injunctive relief, or to any relief whatever against this defendant." When a municipal corporation is attempting to carry into effect an illegal act, it may be enjoined, if there are grounds for equitable interference. Vesta Mills v. Charleston, 60 S. C. 1, 38 S. E. 226; Wilkins v. Gaffney, 54 S. C. 199, 32 S. E. 299. The requirement in the ordinance for the mayor to remove any obstruction which tends to interfere with the free use of the alley contemplated the removal of obstructions as often as they were placed in or along the alley. It was therefore a continuing menace to the rights of the plaintiff, as alleged in the complaint, and could properly be made the basis of equitable relief. McClellan v. Taylor, 54 S. C. 430, 32 S. E. 527; Ragsdale v. R. R., 60 S. C. 381, 38 S. E. 609; 3 Pom. Eq. Jur. § 1345.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 84)

MULLINS v. MARION COUNTY.

(Supreme Court of South Carolina. July 8, 1905.)

SHERIFFS—FEES—ACTING AS CONSTABLE.

Civ. Code 1902, § 1030, provides that a magistrate may appoint a constable at a fixed salary, or may direct his papers to the sheriff, who shall receive the same compensation for serving them as a constable would be entitled to. *Held*, that where the magistrate has the papers served by the sheriff, and appoints no constable, the sheriff may collect the fees provided for constables by section 3121.

Appeal from Common Pleas Circuit Court of Marion County; Watts, Judge.

Controversy submitted without action between B. R. Mullins and Marion county. From judgment for plaintiff, defendant appeals. Affirmed.

James W. Johnson, for appellant. M. C. Woods, for respondent.

POPE, C. J. This appeal is from the judgment of his honor Judge Watts, upon the following agreed issue, to wit: "Whether the sheriff should be paid $150 in full of his services, under the provisions of section 1032, Civ. Code 1902, or whether he should be paid $217.75 in full of his services, under the provisions of section 3121. There is no dispute on any other point." By Judge Watts' judgment, he held that the sheriff should be paid $217.75. After entry of judgment, the defendant appealed on three grounds.

The first ground is as follows: "First. Because it is respectfully submitted that his honor erred in not holding that the plaintiff was entitled to the compensation fixed by law, to wit, $150 for the constable of the magistrate residing at Marion, S. C., for serving the papers during 1903, and to no other compensation therefor." The question here presented arises from this condition of affairs: By law the county of Marion was divided into 10 subdivisions and a magistrate was "provided for each subdivision. That at Marion Court House was given a salary of $350 per year, and a constable was allowed at a salary of $150 per year; but it was provided that any magistrate might direct his papers to the sheriff for service, and in such case the sheriff shall serve same, and shall receive the same compensation therefor which the constable would be entitled to for the same service. There was no constable appointed for this township, and papers were directed by the magistrate to the sheriff, who served the same. Now it becomes necessary to determine whether the sheriff shall receive the compensation provided for the constable, to wit, the sum of $150, or whether he shall be paid the fees affixed by law to a constable for the service of such papers; there being a difference of $67.75 in favor of the latter plan. Although section 1032 of volume 1 of the Civil Code of 1902 in express terms requires the magistrates and their constables to accept the compensation fixed in this section in lieu of all costs and fees on the criminal side of the law, yet such section requires that such fees and costs as are fixed by law shall be collected, but the same shall be turned over to the county treasurer. Section 3121 of the Civil Code of this state (volume 1) provides the costs and fees for constables. After a careful consideration of these two sections of our Code, we think there was no error on the part of the circuit judge. The word "compensation," used in the proviso, where it relates to sheriff, need not give too much concern, for it really includes costs and fees as well as salary. It may be that a magistrate of Marion county may have a constable, and yet feel called upon, from a sense of public duty, to use the sheriff also; and under those circumstances a resort would necessarily arise to fix his compensation under said section 3121, supra. Therefore we overrule this ground of appeal.

"Second. Because it is respectfully submitted that his honor erred in not sustaining the position of the county board of commissioners in refusing to pay the plaintiff more than $150 for his services for 1903 rendered D. J. Oliver as magistrate at Marion, S. C." From what we have said in refusing to support the first ground of appeal, we must overrule also the second.

"Third. Because his honor erred in not holding that when the sheriff served the papers of D. J. Oliver, magistrate, that he could only get the pay fixed by law for said Oliver's constable, to wit, $150." We may remark just here that the views we have already expressed render it necessary that we should overrule this exception.

It is the judgment of this court that the judgment of the circuit court be, and it is, affirmed.

(73 S. C. 223)

BRYANT v. THIGPEN.

(Supreme Court of South Carolina. July 8, 1905.)

CHATTEL MORTGAGE—INDEXING—SUFFICIENCY.

Civ. Code 1902, vol. 1, § 950, provides for the recording of chattel mortgages, where the amount is not more than $100, by entering on an index book the names of the parties, a description of the chattels, the date of the mortgage, etc. *Held*, that recording a chattel mortgage and agricultural lien for less than $100 by indexing in book for that purpose, under the head of "Character of Debt," "L. & M.," and under "Amount," "$25," is a sufficient indexing of a chattel mortgage to the amount of $25, though the mortgage secures other indebtedness.

Appeal from Common Pleas Circuit Court of Clarendon County; Klugh, Judge.

From judgment affirming judgment of magistrate in J. J. Bryant against F. W. Thigpen, defendant appeals. Affirmed.

Wilson & Durant, for appellant. W. C. Davis, for respondent.

POPE, C. J. An action was begun in magistrate's court in Clarendon county for the claim and delivery of a bay mare named "Ellen," by the plaintiff against the defendant, based upon a lien and chattel mortgage recorded in the book for record of chattel mortgages for amounts less than $100, as provided for in the last part of section 950, vol. 1, Civ. Code 1902. The defendant claimed that said record was void because the full amount for which said mortgage was given did not appear in such recording. The magistrate held that such paper was properly recorded, and therefore gave judgment for the plaintiff in the sum of $25. An appeal was taken to the circuit court by the defendant on the same objection he had urged before the magistrate. The circuit judge held that the index as provided for in section 950, supra, was constructive notice to the defendant of the mortgage, and therefore gave judgment dismissing the appeal. The defendant now appeals to this court upon two grounds, as follows: First, "that the circuit judge erred in holding that indexing would be a sufficient record of the instrument herein"; second, "that the circuit judge erred in holding that the indexing was sufficient record, and sufficiently showed the amount and character of the debt secured, it being respectfully submitted that the entries in the index book were not sufficient in this respect." We will now consider these two exceptions together.

This part of section 950 of the first volume of the Code is as follows: "It shall be a sufficient record of any chattel mortgage, where the amount secured is not more than one hundred dollars, to enter upon an index book, to be kept for that purpose by register of mesne conveyances, the names of mortgagor and mortgagee, the amount and character of the debt secured, a brief description of chattels pledged, the date of said mortgage and of the maturity of said debt, and the date of presentation of such mortgage for record; and the fee to be charged by the register of mesne conveyances shall be the same as now provided by law for the indexing of liens on crops for advances for agricultural purposes." As was said by this court in the case of Milford v. Aiken, 61 S. C. 110, 39 S. E. 233: "The object of a registration law is to provide a ready means to the public of learning the status of property, real or personal, so far as claims to the same may be in persons other than the owner. These registration laws are purely the creation of the statute law, and therefore are subject to such variety as to form, methods, etc., as to the legislative mind may seem best. For instance, for a long time mortgages of real and personal property were recorded in the same book; but after a while the demands of trade became so great that the state Legislature directed that these mortgages of real and personal property, respectively, should be made in separate books, with a separate index to each. And as to personal property, in answer to the same demands of trade, what is known as 'agricultural liens' (which is nothing more than a mortgage) were required to be placed in a separate book for registration, and the form of such registration was made very simple, and the cost of recording was greatly reduced." In the case just cited it was held that the affidavit of a witness to such lien and mortgage was not required in order to be recorded.

Law, when applied to an action, looks to the concrete case. Here, for instance, it is admitted that the plaintiff paid the defendant but $25, and this amount was set forth in the record of such chattel mortgage. It is true that in the third clause of said mortgage some reference is made to a further consideration of the same, "and in order to secure the payment at the time aforesaid, of any other and such other sums of money, and the interest thereon, which the party of the second part may be due and owing unto the party of the first part at any time during the current year." This was not set out in the record but only the sum of $25 was so set out. In may be granted that, if the party of second part had been due to the party of the first part any other sum than $25, it would have been held void, but such is not the case here.

In order to show the exact compliance in the recording of this chattel mortgage with record here, we reproduce the same:

Date of Presentation for record. Feb. 13, 1904.		Mortgagor Robert Mack.
Mortgagee J. J. Bryant.	Date of Mortgage Jan. 11, 1904.	Date of Maturity Oct. 15, 1904.
Amount $25.00.	Character of Debt. L. & M.	Date of Settlement.

Description of Chattels Pledged.

All cotton and cotton seed to be made on ten acres, one bay mare, named Ellen, and one open top buggy and harness, all in good repair.

A comparison of the items of the record with the items of section 950, supra, do show that the chattel mortgage was properly recorded. We must therefore overrule these exceptions.

The judgment of this court is that the judgment of the circuit court is affirmed.

(72 S. C. 116)

SMITH v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. July 11, 1905.)

1. TELEGRAPH COMPANY — OFFICE HOURS — SUNDAY.
If a telegraph company opens its office for business on Sunday, it must have reasonable hours therefor.

2. SAME—NEGLIGENCE.
Evidence *held* insufficient to show reckless disregard of the duty of a telegraph company to deliver a telegram, or negligence which was the proximate cause of mental anguish of addressee.

Appeal from Common Pleas Circuit Court of Cherokee County; Gage, Judge.

Action by Joanna Smith against the Western Union Telegraph Company. From judgment for plaintiff, defendant appeals. Reversed.

Geo. H. Fearons, Evans & Finley, and J. H. Marion, for appellant. Hart & Bell, for respondent.

JONES, J. The complaint in this action was brought to recover damages for mental anguish for alleged negligent and willful failure to promptly deliver the following message: "Joanna Smith, Gaffney, S. C. If you want to see Hannah alive, come at once. [Signed] John Corrie." This appeal comes from the judgment, on verdict, for $100 in favor of plaintiff. The complaint alleged that by reason of the failure to promptly deliver said message the plaintiff was deprived of seeing and being with her sister before her death, and of accompanying her remains from the city of Asheville, N. C., to Gaffney, S. C., and was thereby subjected to great mental anguish and suffering. The message was filed with the defendant company at Asheville, N. C., on Sunday, November 8, 1903, to be transmitted to plaintiff at Gaffney, S. C. It was received by the Gaffney office at 4:50 p. m., Sunday. The office hours at Gaffney on Sundays were from 8 a. m. to 10 a. m., and from 4 p. m. to 6 p. m. The messenger made effort to deliver the telegram, and returned to the office with the message undelivered at 6 p. m., when the office was closed and the message left therein for delivery the next day. About 15 minutes after the closing of the office, the messenger boy, on his way home, obtained information as to the place of residence of the plaintiff, but, because the office was closed, did not make any further attempt to deliver on that day. The message was delivered the next day, Monday, between 8 and 9 a. m. The plaintiff's sister died a short while before 12:55 p. m., November 9, 1903. Train 35 passed Gaffney for Spartanburg at 11:53 Sunday night, and train 39 passed Gaffney for Spartanburg at 9:14 Monday morning. These trains connected at Spartanburg with the train for Asheville, due to leave Spartanburg at 10:35 a. m. and arrive at Asheville at 1:50 p. m.

1. The first question presented by the exceptions is whether the circuit court erred in modifying defendant's third request by charging the jury that, when a telegraph company opens its office for business on Sunday, it must be shown that its office hours on that day are reasonable. Defendant's third request was as follows: "These hours need not be the same on Sunday as on other days of the week. A telegraph company may not open its office for business at all on Sunday, and, when it does, may limit these hours to a very small part of the usual time devoted to the transaction of business on other days." With reference to this request, the court charged the jury in these words: "Sunday is a day of rest, and a telegraph company may close its office and stay closed for the day; but, if it does open its office for business, it must have reasonable hours." No breach of duty should be predicated upon a failure to do what is forbidden by law, but there is nothing in the law to prevent a telegraph company from undertaking to transmit and deliver a message like the one in question on Sunday. Our statute (section 500, Cr. Code) provides as follows: "No tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any wordly labor, business or work of their ordinary callings upon the Lord's Day (commonly called the Sabbath) or any part thereof (work of necessity or charity only excepted); and every person being of the age of fifteen years or upwards offending in the premises shall, for every such offense, forfeit the sum of one dollar." So that, if this statute be held to prohibit an operator or messenger from delivering ordinary social and business telegraphic messages on Sunday, it would have no application to a message of the kind in question, as it properly falls within the excepted classes as a work of necessity or charity, since it relates to sickness and approaching death of a relative. Doyle v. Lynn & Boston Ry. Co., 118 Mass. 195, 19 Am. Rep. 431; G., C. & Santa Fé Ry. Co. v. Levy, 59 Tex. 542, 46 Am. Rep. 269; Western Union Telegraph Co. v. Wilson, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 27. The defendant, therefore, having undertaken to transmit and deliver such a message, was bound to exercise ordinary care to promptly deliver the same. A telegraph company may, however, establish reasonable office hours in the conduct of its business, and is not ordinarily bound to deliver messages outside such hours (Bonner v. Western Union Tel. Co., 71 S. C. 303, 51 S. E. 117; Harrison v. Western Union Tel. Co., 71 S. C. 387, 51 S. E. 119); but, inasmuch as ordinary business is generally suspended on Sunday, it is manifest that it is not incumbent on a telegraph company to observe the same number of hours on Sunday as on week days. But nevertheless, if it undertakes to deliver

messages which may be transmitted and delivered on Sunday, it is bound to observe such hours as are reasonably required for the proper discharge of its duty. Due consideration must be had to the requirements of the community on Sundays. Appellant, therefore, cannot complain that its third request to charge was modified so as to require it to observe reasonable office hours on Sunday.

2. The next question is whether the court erred in refusing defendant's motion for a new trial. Appellant contends that there was no testimony tending to establish or sustain the verdict of the jury: (a) In that there is an entire absence of proof that the delay in the delivery of the telegram was a proximate cause of the injury plaintiff is alleged to have sustained; (b) in that there is an entire absence of proof of any actual damages suffered by the plaintiff on account of the alleged delict of the defendant; (c) in that there is an entire absence of testimony tending to establish wanton negligence, willful misconduct, or such state and frame of mind on the part of the defendant as will permit of exemplary damages; and (d) in that, from the uncontradicted and undisputed testimony, only one inference can be drawn as a matter of law, to wit, that the delay in the delivery of the telegram did not deprive plaintiff of reaching and seeing her sister while alive, and did not prevent her from accompanying her sister's remains from Asheville to Gaffney. This exception is well taken. We see nothing in the testimony from which it could be inferred that the defendant recklessly disregarded its duty. The evidence showed that the message was promptly transmitted to Gaffney, that from the time of its receipt at the Gaffney office to the closing hour of that office a continuous effort was made to deliver the message to the plaintiff, that the closing hour of the Gaffney office on Sunday was reasonable, and there was no allegation or evidence of a special agreement to deliver outside of the reasonable office hours of the defendant. There was therefore no foundation for punitive damages.

With respect to damages for mental anguish, even if it be granted that the defendant was negligent, the evidence totally fails to show that the mental anguish from the causes alleged was a direct, natural, and proximate result of the defendant's negligence. In so far as plaintiff's suffering resulted from failure to see and be with her sister before her death, the undisputed evidence shows that it would have been impossible for plaintiff to have reached her sister before her death, even if the message had been immediately delivered to her. In so far as plaintiff's mental anguish was the result of her failure to accompany her sister's remains on the train from Asheville to Gaffney, that was something which the defendant company could not reasonably have anticipated as a result of the failure to deliver the message promptly, as there was nothing on the face of the message, or brought to the knowledge of the defendant, to indicate that it was within the contemplation of any one that plaintiff would accompany her sister's remains from Asheville to Gaffney for burial. Arial v. Western Union Tel. Co., 70 S. C. 418, 50 S. E. 6.

The judgment of the circuit court is reversed.

(72 S. C. 126)

WILLIS v. CHEROKEE FALLS MFG. CO.

(Supreme Court of South Carolina. July 11, 1905.)

1. INJURY TO SERVANT—LIABILITY OF MASTER—INSURER.

In an action for injuries to a servant, an instruction that the master is responsible for the safety of the surroundings and place where the employé is by him put to work is not improper, where the court also charged that the master must furnish the servant with a reasonably safe place to work and with safe appliances, but that he is not an insurer of the safety of the party, but must have such appliances and such place to work as a man of ordinary prudence would furnish under like circumstances.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 173, 178, 179–192.]

2. SAME—NEGLIGENCE—EVIDENCE.

In an action for injuries to a servant of tender years, evidence *held* to establish prima facie proof of negligence.

Appeal from Common Pleas Circuit Court of Cherokee County; F. B. Gary, Special Judge.

Action by Otis Fletcher Willis against the Cherokee Falls Manufacturing Company. From judgment for plaintiff, defendant appeals. Affirmed.

This is an appeal upon two exceptions. The first assigns error in the charge to the jury, and the second in refusing a motion for a new trial. The complaint (omitting the formal portion thereof) alleges: "That on December 23, 1902, the plaintiff, Otis Fletcher Willis, 11 years of age and of small stature for his years, was in the employment of the defendant as a sweeper; that as such it was his duty to sweep up waste and place it in a waste box furnished by the defendant; that on said day, while in the performance of his duty as such laborer, he was attempting to put some of the swept-up waste into the waste box, and in so doing had to raise the lid of said box, and while so engaged his feet slipped from under him, his left foot was caught in the gearing or spokes of the pulley on the drawing frame of the defendant company, which was only a few inches distant from said box, his body was by it beaten several times against the floor, his left leg was torn off, his right arm and hand rendered permanently useless, his face and body badly beaten and bruised, to his damage $10,000; that said injuries and dam-

age were directly due to and caused by negligence and carelessness of the defendant in the following respects: (1) In having the lid of said box too high for one of his size, in consequence of which it was necessary for him to tiptoe, and in consequence of which his foot slipped, with the result stated. (2) In having said box unnecessarily in a dangerous place, to wit, within a few inches of said running pulley, in consequence of which, and on account of which, his foot was caught, with the result aforesaid. (3) In having said pulley in such close proximity to said box where said child, the plaintiff, had to perform his work, without having the same in any way covered or protected, so as to prevent its catching said plaintiff. (4) In not providing plaintiff with a safe place in which to work, but in having him to work in such unsafe place, as above stated, to wit, the said box with such high lid, so unnecessarily closely placed by said machinery, which was uncovered and unprotected, notwithstanding the fact that the defendant knew that the floor upon which said box stood, and upon which plaintiff would have to stand in raising said lid, was very greasy and slippery; the whole making a combination which rendered the place unsafe for said plaintiff, and by which the injuries were inflicted as aforesaid." The defendant denied the allegations of the complaint, and set up as a defense that the negligence of the plaintiff proximately caused and contributed to his injury. The jury rendered a verdict in favor of the plaintiff for $1,750, and the defendant appealed.

Butler & Osborne and H. J. Haynsworth, for appellant. Stanyarne Wilson and V. E. De Pass, for respondent.

GARY, A. J. (after stating the foregoing facts). 1. The first exception assigns error as follows: "(1) In charging the jury that 'the master is responsible for the sufficiency and safety of the surroundings and place where the employé is by him put to work'—it being submitted that by said instruction his honor placed upon the defendant the liability of an insurer of the safety of the surroundings and place of work, whereas the master is liable for the want of safety in such place only in case this condition is by reason of his negligence." The charge set out in the exception was presented in the form of a request, and his honor, the presiding judge, said: "In connection with what I have charged you, I charge you that." It is therefore necessary to see what he had charged relative to this question. He charged that, "when the relation of master and servant exists, the master on his part engages, and it is his duty to furnish, the servant with a reasonably safe place to work, and with safe and suitable appliances for such work, and it is his duty to keep those appliances in repair. Now, that does not mean necessarily that he is an insurer of the safety of the party, but it means that he has such appliances and such place to work as a man of ordinary prudence would have furnished under like circumstances. * * * The test being, at last, what would an ordinarily prudent man have done under the circumstances? what kind of place would a prudent man have furnished? what kind of appliances would a prudent man have furnished? As I say, in ascertaining whether or not the master has carried out his part of the implied agreement, you have a right to consider all these questions; that is, the surrounding circumstances, the character of the work, and the youth and intelligence of the servant." The only error assigned by the exception is that the charge therein mentioned placed upon the defendant the liability of an insurer of the safety of the surroundings and place of work. This charge must be construed in connection with the other portions thereof, which fully explained the law in such cases, after which it cannot reasonably be supposed that the jury was misled, especially when they were told to consider the charge embodied in the request in connection with the other parts of the charge.

2. The second exception is as follows: "(2) In refusing to grant a new trial on the ground that there was no evidence to sustain the verdict; it being submitted that there was no evidence of negligence on the part of the defendant company, and no evidence that plaintiff was injured by the negligence of the defendant." It is unquestionably the duty of the master to provide a reasonably safe place for the servant to work, and when there is testimony tending to show that there was a failure of duty in this respect, in consequence of which the servant sustained injury, it makes out a prima facie case of negligence on the part of the master. Richey v. Ry., 69 S. C. 387, 48 S. E. 285; Branch v. Ry., 35 S. C. 405, 14 S. E. 808. In considering whether the place where the plaintiff was employed to work was safe, it must be remembered that he was of very tender years for such work. There was testimony tending to show that the usual and proper place for a waste box was on the spare floor, and out of the way of the machinery, while in this case the waste box was only a few inches away from the revolving pulley in which the plaintiff's foot was caught; that the machinery was not covered or protected; that the pulley was not solid, but had spokes, thereby permitting the plaintiff's foot to be caught in it, while the pulleys of other mills were solid; that the defendant had been notified of the danger to children employed to put waste in the box, but disregarded the admonition. These facts afforded at least some evidence that the surroundings where the plaintiff was required to discharge his duties was not a safe place for a person of his tender years to work. This constituted prima facie evidence of negligence, and, when it appeared that the plaintiff was injured by

the machinery while discharging his duties relative to the waste box, the presiding judge properly submitted the case to the jury.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 120)

RAGSDALE v. SOUTHERN RY.

(Supreme Court of South Carolina. July 11, 1905.)

1. EVIDENCE — ADMISSIONS — LETTERS OF AGENT.

Where agency has been established, letters signed by the agent as such are admissible in evidence against his principal.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 887–915.]

2. WITNESS — REFRESHING MEMORY — USE OF MEMORANDUM.

Where a witness relies on a paper to refresh his memory, and testifies only because he finds the facts contained therein, the paper cannot be used, unless it be an original paper made by the witness himself and contemporaneously with the transaction referred to.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 892.]

3. CARRIERS—LOSS OF FREIGHT — EVIDENCE—CORRESPONDENCE OF AGENTS.

In an action against a carrier for deficiency in cotton seed shipped, where there was evidence that the witness was the agent of defendant railroad at a certain station, and had received as such agent the cotton seed in question, and that one B. was agent of defendant, and as such had weighed the cotton seed in question, it was competent for the witness to testify what the correspondence was between these two agents of the defendant in regard to such matter.

4. EVIDENCE—DECLARATION OF AGENT.

An agent can bind his principal by declarations made within the scope of his employment.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 887–915.]

5. APPEAL—HARMLESS ERROR.

Admission of immaterial irrelevant evidence is harmless error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4154, 4155.]

6. SAME—REVIEW.

The Supreme Court cannot consider facts set out in the exceptions alone.

Appeal from Common Pleas Circuit Court of Fairfield County; Watts, Judge.

Action by John K. Ragsdale against the Southern Railway. From judgment on circuit affirming magistrate's judgment, defendant appeals. Affirmed.

R. H. Welch, for appellant. Ragsdale & Dixon, for respondent.

POPE, C. J. This is the second time this case has been before this court. See 69 S. C. 429, 48 S. E. 466. It comes before us now upon exceptions against the admissibility of certain testimony, and in alleged charges of the magistrate which were sustained by the circuit judge. The plaintiff sued for the recovery of $75.78 for an alleged deficiency of 10,050 pounds of cotton seed, shipped by the plaintiff over defendant's railroad on the 10th October, 1903. After hearing testimony, the jury found a verdict against the defendant for $75.78. Thereupon the defendant appealed to the circuit court. After hearing the cause the circuit judge overruled the exceptions, and affirmed the judgment of the magistrate in every particular, in a short order. From this judgment of the circuit court the defendant appealed to this court on the following grounds: "(1) Because the magistrate erred in allowing the plaintiff to introduce in evidence a letter from D. L. Bryan, signed 'Agent,' dated October 20, 1903, and addressed to 'M. C. Robertson, Manager, Columbia, S. C.,' on the ground that the same was incompetent, irrelevant, and mere hearsay testimony. (2) Because the magistrate erred in allowing the plaintiff to introduce in evidence a letter, signed 'M. C. Robertson, Manager,' dated October 20, 1903, and addressed to 'D. L. Bryan, Esq., Agent, Columbia, S. C.,' on the ground that this testimony was incompetent, irrelevant, and mere hearsay testimony. (3) Because the magistrate erred in not allowing the witness Mr. Cooper to refresh his memory from the paper handed to him, and state whether or not, after being so refreshed, he could testify what his weight of cotton seed in question was, and in not permitting him, after being so refreshed, to testify what the weight of cotton seed was. (4) Because the magistrate erred in allowing the witness Mr. McMeekin to testify as to what Mr. Bryan, in Columbia, telegraphed to him about the consignee as named in the waybill covering the car of seed in question, and allowing the witness to testify as to what he telegraphed in reply to Mr. Bryan, on the ground that the consignee as named in the waybill was in writing, and on the further ground that such evidence was incompetent, irrelevant, and hearsay. (5) Because the magistrate erred in allowing the plaintiff to testify as to certain conversations that passed between him and Mr. McMeekin relative to this shipment of seed; the same being incompetent, irrelevant, and hearsay testimony. (6) Because the magistrate erred in allowing the plaintiff to introduce in evidence a paper from the Southern Cotton Oil Company, which contained a statement purporting to show the settlement which it made with the plaintiff for the seed in question; the same being incompetent, irrelevant, and mere hearsay testimony. (7) Because the magistrate erred in allowing the witness Mr. Moss to testify that he had heard that stealing had taken place from cars in the city of Columbia; the same being incompetent, irrelevant, and hearsay. (8) Because the magistrate in his charge to the jury erred in charging 'That the plaintiff must prove his case by the preponderance of the testimony, and that the defendant must prove its case by the preponderance of the testimony'; the error being that the answer of the defendant was a general denial of plaintiff's complaint, and he was not re-

quired under the pleadings to prove his general denial by the preponderance of the testimony; (9) Because the magistrate erred in not charging the jury the law applicable to the case, he having charged no law whatever, except that the plaintiff must prove his case by a preponderance of the testimony, and the defendant must prove his by a preponderance of the testimony. (10) Because the magistrate erred in refusing to charge the defendant's first request to charge, which was: 'There was no evidence in this case that any seed was lost out of this car by the Southern Railway Company.' (11) Because the magistrate erred in refusing to charge the defendant's third request to charge, which was as follows: 'There is no evidence in this case that the Southern Railway Company lost any of the cotton seed claimed to have been lost.'" We will now pass upon these grounds of appeal.

1. We will consider first and second grounds together. When this court reversed the judgment on the first trial, it was in part because the agency of D. L. Bryan of the defendant at Columbia, S. C., was not proved, and, of course, any declarations of said D. L. Bryan could not be received. However, on the second trial the agency of D. L. Bryan was abundantly proved. So, also, the signature of M. C. Robertson was proved, and, inasmuch as the weight of said cotton seed, showing a net of 34,300 pounds, was admitted by D. L. Bryan as agent, was rendered competent as against the defendant; thus showing a loss of 10,105 pounds of the cotton seed as shipped from Blair's station. This testimony was competent, and these two exceptions are therefore overruled.

2. We will next consider the third ground of appeal. The witness Mr. Cooper, for the defendant, in his testimony stated that "I can't give the weights. * * * I do not remember the weight of the cotton seed." When this witness was handed a copy of the case in the first appeal, which was printed, he was asked to refresh his memory from that, and then to testify as to such weights. This was objected to. In Bank v. Zorn, 14 S. C. 444, 450, 37 Am. Rep. 733, the late Chief Justice Simpson said: "The rule upon this subject, in its broadest outline, embraces two classes of cases: First, where the witness, after referring to the paper, speaks from his own memory, and depends upon his own recollection as to the facts testified to; second, where he relies upon the paper, and testifies only because he finds the facts contained therein. In the first class the paper is always permitted to be used by the witness, without regard to when or by whom made. In the second class, this rule of admission is much more stringent. In fact, it cannot be used, unless it be an original paper made by the witness himself and contemporaneously with the transaction referred to." It seems to us that this matter falls under the second class above referred to. It was not made by the witness himself, and therefore could not be used by him. This exception is overruled.

3. In regard to the fourth ground of appeal, we hold that it was legitimate for Mr. McMeekin to give the testimony referred to. It had been proved that Mr. McMeekin was the agent of the defendant at Blair's Station, and had received as such agent the cotton seed in question, and also that Mr. Bryan was the agent of the defendant, and as such had weighed the cotton seed in question. It was, therefore, competent for Mr. McMeekin to testify what the correspondence was between these two agents of the defendant in this matter. This ground of appeal is therefore overruled.

4. We will next consider the fifth ground of appeal. We think the plaintiff's testimony as to certain conversations between him and Mr. McMeekin as to this shipment of cotton seed was competent. The defendant is bound by the admission of its agent, when made in his line of duty. This exception is therefore overruled.

5. We will next consider the sixth ground of appeal. The testimony here referred to was purely cumulative and did no harm to the defendant. It is overruled.

We will next notice the seventh ground of appeal. The testimony of Mr. Moss that he had heard of stealing from the defendant's cars in Columbia, S. C., could work no real disadvantage to the defendant. It is therefore overruled.

6. We will next consider the eighth ground of appeal; also the ninth. These grounds of appeal relate to the charge of the magistrate to the jury. We find in the "case" no reference to the charge of the magistrate, and nothing from the circuit judge in regard thereto. The only reference to them is in the grounds of appeal themselves. We call to the attention of counsel that this court has frequently held that we cannot consider facts set out in the exceptions alone. State v. Levelle, 36 S. C. 600, 15 S. E. 380; Rucker v. Smoke, 37 S. C. 377, 16 S. E. 40, 34 Am. St. Rep. 758; Lites v. Addison, 27 S. C. 226, 3 S. E. 214; and many other cases. These exceptions are therefore overruled.

We next pass upon the tenth ground of appeal. There was evidence that cotton seed were lost out of this car by the Southern Railway Company. Magistrate did not err as here pointed out. This ground of appeal is overruled.

Finally, we will dispose of the eleventh ground of appeal. We do not think that the magistrate erred as here pointed out. The testimony was before the jury, and the jury alone could settle the issue. Finally, we remark that, under section 368 of the second volume of our Code of Laws, it is required that the "appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits." We

have no doubt that the circuit judge was duly mindful of this provision of our laws when he rendered his judgment herein.

It is the judgment of this court that the judgment of the circuit court be, and it is, affirmed.

(72 S. C. 104)

STATE v. BYRD et al.

(Supreme Court of South Carolina. July 5, 1905.)

1. JURY — DISQUALIFICATION — RELATIONSHIP.

On a trial for murder, a juror, having married the second cousin of deceased, was related to him within the sixth degree by affinity, and was properly rejected.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 414, 417.]

2. SAME—REVIEW ON APPEAL.

A finding by the circuit judge that a juror was not indifferent in the cause is not reviewable where there was evidence to support it.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3075.]

3. HOMICIDE—RESISTING ARREST.

Where defendant was engaged in the commission of a crime which justified his arrest without a warrant, and he shot an officer having authority to arrest him, on a mere attempt to arrest, with knowledge that he was such an officer, he is guilty of a crime.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 144.]

4. CRIMINAL LAW—ARREST WITHOUT WARRANT.

Under Cr. Code 1902, §§ 26, 590, a magistrate has power to arrest without a warrant one committing a misdemeanor in his view.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arrest, §§ 145–148.]

5. SAME—CONSTITUTIONAL LAW.

Cr. Code 1902, §§ 26, 590, authorizing a magistrate to arrest one committing a misdemeanor in his presence without a warrant, is not a violation of Const. art. 1, § 16, protecting a citizen from unreasonable seizure of his person and property.

6. HOMICIDE—MALICE.

The use of a deadly weapon raises the presumption of malice.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 269.]

7. SAME—INSTRUCTIONS.

On a trial for murder, an instruction that "malice is the intentional killing of a person, knowing it to be wrong, intending to do it, knowing it to be wrong," without legal excuse, is not error, especially when followed by a full statement of the law as to manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 588.]

8. SAME—SELF-DEFENSE.

In a charge on self-defense, error in saying that defendants were not obliged to show the existence of one of the elements of self-defense is favorable to defendants, and they cannot complain thereof.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 717.]

9. CRIMINAL LAW—FAILURE TO INSTRUCT.

Where the court had charged as to whether defendants were guilty of crime in hauling contraband liquor, failure to charge that, if the liquor was not contraband, they were not guilty, was not error, where no request was made.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2005.]

Appeal from General Sessions Circuit Court of Greenville County; Townsend, Judge.

Fletcher Byrd and Palmer Chriswell were indicted for murder. From sentence on verdict of guilty, defendants appeal. Affirmed.

Adam C. Welborn, for appellants. J. E. Boggs and Asst. Atty. Gen. Townsend, for the State.

WOODS, J. The defendants were convicted of the murder of William J. Cox, and sentenced to be executed on July 1, 1904. By their appeal they first submit that the circuit judge erred in rejecting the jurors L. W. Watson and Guy L. Watson. The former, having married the second cousin of deceased, was related to him within the sixth degree by affinity, and was properly rejected. State v. Brock, 61 S. C. 141, 39 S. E. 359. Upon being examined on his voir dire, the juror Guy L. Watson said he had expressed or formed an opinion as to the guilt or innocence of the accused, but that it might be changed by evidence; that he was without prejudice, and he thought he could render a fair and impartial verdict. He married a fourth cousin of deceased. The finding by the circuit judge that the juror was not indifferent in the cause is not reviewable by this court, as it was not without evidence to support it. State v. Williamson, 65 S. C. 242, 43 S. E. 671; State v. Hayes, 69 S. C. 295, 48 S. E. 251.

The state offered evidence tending to prove these facts: William J. Cox, the deceased, was a magistrate. The defendants on the day of the homicide drove by his store in a buggy. B. M. Austin, at one time a dispensary constable, was at the store, and, seeing there was some article in the buggy covered with oilcloth, reached the conclusion it was contraband liquor. Thereupon he and Cox followed the defendants, and, after passing them in the road, turned back, intending to arrest them. They then discovered that the defendants had gotten out of the buggy and were standing behind it, each with a pistol in his hand. Austin drew his gun and ordered the defendants to throw up their hands. They complied with the demand, but Palmer Chriswell retreated about 30 yards, and then fired on Austin, who was following him. Austin, the only eyewitness examined, testified that while he was thus engaged with Chriswell he heard firing from the direction of the point where Cox had approached Fletcher Byrd, the other defendant, and there Cox was found shot to death. At the time of the attempted arrest the defendants were not told that Cox was an officer, but the defendant Fletcher Byrd subsequently stated to the witnesses Hughes and Gertrude Gillion that the shooting was with "spies," or dispensary constables. The evidence tended to show further that the defendants lived just across the Greenville line, in Laurens county, and were not unfamiliar with the country and

its inhabitants. The defendants offered no testimony.

It is necessary to quote the first exception to the charge in full. It is that the circuit court erred "in not charging the jury that if they believe from the evidence that the deceased, William J. Cox, and D. M. Austin drove by the defendants, and across the road in front of them, drew a gun on them, ordered them to halt and surrender, had no warrant for their arrest, and never told the defendants they were officers of the law, the defendants would have the right to resist arrest, and that they would have the right to kill the assailants, or either of them, if necessary to save themselves from serious bodily harm or death." It might be sufficient to say that the circuit judge stated to the jury fully his views as to the limitations of the right of an officer to arrest without warrant, and was not requested to charge defendants' view of the law as stated in this exception. But the exception could not, in any view, be sustained, because, if the deceased had the right to make the arrest, the defendants could not justify resistance on the ground that he did not give them express notice at the time that he was an officer, if that fact was already known to them (State v. Williams, 36 S. C. 493, 15 S. E. 554); and there was, as we have seen, some evidence from which such knowledge might be inferred. But aside from this, the facts afford no basis for a charge as to the right of self-defense of those threatened with death or serious bodily harm. There is nothing in the evidence to suggest an intention of the deceased magistrate to do more than arrest the defendants, and, even if the attempted arrest was illegal, an illegal arrest is usually nothing more than a trespass, and does not excuse a homicide committed in resisting it, unless it appears that such killing was necessary in self-defense; that is, to prevent death or great bodily harm. 25 A. & E. Ency. Law (2d Ed.) 279, and authorities cited. As a general rule, it is the duty of an officer, in making an arrest, to state his official character and the cause of the arrest, exhibiting his warrant, if he has one; but the failure to take these precautions does not justify homicide or even physical resistance by the party arrested, without inquiry on his part as to the authority for his arrest. In State v. Anderson, 1 Hill, 327, 345, which is generally regarded as a case of great authority, a private citizen was killed while attempting to arrest Anderson, in this state, for a murder committed in Georgia. Judge O'Neall says: "The qualification to the general rule to which I have alluded is that where the party making the arrest inform the prisoner of their intention to arrest, or actually make it, and the prisoner makes no demand of the cause, it is not necessary to state it. After Col. Martin informed the prisoner that he and his party were there to arrest him, to avail himself of his want of knowledge of the cause of the intended arrest, he ought to have demanded it. His failure to do so, as well as the facts to which I have already adverted, deprive him of any benefit of this defense." The defendants knew they were actually engaged in the commission of a crime which subjected them to arrest without warrant by a magistrate or certain other officers mentioned in the dispensary law, and when they shot without inquiry they did so at their peril. In the Anderson Case, the court held the crime charged in Georgia was a felony justifying arrest in this state without warrant. The facts of the killing, which was there held to be murder, are strikingly like those adduced in this case, and the view of the court is conclusive of the question here made: "The prisoner's guilt in Georgia was, I think, fully proved by the witness Wheeler. The witness and Goodson were two of a party who were in pursuit of the prisoner and his brother for some offense. They discovered them in the woods, and ordered them to stand. The brother instantly ran, and the prisoner shot Goodson dead. There was nothing in this transaction which made it less than murder. There was no force imposed on the prisoner, not even the touching of his person, or an attempt to lay hands on him. There was no offer or threat to kill or do personal violence to him. He was requested to stand, and, instead of doing as any honest man would have done—standing still and asking 'why he was required to stand?'—he shot and killed Goodson. If, under these circumstances, the homicide is not to be adjudged murder, it will be difficult hereafter to apply to any case Mr. Justice Foster's description of the distinguishing characteristic of murder—'a heart totally devoid of social duty and fatally bent on mischief.'"

The circuit judge charged: "Magistrates may arrest persons whom they see, or who come in their view, of violating the law. They may arrest them or order them arrested without a warrant, but a warrant must be gotten as soon as possible. A magistrate may arrest a person who is violating the law within his view. * * * If you find that the defendants were hauling contraband liquor, that was a violation of the law, and a magistrate would have the right to arrest them without a warrant, if it came within his view." As to this instruction, the defendants take the position that a magistrate may arrest without warrant only for a felony or breach of the peace committed in his presence, and therefore he could not legally arrest one who was hauling contraband liquor in his view, that being only a misdemeanor. Section 26 of the Criminal Code of 1902 authorizes and requires a magistrate, without warrant, to "arrest and commit, if necessary, any person who, in his view, shall perpetrate any crime or misdemeanor whatsoever." State v. Williams, supra. Section 590 of the Criminal Code of 1902 provides: "Any person detected openly or in the act of

violating any of the provisions of this chapter shall be liable to arrest without warrant: provided, a warrant shall be procured within a reasonable time thereafter." The chapter in which this section is found relates to the liquor laws of the state. There was evidence tending to show that the defendants killed the magistrate who was attempting to arrest them while they were perpetrating in his view the crime of transporting contraband liquor from one place to another within this state. See State v. Moody, 70 S. C. 56, 49 S. E. 8. Under section 16 of article 1 of the state Constitution, which protects the citizen from unreasonable seizure of his person and property, there is, no doubt, a limit to the power of the General Assembly to authorize arrest of the citizen without warrant, but we do not think that limit has been reached when an officer is required to arrest without warrant one whom he discovers in the act of violating the criminal law. A full discussion of the authorities on this subject will be found in Burroughs v. Eastman (Mich.) 59 N. W. 817, 24 L. R. A. 859, 45 Am. St. Rep. 419. Jones v. Root, 6 Gray (Mass.) 435, holds constitutional a statute relating to the arrest without warrant of persons transporting contraband liquor, almost exactly the same as section 590 above quoted. "At common law, as a general rule, an arrest could not be made without warrant for an offense less than felony, except for a breach of the peace." 3 Cyc. 880; State v. Sims, 16 S. C. 486. These common-law exceptions to the general rule were based on the principle that the ordinary right of exemption from arrest, except upon warrant, should yield to public necessity. Without such exceptions the due administration of the law would be vitally impaired. As long as exceptions additional to those fixed by the common law fall fairly within the principle from which the common-law exceptions arose, they are not subject to constitutional objection. To hold that the Legislature has no power to prevent crime by requiring an officer to arrest the person actually committing it, without waiting to procure a warrant, and thus allow time for the complete perpetration, would in many cases lead to the practical result that, though the state may punish the criminal, it cannot arrest the perpetration of the crime by laying its hand instantly on the criminal while in the criminal act.

The circuit judge charged: "The use of a deadly weapon presumes malice, but the presumption may be rebutted. So, after all, it is left for the jury to say, from all the facts and circumstances, whether the killing was done with malice, or not." This was in exact accordance with the law as laid down in State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; State v. Jackson, 36 S. C. 487, 15 S. E. 559, 31 Am. St. Rep. 890; and a number of other cases.

The defendants next complain of this sentence in the charge: "Malice is the intentional killing of a person, knowing it to be wrong, intending to do it, knowing it to be wrong, without just legal excuse." This is substantially the same language used by the circuit judge in State v. McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661. As in that case, the word "excuse," as here used, embraced the idea of extenuation, which would reduce the crime from murder to manslaughter, for immediately after this portion of the charge as to malice follows a full statement of the law as to manslaughter, which was so clear that the jury could not fail to understand, if the "excuse" of sudden heat and passion on sufficient legal provocation existed, the offense would be manslaughter, and not murder.

Exception is taken to the opening of the charge on the subject of self-defense for lack of consistency and clearness. The burden was on the defendants to prove all the elements of self-defense. These were clearly laid down in the charge. The error of saying that the defendants were not obliged to show the existence of one of these elements was favorable to the defendants, and they cannot complain that it was immediately corrected.

On the question as to whether the liquor the defendants had was contraband, the circuit judge charged: "If you find that the defendants were hauling contraband liquor, that was a violation of the law; that would be a violation of the law, and the magistrate would have the right to arrest them without a warrant if it came within his view; and if he was satisfied, of his own knowledge, that they were violating the law, he would have the right to arrest them, and would have the right to call in anybody to assist him." There was no request to charge the converse of this proposition, and emphasize the rights of the defendants by an instruction to the effect that the defendants were not subject to arrest for transporting liquor not contraband. The exception which alleges error in this respect therefore cannot be sustained.

The judgment of this court is that the judgment of the circuit court be affirmed, and that the case be remanded to that court for the purpose of having a new day assigned for the execution of the sentence heretofore imposed.

(72 S. C. 124)

McCARTER v. GREENVILLE TRACTION CO.

(Supreme Court of South Carolina. July 11, 1905.)

CARRIERS—EXPULSION OF PASSENGER.

Where a passenger entered a special street car chartered by a particular person, and tendered the amount of his passage, and kept his seat with the knowledge and consent of the conductor, who intended to transport him to his destination, the carrier thereupon waived the right to insist that he was not a passenger, and was liable for his subsequent expulsion.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 981, 982, 1250.]

Appeal from Common Pleas Circuit Court of Greenville County.

Action by E. L. McCarter against the Greenville Traction Company. From judgment for plaintiff, defendant appeals. Affirmed.

M. F. Ansel, for appellant. McCullough & McSwain, for respondent.

GARY, A. J. In order to understand clearly the questions presented by the exceptions, it will be necessary to state the issues raised by the pleadings. The complaint alleges that the defendant is a corporation engaged in the operation of an electric street railway in the city of Greenville as a common carrier of passengers; that on the 15th of September, 1903, the plaintiff, in company with a friend, boarded one of the defendant's cars for the purpose of riding thereon, and thereby became a passenger; that, when the conductor approached the plaintiff to collect the fare, he tendered to the conductor 50 cents in silver (one piece), and requested him to deduct therefrom the charges for two fares, amounting to 10 cents; that the conductor accepted the half dollar, but, not having the return change, tendered it back to the plaintiff, and at the same time told the plaintiff and his friend that they would have to get off the said car; that the conductor gave the signal for the car to stop, and, when it did so, again, in a stern and angry manner, ordered the plaintiff to leave the car, which he did, in order that he might not be subjected to the humiliation of a forcible ejectment, and to prevent a difficulty in the presence of ladies. The answer of the defendant, after denying the allegations of the complaint as therein set out, alleges: "(1) That on the evening of the 15th of September, 1903, this defendant was running a special car from Pendleton street up Washington street, carrying certain passengers who were attending an entertainment on Pendleton street that evening; that it was after the regular schedule hours, and that, while passing up Washington street, the plaintiff and one other young man boarded said car and did offer to pay their fare with a fifty-cent piece; that it being after 11 o'clock in the night, and not having the change on hand, and having failed to get the change from those on the car, the conductor of said car returned the fifty cents back to the plaintiff, and said to him that he could not make the change, but did not order the plaintiff and his friend to get off, nor did he put them off, nor did he stop the car to put them off, but, when the car did stop at Richardson street to take on other passengers, the plaintiff and his friend voluntarily and of their own accord left the car. (2) That this defendant had no intention of putting plaintiff and his friend off the car after they had tendered their fare, and would have carried them on as far as the car went on that trip without charge, if they had not voluntarily left the car themselves. (3) That, when the car stopped at Richardson street to take on other passengers, nothing was said to the plaintiff and his friend about getting off the car, but they did so of their own accord. They made no request at the time to be carried on, whether they paid their fare or not, but this defendant had no intention of putting them off." The jury rendered a verdict in favor of the plaintiff.

The first exception is as follows: "Because the circuit judge erred in charging the jury as follows: 'If a common carrier receives a person on its car, it thereby assumes towards that person all the duties incumbent on a common carrier, irrespective of whether the particular car happens to be a regular schedule car or a special car; the testimony having shown that the car that the plaintiff desired to ride upon was a special car, chartered by a particular person, and was run that night after regular schedule hours and for a particular purpose.'" The answer shows that the plaintiff tendered the amount of his passage and kept his seat in the special car with the knowledge and consent of the conductor, who intended to transport him to his destination. The defendant, therefore, waived the right to insist upon the fact that he was not a passenger. Adger v. Railway, 71 S. C. 213, 50 S. E. 783; Blair v. Jeffries, Dud. 59. In 5 Enc. of Law, 540, the rule is thus stated: "A company is not bound to receive or transport passengers on special trains running for the particular purposes of the road, and not for the convenience of the traveling public; but, if it does receive a person on such train for carriage, it assumes toward him the same duties as if he had been a passenger traveling on the same train on its regular trips." In Wagner v. Railway, 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156, it was held that a passenger, allowed to ride on a special train, who has no notice of any want of authority to grant the permission, whether he pays fare or not, in the absence of collusion between him and the conductor to defraud the company of its fare, becomes a passenger, and as such is entitled to have the train on which he travels managed with the care that is due from a common carrier

to passengers on a train of that character. The case of White v. Railway, 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489, decides that a corporation chartered as a common carrier, with power to use steamboats as well as trains, is liable as a carrier to a passenger on one of its boats, though the boat is at the time let for an excursion, where it also lets the crew which is still in its pay and subject to be discharged or changed by it.

This ruling disposes of the remaining exceptions. It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 150)

TOWN COUNCIL OF DUE WEST v. FULLER.

(Supreme Court of South Carolina. July 12, 1905.)

MUNICIPAL COURTS — NOTICE OF APPEAL — CONSTITUTIONAL LAW.

Civ. Code 1902, § 2005, requiring that on appeal from municipal court in cities and towns of less than 5,000 inhabitants notice shall be given within 24 hours after judgment, is constitutional.

Appeal from Common Pleas Circuit Court of Abbeville County; Townsend, Judge.

Indictment by town council of Due West against Isaac Fuller. From order of circuit court sustaining judgment of municipal court, defendant appeals. Affirmed.

M. P. De Bruhl and P. Greene, for appellant. W. N. Graydon, for respondent.

POPE, C. J. The defendant was tried before the town council of the town of Due West, in Abbeville county, on March 9, 1904. He was charged with stealing two turkeys from Cy. Ellis on February 28, 1904, and was arrested by Intendant Reid and Warden Kennedy, and was tried immediately. No warrant or summons was issued. The defendant was found guilty by said town council, and sentenced to pay a fine of $20 or work 30 days on the chain gang. On the fifth day after the trial the defendant served a notice of appeal. Pending the hearing of the appeal, the defendant under the writ of habeas corpus was granted bail upon entering into a bond in the sum of $200, conditioned for his appearance to abide the decision of the court upon his appeal. The grounds of appeal were as follows: "(1) Because said town council had no jurisdiction to try defendant for the offense charged; said offense, if any, having been committed beyond the incorporate limits of said town of Due West. (2) Because the testimony showed that the defendant did not live within the town of Due West, and the prosecutor testified that the turkeys were taken from his house, which is outside of the town of Due West. (3) Because the defendant objected to being tried by said town council, said council had no jurisdiction. (4) Because the defendant gave a reasonable explanation of his possession of said turkeys, alleged to have been stolen, and it was error to convict him of the larceny."

The case was heard by his honor, Judge Townsend, at the court of general sessions of Abbeville county. The attorney for the town council presented as a preliminary objection to the hearing of the appeal that the record showed that the notice of appeal was not served until the fifth day after the defendant was convicted, and that, inasmuch as the law required that such appeal must be taken within 24 hours after the decision of the town council, the court could not take jurisdiction of the same. The circuit judge held that this objection was fatal to the appellant, and passed the following judgment: "This case came before the court upon an appeal from the judgment of the town council of Due West, convicting the defendant of petit larceny. Objection was interposed by the town council that the appeal had not been taken in time. The defendant was convicted on March 9, 1904, and notice of appeal was not served until the fifth day after. The defendant claims that section 2005 of the Civil Code is unconstitutional, on the ground that the city of Charleston is exempted from the operation of said section. Said section provides that appeals may be taken from the judgment of municipal courts, provided that in towns of less than 5,000 inhabitants notice of appeal must be served within 24 hours after judgment. In case of towns or cities of over 5,000 inhabitants, the state allows 5 days in which to appeal. I cannot hold that the section above quoted (section 2005) is unconstitutional. For this reason I hold that the appeal was not taken in time, and that this court is without jurisdiction to consider this appeal. If I thought that I could consider the facts, I would hold that the testimony does not show that the defendant is guilty of the charge, or that the larceny was committed within the town of Due West; but under my view of the law, I do not think I have any right to pass any order on the merits, but only to dismiss the appeal, which is hereby ordered."

The defendant then appealed to this court on grounds which were intended to raise some questions that were before the circuit judge. Of course, the appeal from the circuit court to this court is intended to test the accuracy and legality of the conclusions of the circuit judge. No matter how thoroughly questions may be argued, unless they are based upon alleged errors of the circuit court, we cannot consider them. We agree with the circuit judge that, if we could consider the facts, we might reach the same conclusion as that of the circuit judge, but by law we are debarred from the power of considering the facts. The circuit judge has held that there is no appeal by the defend-

ant that he could consider, because the appeal was not taken until after the expiration of 5 days, and of course, therefore, it was not within 24 hours after the rendition of the judgment of the town council of Due West. This is a palpable violation of the provisions of section 2005 of our Civil Code of 1902. We cannot hold that section unconstitutional.

It is the judgment of this court that the judgment of the circuit court be affirmed, without prejudice, however, to the appellant's rights to test the jurisdiction of the magistrate by some other proceeding, if he may be so advised.

(72 S. C. 182)

WISE v. WERTS.

(Supreme Court of South Carolina. July 11, 1905.)

MAGISTRATES—JURISDICTION.

Under Const. art. 5, § 23, providing that every civil action cognizable by a magistrate shall be brought before a magistrate in the county where defendant resides, magistrates in a county have jurisdiction coextensive with the county, which is not limited to actions in the township where the defendant resides.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 146.]

Appeal from Common Pleas Circuit Court of Saluda County; Watts, Judge.

Action by M. C. Wise against R. Lee Werts. From circuit judgment reversing magistrate's judgment, plaintiff appeals. Reversed.

J. N. O. Gregory, for appellant. B. B. Evans, for respondent.

POPE, C. J. This appeal relates to the claim and delivery of a white spotted pointer bird dog. The cause was heard by M. L. Little, Esq., the magistrate of the Fifth judicial district of Saluda county. The property was valued at $65. Both the plaintiff and defendant resided in the Third judicial district of Saluda county. The magistrate, after hearing the testimony and argument of counsel, gave judgment for the plaintiff for the delivery of the dog by the defendant, or, upon failure to do so, for the payment of $65, the value of the dog.

An appeal was taken therefrom by the defendant, which came on for trial before Judge R. C. Watts, who gave judgment reversing the magistrate's judgment, upon the ground that the magistrate was without jurisdiction of the defendant, the said R. D. Werts, in that he resided in the Third judicial district of Saluda county, S. C., and that Magistrate M. L. Little's judicial powers were confined by statute to the limits of No. 5 township, in said county. An appeal was then taken to this court, upon the ground that the circuit judge erred in his judgment.

The appeal must be sustained. By the provisions of section 23 of article 5 of our state Constitution, it is required: "Every civil action, cognizable by magistrates, shall be brought before a magistrate in the county where the defendant resides." The defendant resided in Saluda county, and the action brought against him was a civil action. But it was claimed that the jurisdiction of the magistrate was limited to actions in the township where defendant resided. This was an error; for in section 1039 of volume 1 of the Code of Laws of this state there is no limit to the jurisdiction of magistrates of Saluda county, provided the defendant resided in that county. They have jurisdiction in civil actions throughout the county. The circuit judge was in error.

It is the judgment of this court that the judgment of the circuit court be reversed and that the judgment of Magistrate M. L. Little be affirmed.

(72 S. C. 175)

WHITE et al. v. BRITTON et al.

(Supreme Court of South Carolina. July 18, 1905.)

1. RECEIVER—APPOINTMENT.

The appointment of a receiver by a judge on his own motion, without an application by either party, is error.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 43.]

2. SAME—CLERK OF COURT.

It is error in a circuit judge to appoint a clerk of court receiver.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 73–75.]

Appeal from Common Pleas Circuit Court of Sumter County; Purdy, Judge.

Action by Francis C. White and others against John J. Britton, Jr., and others. From other appointing a receiver, plaintiffs appeal. Reversed.

Jennings & Manning and Haynsworth & Haynsworth, for appellants. Lee & Moise, for respondents.

POPE, C. J. The plaintiffs are the heirs at law of James G. White, deceased, and as such brought this action against the defendants as trustees of the Zoar Church, wherein they sought that the defendants, their servants and agents, be restrained and enjoined from in any way interfering with the plaintiffs, their tenants, agents, or assigns, in the lawful and peaceable possession of an acre of land lying on the west side of the Sumter & Manning public road, extending 49 yards on the public road, and extending back westward 100 yards in the shape of a parallelogram, bounded on the north by land of W. J. Lawrence, east by the said public road, and south and west by lands of the grantor.

The plaintiffs alleged that the said acre of land was conveyed to said defendants by their ancestor, James G. White, to have and to hold for the use of the preacher or preachers who are now serving, and who may hereafter serve, the Zoar Church (which is one of

the churches within bounds of the South Carolina Conference of the Methodist Episcopal Church South), and for no other purpose, and the same shall revert to the grantor or his heirs, if sought to be disposed of or used for any other purpose; that no preacher of the Zoar Church has occupied the parsonage on said lot of land since January, 1904, but that said preacher now occupies the parsonage of the Oswego circuit; and that the plaintiffs are now in possession of said lot of land, but that the defendants are seeking to interfere with the plaintiffs' possession of said lot of land. Judge Purdy granted an order on the 7th of January, 1905, by which he ordered "that defendants do show cause before me at my office, in the city of Sumter, S. C., on the 25th of January, 1905, at 12 o'clock m., or as soon thereafter as counsel can be heard, why a temporary injunction should not issue restraining the defendants, their agents and servants, from in any way interfering with the plaintiffs, their tenants, agents, and servants, in the said possession of said premises, pending the hearing and determination of the suit herein for permanent injunction therein demanded. It is further ordered that the defendants, their agents and servants, in the meantime be, and they are hereby, restrained and enjoined from in any way interfering with the plaintiffs, their tenants, agents, and servants, in the possession of the said premises."

The defendants filed a petition and some affidavits, in which they virtually contravened all the allegations of the plaintiffs, except, of course, the deed from James G. White and his death. Thereupon Judge Purdy, on the 9th of January, 1905, issued the following order: "It is ordered that said petition be forthwith filed in said cause, and that pending the rule to show cause heretofore issued herein, and for the purpose of preserving the status quo as to the property referred to in the complaint, and especially for the purpose of preventing the plaintiffs from putting a negro in possession of said premises, or themselves further entering thereon, the plaintiffs in said action be, and they are hereby, restrained from further entering on or interfering with the said premises, either in person or by their servants or agents, until the hearing of the rule to show cause above referred to, and until the further order of this court in the said cause." The defendants filed their answer on the 16th of January, 1905.

Both sides introduced affidavits, and after argument Judge Purdy issued the following order: "The plaintiffs obtained from me at the commencement of this action a rule to show cause why the defendants should not be enjoined from doing the acts complained of in the complaint, and, pending the rule to show cause, I granted the restraining order, and afterwards made another order seeking to preserve the status of the property as of the time of the commencement of the action. At the hearing the plaintiffs earnestly argued before me that, inasmuch as the plaintiffs made a prima facie showing for the restraining order, it is my duty to grant it. It is the tendency of the courts to grant a restraining order where a prima facie showing is made, and I had made up my mind that such an order would follow in this case, and so announced to the plaintiffs' attorney. Before filing the order, however, I reviewed the case from every standpoint, taking into consideration, not only the fact that the defendants have taken issue with the plaintiffs at almost every point, but particularly the fact that the feelings of the parties are very much aroused and the peace of the neighborhood endangered. Under all these circumstances I have determined to take another course, and, while my power to do so may be questioned or doubted, I shall make an order which I deem best for the interest, not only of the litigants, but for the community in which they live, as I regard the latter of as great, if not greater, importance than the former, and in this case certainly greater than any issue involved. The land and the buildings are claimed by both parties. The defendants have some personal effects in the building, and the court will take charge of and endeavor to preserve all of the property. It is therefore ordered, on the motion of the court, that L. I. Parrott be, and he is hereby, appointed as receiver to take charge of the premises described in the complaint, and to hold the same, subject to the further order of this court, with the usual powers of receivers in such cases." From this order the plaintiffs appealed. The grounds of appeal, while seven in number, virtually raise questions as to the appointment of a receiver, with an objection to the person so appointed; and, secondly, that the order appealed from was error, because it overlooked the restraining orders already granted pending the hearing of the motion to grant a temporary injunction.

On the first point we remark that it was error in the circuit judge to appoint L. I. Parrott, Esq., who was clerk of the court of common pleas of Sumter county. We think the circuit judge ought not to have appointed Mr. Parrott, who was clerk of court, to the office of receiver. While this precise point has not been before this court, yet when the circuit judge, in the case of Kilgore v. Hair, 19 S. C. 486, passed an order appointing the master as receiver, this court promptly overruled such appointment. The same objection exists as to the appointment of the clerk as receiver. But there are other objections to the proposed order of the circuit judge herein. This action was taken without notice to any party to the cause. Again, no application by either party was made for such appointment. Again, it was made by the circuit judge on his own motion, and so stated in the body of the judge's order. See subdivisions 1, 7, 8, and 9 of section 265 of

the Code of Civil Procedure of 1902 of this state. Having so determined, it will be useless to consider the other points raised, as the judge did not decide the same.

It is the judgment of this court that the order of the circuit court appealed from be, and the same is, vacated and set aside; and the action is remitted to the circuit court.

(72 S. C. 151)

CANNADY v. MARTIN.

(Supreme Court of South Carolina. July 11, 1905.)

1. JUDGMENT — DEFAULT — DISCRETION OF COURT.

Under Code Civ. Proc. § 195, it is within the discretion of the court to excuse default in serving answer in time by mail.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 265.]

2. EQUITY—JUDGMENT BY DEFAULT.

Under Code Civ. Proc. § 267, in a suit in equity plaintiff was not entitled to judgment by default of answer, but was bound to establish her right to the relief sought to the satisfaction of the chancellor.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 228.]

Appeal from Common Pleas Circuit Court of Laurens County.

Action by May F. Cannady against Anna L. Martin. From judgment for defendant, plaintiff appeals. Affirmed.

Mr. Cannady, for appellant. F. P. McGowan, for respondent.

JONES, J. The record for appeal in this case was prepared by a layman and is very imperfect. The action was brought by plaintiff, as devisee of Nancy M. Maddox, deceased, to set aside a sale to defendant by the probate judge of Laurens county of the devised land for the payment of the debts of the testatrix, on the ground that such debts had, previous to the sale, been paid by a tender of the amounts due to the creditors, and also to the probate court. The summons was served September 10, 1904, and on December 9, 1904, judgment for costs was entered in favor of defendant against the plaintiff; the judgment reciting that the issues in the case had been tried, and judgment for the defendant rendered, on the 25th day of November, 1904. This appeal is from the ruling and judgment of the presiding judge on these grounds: "(1) His honor erred in not granting judgment to plaintiff upon the plea of not being answered by the defendant, as set out in the complaint. (2) His honor erred in granting judgment to the defendant, claiming to have answered by mail and not by personal service, as the law directs answers shall be served. (3) His honor erred in sustaining the defendant, without affidavit, to have answered."

1. We find nothing in the case upon which these exceptions can be based. Even if it be true that the defendant, in attempting to serve answer by mail, failed to serve properly and in time, it was within the discretion of the court to excuse the default and permit answer (Code Civ. Proc. § 195); and we are bound to assume from the record before us that the issues, which were determined against plaintiff, were tried either upon answer or demurrer.

2. Besides, as this was a case in equity, plaintiff was not entitled to judgment by default of answer, but was bound to establish her right to the relief sought to the satisfaction of the chancellor (Code Civ. Proc. § 267); and the record shows that this was not done, but, on the contrary, that the issues were determined against the plaintiff.

The judgment of the circuit court is affirmed.

(72 S. C. 97)

KEYS v. WINNSBORO GRANITE CO.

(Supreme Court of South Carolina. July 5, 1905.)

1. INJURY TO SERVANT — DEFECTIVE APPLIANCES.

In an action for injuries to a servant, where there was a failure of one or the other of two appliances, and one of them was known to be defective, there is ground for the jury to draw an inference that it was probably the defective appliance, and not the other, that failed and caused the accident.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 879, 897.]

2. SAME—QUESTION FOR JURY.

Where a servant in charge of the work buys appliances through the superintendent, and on complaint of defect in the appliances he is assured by the superintendent that they are safe and is instructed to use them, whether he was negligent in so doing was a question for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1093.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

A servant is not required to ascertain if appliances furnished are defective, but cannot recover for injuries received from defects when it was his duty to keep the appliances in repair.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 711, 714, 715.]

4. TRIAL—REQUESTS OF COUNSEL.

The failure of the court to analyze the numerous requests of opposing counsel on the same subject, and indicate in logical sequence how they modify each other, is not ground for reversal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 664.]

5. SAME—REPEATING INSTRUCTION.

Repeating the same instruction in different words is not ground for reversal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 513.]

6. INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE.

Where a servant neglects to attend to appliances under his charge, and is injured thereby, he is guilty of contributory negligence, and cannot recover from the master.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 711.]

Appeal from Common Pleas Circuit Court of Fairfield County; Watts, Judge.

Action by J. C. Keys against the Winnsboro Granite Company. From judgment for plaintiff, defendant appeals. Reversed.

The following are the exceptions:

"(1) Because his honor erred in refusing defendant's motion for a nonsuit on the ground that there was no evidence showing negligence on the part of the defendant company, causing or being the proximate cause of the injury complained of by plaintiff; and because he did not hold that there was no evidence to show that the clamps or clips furnished by defendant, which plaintiff had testified were unsuitable, were the cause of the plaintiff's injury, and order a nonsuit.

"(2) Because his honor, in his general charge, charged the jury as follows: 'It was the duty of the defendant company, if the plaintiff was in their employment, if they put him to doing any work, to furnish him with ordinarily reasonably safe and suitable appliances to do that work with, and to keep that machinery and appliances necessary to do any work they put him to doing in reasonably safe and suitable repair'—and then stating that if the defendant company failed in these duties the plaintiff would be entitled to damages. We submit the above was error, and not the law of this case, where the testimony showed that the plaintiff himself was in charge of the machinery and appliances, and it was his duty to keep the same in repair, and it was also his duty to purchase supplies for the machinery department under the superintendent.

"(3) Because his honor erred in charging plaintiff's first request, as follows: 'The rule is well settled that it is the duty of the master to furnish safe and suitable appliances for the performance of the work required of the servant, and also to see that same are kept in proper repair, and hence, where either of these duties have not been performed, there is an omission of duty on the part of the master, which affords at least prima facie evidence of negligence on the part of the master; for these duties cannot be delegated to another so as relieve the master from liability to another for injuries sustained by reason of a failure to perform them properly'—the error in the above charge being, first, in making it the unqualified duty of the master to furnish safe machinery and appliances and to keep the same in repair, without reference to reasonable care; secondly, in excluding from the jury the consideration of the plaintiff's duty under his contract herein to purchase the supplies for the machinery department and to keep all machinery in repair; and, third, in holding that the master was practically liable to the plaintiff, whose duty it was under his contract to purchase machinery and keep all machinery in repair, for his own negligence in the performance of what he had contracted to do.

"(4) Because his honor erred in charging the plaintiff's second, third, and fourth requests to charge, as the same are set out in the case; the error being that said requests are wholly inapplicable to the case at bar, wherein it was admitted that the plaintiff himself was in charge of all the machinery in question, and it was his duty to keep the same in repair.

"(5) Because his honor erred in failing or refusing to charge the defendant's fourth request as follows: '(4) The master is not bound to change his machinery in order to apply every new invention or supposed improvement in appliances. He may even use a machine or appliance shown to be less safe than another in general use, without being liable to his servant for the use of it.'

"(6) Because his honor erred in failing to charge defendant's seventh request without qualification, and in nullifying said seventh request with a statement wholly inconsistent with it. Said request and statement being as follows: '(7) Where, from the nature of his employment and the duties of the servant in regard to the machinery and appliances, he has equally as good means of knowing the defects and dangers of the machinery as the master, and is under the same obligation to discover them as the master, and he continues to use them, then he assumes the risk of the use of such machinery and appliances, and he cannot recover for injuries received in their use.' I charge you that with this addition: 'That it is the duty of the master to furnish reasonably safe and suitable appliances for the servant to do work with, and to keep these reasonably safe and in reasonably good repair; and the servant has the right to assume that the master has done his duty in furnishing him reasonably safe and suitable appliances and keeping them in reasonably safe and suitable repair.'

"(7) Because his honor erred in charging the jury at plaintiff's request as follows: 'Contributory negligence is not a defense to the master's duty to furnish safe appliances.'"

A. G. Brice, for appellant. Buchanan & Hanahan, for respondent.

WOODS, J. The plaintiff recovered judgment for personal injuries received from the slipping of a guy wire on a derrick in charge of the plaintiff as an employé of the defendant, and used by him at the time in hoisting a heavy piece of timber. The lower end of the guy wire was made fast by passing it through a staple driven into a rock or tree, reversing it, and clamping it to the body of the wire by clips or cleats. The plaintiff undertook to prove these cleats were of insufficient strength, and that the accident resulted from the wire slipping through them.

1. The first question raised by the appeal is whether there was error in refusing to grant a motion for a nonsuit made on the grounds: (1) That there was a total failure of evidence to establish these essential facts; and (2) that, even if the injury was due to

defective cleats, the defects were known to plaintiff, who was in charge of the work, and he assumed the risk. The testimony on both sides is to the effect that the accident was due either to the drawing of the staple or the slipping of the cleats. If nothing more had been proved, the plaintiff's case would have depended on the proposition that defect in machinery is to be presumed from the mere fact that it failed or broke in the use; and, as this doctrine has been rejected in this state, a nonsuit would have been proper. Gentry v. Ry. Co., 66 S. C. 256, 44 S. E. 728; Edgens v. Gaffney Manufacturing Co., 69 S. C. 530, 48 S. E. 538. But the plaintiff testified the cleats "were not large enough, and they were home-made clips, and were not safe, in my opinion," and there was no evidence whatever of any defect in the staples. When it is proved an injury occurred from the failure of one or the other of two appliances, and one of them was known to be defective, ground is furnished for the jury to draw a reasonable inference that it was probably the defective appliance, and not the other, that failed and caused the accident. Mahoney v. Railroad Co., 60 Hun, 586, 15 N. Y. Supp. 501, affirmed in 30 N. E. 864; Bromly v. Birmingham M. R. Co. (Ala.) 11 South. 341.

2. It is true plaintiff was in charge of all machinery of the company, but he was under the supervision of the superintendent, and could purchase supplies for the machinery department only through the superintendent, who was the representative of the company at the quarry. There was evidence that when plaintiff complained to the superintendent of the defective cleats, he was assured they were safe and instructed to use them. It was a question for the jury to determine whether the plaintiff was negligent in using the cleats after receiving this assurance from his superior. Mew v. Railway Co., 55 S. C. 100, 32 S. E. 828. For these reasons it would have been error to grant the motion for nonsuit on either ground.

3, 4. When the whole charge is considered, it will be found the jury were instructed the defendant was required to furnish only reasonably safe and suitable appliances; that it is not in general the duty of the servant to ascertain whether the appliances furnished by the master are safe and suitable, but that a servant could not recover for injuries resulting from defects, when it was the servant's own duty, under the terms of his employment, to supervise and keep the machinery and appliances in repair. That this is a correct statement of the law will not be doubted. It is true the main charge and the various requests relating to the same subject were not given in strict connection, but this, however desirable, is not always attainable. The failure to analyze and connect the numerous requests of the opposing counsel on the same subject and indicate in logical sequence how they modify each other, does not afford ground for reversal. The second, third, fourth, sixth, and seventh exceptions are therefore overruled.

5. The defendant submits there was error in refusing to charge: "The master is not bound to change his machinery in order to apply every new invention or supposed improvement in appliances. He may even use a machine or appliance shown to be less safe than another in general use without being liable to his servant for the use of it." The jury had already been instructed: "The master is not bound to furnish his servant with machinery and appliances that are absolutely safe; nor is he required by law to furnish machinery or appliances of the latest or best pattern and design. The master's duty in law is fulfilled if he furnished such machinery and appliances to his servants as a reasonable and prudent person would ordinarily use under the same or similar circumstances." There was no error in failing to repeat the instruction in different words.

6. The most serious question arises under the charge as to contributory negligence. The plaintiff testified that it took from two to four cleats to hold each guy wire, and that he thought he had only two on when the accident happened. The witness Beauchamp, foreman of the quarry, testified he had never seen a derrick put up with only two clips to each wire, that it was safer to use three clips, and that he would never stop with less than that number. It will be seen, therefore, that the issue of contributory negligence was vital. On this subject the following instruction was given at defendant's request: "If the jury believe from the evidence that the plaintiff was in charge of the erection of the derrick on the day he was hurt, and if the jury further believe that sufficient clamps were not put on that wire to hold it, or that the clamps when put on the wire were not properly fastened and tightened, and that the neglect to properly attend to these matters, or either of them, in any degree contributed to or caused the accident to the plaintiff, then he cannot recover, and your verdict will be for the defendant." The defendant could not have asked a more explicit statement of the law. After this, however, and near the conclusion of the charge, plaintiff's counsel arose, and at his instance the following instruction was given: "If, through the omission of the defendant to furnish reasonably safe machinery and appliances, the plaintiff was hurt, the company is liable, unless he assumed the risk. Assumption of risk must be proved by the defendant. *Contributory negligence is not a defense to the master's duty to furnish safe appliances.*" The sentence we have italicized was directly contrary to the instruction before given as to contributory negligence, and in the circumstances it could hardly have failed to impress the jury as a change and correction of

the previous instruction, taking from them the consideration of that defense. The proposition first charged was correct. Darwin v. R. R. Co., 23 S. C. 531, 55 Am. Rep. 32; Bodie v. Ry. Co., 61 S. C. 484, 39 S. E. 715.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause be remanded for a new trial.

(73 S. C. 112)

DAVIS v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. July 6, 1905.)

1. NEGLIGENCE—EXPLOSION OF BOILER—EVIDENCE.

In an action for injuries caused by the explosion of a boiler on defendant's premises, evidence that it was old, rusty, and cracked, and also patched, was sufficient to take the case to the jury on the question of negligence.

2. SAME—LIABILITY OF OWNER.

The liability of an owner of a boiler for injuries caused to his neighbor's property by its explosion is based on his negligence in its use.

Appeal from Common Pleas Circuit Court of Laurens County; Ellis G. Graydon, Special Judge.

Action by Annie C. Davis against the Charleston & Western Carolina Railway Company. From order of nonsuit, plaintiff appeals. Reversed.

F. P. McGowan, for appellant. Simpson & Cooper, for respondent.

WOODS, J. The complaint alleged the explosion of a boiler owned by defendant and operated at a coal chute on its right of way, by which the boiler, hot water, steam, cinders, gravel, and mud were thrown upon plaintiff's premises, knocking down his fence and causing other damage, to the amount of $150. It was charged that the explosion was due to the negligence of the plaintiff in operating "an old, worn-out, and defective boiler." A nonsuit was granted on the grounds (1) that there was not evidence to establish that the boiler was defective; and (2) that, if defective, there was no evidence the explosion was due to the alleged defect.

1. The plaintiff testified as follows: "Q. Describe what kind of a place it exploded, the rent in the boiler? A. It exploded from the bottom. I expect it is about 12 or 14 inches where it exploded; busted up. Q. How did the iron look where the burst was, as being an old or a new piece of iron? A. It looked like an old piece of iron. From the appearance of the patches there it was not new iron. It had been patched several times. Q. How about any rust, corrosion, scales on it? A. Yes, sir; it was an old boiler, rusty and scaly. Q. You say it was old and rusty, and had been patched? A. Yes, sir." This was followed by the evidence of the witness J. W. Hargrove: "Q. Where was the patch on the boiler? A. It was on the front part. Q. Near the fire flues? A. Down near the fire flues. Q. No pressure on it there from the steam? A. I don't know anything about that. It was patched. The crack came all around, and a patch was put over it under the fire box, where it burnt out. Q. Was the explosion near the patch? A. Right at the patch, where it was burnt out. Q. Was the patch torn off? A. It was all torn off." It is true, the patch did not necessarily indicate that the boiler was not reasonably safe; but evidence that it was not only patched, but old, rusty, and scaly, and cracked all around, was certainly sufficient to carry the case to the jury on the issue of negligence in operating a defective machine. Explosion at the point on the boiler where the alleged defects existed is evidence from which the jury could reasonably infer it was due to these defects. That the accident was due to defective machinery may be proved by circumstances, as well as by direct proof. Edgens v. Gaffney Manufacturing Co., 69 S. C. 530, 48 S. E. 538; Keys v. Winnsboro Granite Co. (S. C.) 51 S. E. 549. Indeed, after destruction of a machine by explosion, it would generally be impossible to adduce more direct evidence of the cause of the accident than to prove the giving way of the machine at the point where it was defective. For these reasons we think the circuit judge was in error in granting the nonsuit.

2. The further position taken, that the defendant is liable at all events for the damages to the plaintiff, without respect to whether he was negligent or not, cannot be sustained. "Inasmuch as a person has the unquestionable right to use his own property as he chooses, doing with it as he pleases, the mere doing of an act upon one's own property cannot, of itself, render one liable for an action for damages; but such liability must depend upon the manner in which it is done, or upon the nature of the act itself. If it is done so negligently as that thereby his neighbor's property is injured, or if the act is such that its natural and probable consequences would be to injure the neighbor's property, then the wrong consists in the negligence with which the act is done, or that the act itself was of such a nature as that the natural and probable consequences of it would be to injure the neighbor." Gregory v. Layton, 36 S. C. 93, 99, 15 S. E. 352. 355, 31 Am. St. Rep. 857. It cannot be said, in the absence of negligence, that explosion is the natural and probable consequence of operating a steam boiler.

The judgment of this court is that the judgment of the circuit court be reversed.

(72 S. C. 162)

SHARPTON v. AUGUSTA & A. RY. CO.

(Supreme Court of South Carolina. July 18, 1905.)

1. STREET RAILROADS — INJURIES TO PERSON ON TRACK—INTOXICATION.
In an action for injuries to plaintiff by being struck by a street car, where defendant pleaded contributory negligence, in that plaintiff went on defendant's right of way, defendant may show, by questions to plaintiff and by his declarations, that he was intoxicated at the time of the accident.

2. SAME.
In actions for injuries to plaintiff on street car track, under the plea of a general denial, defendant may show plaintiff's intoxication, as tending to show contributory negligence, and to impair his credibility.

3. SAME—INSTRUCTIONS.
An instruction, in an action for injuries to a person on a street car track, that voluntary intoxication will not excuse a traveler for failure to exercise ordinary care at a railroad crossing, is properly refused as inapplicable to the case.

4. TRIAL—EXAMINATION OF WITNESS.
Where a witness testified that he did not write a letter, nor procure any one to write it for him, it cannot be read to him, in order to ask him if he did not write it.

5. SAME—EXCLUSION OF WITNESS.
Where witnesses have been excluded by order of the court, it is discretionary with the trial judge to allow a witness who has been in the courtroom a part of the time to be examined on matters not testified to by the other witnesses.

6. SAME—NECESSITY OF EXCEPTIONS.
It is incumbent on one desiring to base exceptions on error of judge in stating issues raised by the pleadings to call the court's attention to it.

7. APPEAL—INSTRUCTIONS—HARMLESS ERROR.
An instruction charging a proposition of law inapplicable to the facts is not ground for reversal, where the jury could not have been misled thereby.

8. TRIAL—INSTRUCTIONS—EXCEPTIONS.
Where the court charges a proper request, but commits error in remarks in connection therewith, an exception to such remarks must be taken to procure consideration on appeal.

9. STREET RAILROAD—CARE REQUIRED.
The motoneer on an electric car must keep an ordinary lookout for persons on the track.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 174.]

Appeal from Common Pleas Circuit Court of Aiken County; Townsend, Judge.

Action by B. C. Sharpton against the Augusta & Aiken Railway Company. From judgment for plaintiff, defendant appeals. Reversed.

The third request of the plaintiff, referred to in the fourteenth exception, is as follows:

"'(3) If the jury should find that those in charge of the electric car in question failed to keep an ordinary lookout for persons upon the track, or that they failed to give such signals as would have given a warning of the approach of said car, and that the injury of the plaintiff (if he has been injured at all) was caused thereby, and that such failure to keep an ordinary lookout or such failure to give signals amounted to willfulness and wantonness, or was such a disregard of the consequences and of the rights of others as to amount to willfulness and wantonness, then the jury is charged that the defendant company would be liable for damages for any injury that may have resulted to the plaintiff through such misconduct.' I charge you that."

The defendant's exceptions are:

"(1) Because the court erred in refusing to allow counsel for defendant to ask the plaintiff, while a witness on the stand on cross-examination: 'Were you under the influence of liquor at the time you were hit by the car?' Such ruling was error: (a) Because it was the right of the defendant, upon cross-examination, to thoroughly sift the witness. (b) Because it was the right of the defendant to show what was the mental condition of the witness at the time that the acts he was testifying about occurred. (c) Because it was the right of the defendant to show that the witness was, at the time of the occurrence of the acts testified about, incompetent to have seen or heard and become conscious of the same. (d) Because it was the right of the defendant to show what was the condition of the plaintiff at the time he went upon the right of way of the defendant, so that the jury could properly estimate whether it was negligence on the part of the plaintiff to enter upon the said right of way at that time, and in his then condition. (e) Because the defendant had the right, under a general denial, to show that the injury was caused alone by the negligence of plaintiff. (f) Because the refusal to allow said question was an abuse of discretion on the part of the court.

"(2) Because the court erred in refusing to allow counsel for the defendant to propound to the plaintiff, as a witness on cross-examination, the following question: 'Did you not say to Dr. Shaw at the same time, in that conversation, that you were drunk when you received your hurt?' Such ruling was error: (a) Because it was the right of the defendant, upon cross-examination, to thoroughly sift the witness. (b) Because it was the right of the defendant to show the mental condition of the witness at the time that the acts he was testifying about occurred. (c) Because it was the right of the defendant to show that the witness was, at the time of the occurrence of the acts testified about, incompetent to have seen or heard and become conscious of the same. (d) Because it was the right of the defendant to show what was the condition of the plaintiff at the time he went upon the right of way of the defendant, so that the jury could properly estimate whether it was negligence on the part of the plaintiff to enter upon the said right of way at that time and in his then condition. (e) Because the defendant had the right, under a general denial, to show that the injury was caused alone by the negligence of plaintiff. (f) Because the refusal to allow said question was

an abuse of discretion on the part of the court. (g) Because it was the right of defendant to lay the foundation for impeachment.

"(3) Because the court erred in refusing to allow counsel for defendant to read to George Burgess, a witness for plaintiff, the contents of a letter, for the purpose of asking the witness whether or not he had authorized the said letter to be written; the said letter reading as follows:

" 'Lagrange, Ga., August 21, 1903.

" 'Mr. G. H. Conklin—Dear Sir Your letter just rec. to day and answer at once. Mr. Sharpenter offered me $25.00 if I would swear I saw the car strike him and he was in S. C. I was in Ga. at work in Clarks Mill. that is what I know about it. Mr. Sharpenter said that he had one man that was going to swear for him. I don't remember his name onley his given name is Joe but I can show him to you when I come. Mr. Sharpenter wanted me to swear that he wanted me to go get him some whiskey that day that he had not drank any thing. I had not seen him in 3 or 4 weeks before the axedent and I saw him about 6 weeks after that. this is all I know about it just like I am writing. Any time that you need me I will come at once will tell you the same when I get thair that I have told you now.

" 'I remain yours sincerely,

" 'Gorg Burgess.

" 'Lagrange Ga.'

"This ruling was error: (a) Because it was necessary to disclose to the witness the contents of the letter, with its date, and the place from which it was written, so as to lay the foundation for impeachment or contradiction. (b) Because this was a proper method of identifying the letter for the purpose of subsequent use. (c) Because it was proper to thus prove the letter in order to contradict the previous testimony of the witness.

"(4) Because the court refused to allow counsel for defendant to prove by several witnesses that the plaintiff was drunk at the time of the alleged injury. Such ruling was error: (a) Because it was the right of the defendant to show the mental condition of the plaintiff at the time that the acts he testified about occurred. (b) Because it was the right of the defendant to show that the plaintiff was, at the time of the occurrence of the acts he testified about, incompetent to have seen or heard and become conscious of the same. (c) Because it was the right of the defendant to show what was the condition of the plaintiff at the time he went upon the right of way of the defendant, so that the jury could properly estimate whether it was negligence on the part of the plaintiff to enter upon the said right of way at the time and in his then condition. (d) Because the defendant had the right, under a general denial, to show that the injury was caused alone by the negligence of plaintiff.

"(5) Because the court erred in refusing to allow counsel for the defendant to examine George H. Conklin as a witness in behalf of the defendant, under the following circumstances: At the beginning of the case, at the instance of defendant, the witnesses on both sides had been sequestered. At that time it was not anticipated that Mr. Conklin would be used as a witness, and he remained in the courtroom during the trial on that day, during which time the only witnesses examined were the plaintiff and Dr. Butler. During the next day, Mr. Conklin was not only not in the courtroom, but was not in Aiken until after the noon recess, and was not in the courtroom at all until called as a witness. He was offered as a witness to testify only to facts that were brought out by the witnesses who had testified while he was out of the courtroom, and out of the city of Aiken, and was not to testify in connection with any facts that were testified to or about by the plaintiff or Dr. Butler. The errors in this are: (a) That, the reason for the rule having failed, the rule should fail. (b) Because in the interest of justice all testimony that serves to elucidate the issues should be heard. (c) Because, by allowing such testimony, no improper advantage could possibly be had by the defendant over the plaintiff.

"(6) Because the court erred in the following charge to the jury: 'When a party is charged with negligence only, punitive damages cannot be given unless the negligence amounts to recklessness; then punitive damages can be given.' The error in such charge is that punitive damages are not recoverable unless the act of negligence be willful, wanton, or malicious, or so reckless as to be equivalent to wantonness. Negligence that amounts to recklessness is not sufficient to sustain punitive damages.

"(7) Because the court erred in charging the jury that 'the plaintiff charged that * * * he was struck by a car of the company, and was injured bodily, and suffered bodily and mental anguish'; the error in such charge being that the complaint does not set forth any claim for mental anguish.

"(8) Because the court erred in refusing to give the following written request, presented by defendant: 'Voluntary intoxication will not excuse a traveler for failure to exercise ordinary care at a crossing.' Such refusal was error, because if the plaintiff's injury was caused solely by his negligence, and such negligence was due to his intoxication, the jury should have been instructed as requested. Further, this instruction should have been given, in order for the jury to properly pass upon the question as to whether or not the plaintiff was negligent in going on and remaining on defendant's right of way.

"(9) Because the court erred in charging the jury as follows: 'While a railroad company cannot lose its right of way by alienation or prescription, because of the public

interest in its holding it for public purposes, it may impose upon itself, as a private corporation, duties and obligations to the public or to individuals, by inviting the use of the right of way, or indicating its willingness that it should be used by the public or particular individual. In such circumstances the duty devolves upon the railroad company to exercise ordinary care to avoid injury to those so using the right of way.' The charge was error because there was no evidence to warrant the jury in the conclusion that the defendant had invited or indicated its willingness that defendant's right of way should be used by the public or particular individuals.

"(10) Because the court erred in giving the following charge to the jury: 'That a person coming to a regular station of the railroad company, with the intention of boarding a car, and within a reasonable time before the arrival and departure of the train, becomes in contemplation of law a passenger, and it is a question of fact for the jury, under all the facts and circumstances of the case, to decide whether or not the plaintiff in this case was coming to said station with the intention of becoming a passenger on defendant's car, and within a reasonable time before the arrival and departure of the car; in other words, whether or not the relation of passenger and carrier existed between the plaintiff and the defendant. If the jury finds from the evidence in this case that the plaintiff at the time of his alleged injury, if he was injured, was coming to defendant's station with the intention of becoming a passenger on one of its cars, and within a reasonable time before the arrival and departure of the car, then the jury is charged that the defendant owed the duty of exercising ordinary care not to do the plaintiff an injury.' This charge is error, because the principle involved therein is not applicable to one walking along the right of way of a railroad company, and not on or near the premises constituting the station, and not doing anything that would indicate to the defendant company his intention of becoming a passenger.

"(11) Because the court erred in charging that, if the plaintiff was entitled to recover, he was entitled to recover 'such amount as they may consider will compensate him for his injuries, both present and prospective, and for such pains and suffering as he has experienced, and his necessary expenses incident thereupon, such an additional sum as to them may seem proper by way of smart money or vindictive damages against the defendant company.' Such charge was error, because there was no evidence before the jury to show that any expenses had been incurred, and, if any, how much.

"(12) Because his honor erred, when charging defendant's first request, by remarking thereon that 'that is a proposition of law which has been laid down in "one" of our cases, the case of Haltiwanger v. Railroad Company'; the error being that in his later remarks he led the jury to believe that the above proposition of law had been overruled by later cases, and, having been laid down in but 'one' case, it was not the law, whereas, it is respectfully submitted that the said request was, and still is, the law of this state.

"(13) Because his honor erred, when charging defendant's second and sixth request, by reading in connection therewith to the jury from various cases extracts which were not applicable under the pleadings to this case. There being no allegations in the complaint, except that the injury occurred at or near a public crossing or a traveled place, it was error and misleading to read to the jury the law as to places not a public crossing or a traveled place, but used by the public with the knowledge and acquiescence of the defendant, without protest; and especially was this error because, under all the testimony, the injury occurred neither at a public crossing nor a traveled place.

"(14) Because his honor erred in charging plaintiff's third request, and in his remarks on defendant's third request, by stating that 'the law requires they [meaning trolley cars] shall keep a lookout for objects on the track, and observe that care which an ordinary prudent person would use in doing the same thing'; the error being that they are not required to keep a lookout at all points on the track.

"(15) That his honor erred in refusing to allow the defendant to prove affirmatively by the witness Charles Caldwell, and other witnesses produced by the defendant, that the plaintiff was, at the time of the accident, walking on defendant's railroad track in an intoxicated condition; the error being that under the defendant's plea of contributory negligence it had the right to show to the jury said fact, to be considered by them in passing on the question of the plaintiff's negligence."

Wm. H. Bartlett and Croft & Salley, for appellant. S. McG. Simkins and Hendersons, for respondent.

GARY, A. J. The allegations of the complaint that are material in considering the questions presented by the exceptions are as follows: "That on the evening of the 13th of April, 1903, the plaintiff being at Bath, and desiring to go to Langley, as a passenger on the said railway and its cars, approached one of its regular stopping places near a public crossing—that is to say, a public place traveled by the public and a public crossing, being known as 'Nellom's Crossing'—and that, arriving at said station where the cars of said railway were accustomed to stop to take on passengers, and no car having arrived, he walked up and down the railway track waiting for said car, and when very near said traveled place or pub-

lic crossing, and very near said station, the said public crossing and traveled place and said station being near to each other, a car of said railway company approached this plaintiff, who was unaware of its coming, * * * and negligently, willfully, and wantonly, without any warning to this plaintiff, was rushed upon this plaintiff as he traveled along and near said track, for the purpose of going to said station." The defendant denied the allegations of the complaint, except its corporate existence, and set up the following plea: "For a further defense, defendant alleges that plaintiff was negligent in going upon defendant's right of way, not at a station, and in remaining there, and such negligence contributed as a proximate cause to his injury, if any, without which the injury would not have occurred." The jury rendered a verdict in favor of the plaintiff for $300. The defendant appealed upon exceptions which will be set out in the report of the case.

1. First, second, fourth, and fifteenth exceptions: These exceptions will be considered together. While the plaintiff was on the stand as a witness, he was asked, on cross-examination by defendant's counsel, the question: "Were you under the influence of liquor at the time you were hit by the car?" Also, the question: "Did you not say to Dr. Shaw at the same time in that conversation that you were drunk?" His honor, the presiding judge, ruled that both questions were incompetent. The defendant also offered to introduce the testimony of several witnesses to prove that the plaintiff was intoxicated at the time of the injury, but the presiding judge ruled that the testimony was inadmissible. The defense set up in the answer not only alleged the facts constituting negligence on the part of the plaintiff, but that they contributed as a proximate cause to his injury. One of the definitions of the word "contribute" in Webster's International Dictionary is "to furnish or supply in part"; and as defined in 9 Cyc. it is, to "furnish as a share or constituent part of anything." These definitions show that the defendant intended to allege that the negligence of the plaintiff was a constituent element in causing the injury. The case of Charping v. Toxaway Mills, 70 S. C. 470, 50 S. E. 186, shows that these allegations are sufficient to constitute the defense of contributory negligence. When the defendant alleged contributory negligence on the part of the plaintiff in going upon its right of way, it was not necessary to allege the probative facts relied upon to show such negligence. Evidence of intoxication is competent in determining the question of contributory negligence. Hankinson v. R. R., 41 S. C. 1, 19 S. E. 206. But, even if contributory negligence had not been set up as a defense, evidence of intoxication would have been admissible. Under a general denial a defendant can introduce testimony for the purpose of showing that the injury was caused by the negligence of the plaintiff, as this negatives the allegation of negligence by the defendant. Kennedy v. R. R., 59 S. C. 535, 38 S. E. 169. One laboring under intoxication is not likely to exercise the same degree of care as an ordinary person, and therefore the fact of intoxication should be considered by the jury in determining the question of the plaintiff's negligence. 40 L. R. A. 143, note. Furthermore, the testimony was competent as tending to impair the credibility of the witness, for the reason that persons suffering from intoxication cannot reasonably be expected to give as accurate a statement of the surroundings as those whose intellects are free from such influence. State v. Rhodes, 44 S. C. 325, 21 S. E. 807, 22 S. E. 306; Bedenbaugh v. Ry., 69 S. C. 1, 48 S. E. 53; 30 Enc. of Law, 936; 2 Elliott on Ev. § 765. The circuit judge therefore erred in excluding the testimony.

2. Eighth exception: The defendant requested the presiding judge to charge that "voluntary intoxication will not excuse a traveler for failure to exercise ordinary care at a crossing." The request was properly refused, on the ground that it was inapplicable to the case.

3. Third exception: The witness testified that he did not write the letter; that he could not write, and did not authorize any one to write it for him. The presiding judge ruled correctly that the letter could not be introduced in evidence until it was authenticated.

4. Fifth exception: It was discretionary with the presiding judge whether he would allow the witness to testify under the circumstances, and this court is not satisfied that there was an abuse of discretion.

The sixth exception was abandoned.

5. Seventh exception: If the circuit judge erred in stating the issues raised by the pleadings, it was incumbent on the appellant to call his attention to such error; otherwise, it cannot be made the basis of an exception.

6. Ninth exception: The defendant requested the circuit judge to charge as follows: "The acquiescence by a railroad company in the use of its right of way by pedestrians does not amount to a license to use such right of way." He said: "That is the law. It does not amount to a license. This principle I read to you applies to that." He then charged as set out in the exception. It does not necessarily follow that it is reversible error to charge a proposition of law when there are no facts in the particular case to which it is applicable. Boggero v. Ry., 64 S. C. 104, 41 S. E. 819. In order to constitute reversible error the court must be satisfied that there are reasonable grounds for supposing that the jury may have been misled to the prejudice of the appellant. The court is not satisfied that such grounds exist in this case.

7. Tenth, eleventh, and thirteenth excep-

tions: The appellant does not contend that the principles stated by the presiding judge were erroneous, but that they were in applicable to the facts of this case. These exceptions are disposed of by what was said in considering the ninth exception.

Twelfth exception: His honor charged the request, and if he afterwards charged the law erroneously, that should have been made the basis for an assignment of error.

8. Fourteenth exception: The exception contains only a portion of the charge relating to the question therein stated. When the charge in question is considered in connection with the other portions thereof, it will be found that it is free from the error assigned.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

WOODS, J. (concurring). While I do not think contributory negligence was properly pleaded in the answer according to the rule laid down in Charping v. Toxaway Mill, 70 S. C. 470, 50 S. E. 186, I concur in reversing the judgment because the evidence as to the intoxication of the plaintiff at the time of the accident was admissible in support of the plea that the accident was due entirely to his own negligence, and also as tending to prove lack of accuracy in the statement of the plaintiff as to the circumstances under which he was injured.

(72 S. C. 153)

KETCHIN v. RION et al.

(Supreme Court of South Carolina. July 17, 1905.)

1. EXECUTORS — COMPENSATION — ATTORNEY'S FEES.

An executor sued to construe the will and to have his powers and duties defined. The will undertook to carry into effect the powers vested in the testator by a former will. The court held that the will did not execute the powers conferred on the testator by the former will, and appointed an administrator with the will annexed for the first estate. *Held*, that the executor was entitled to commissions on such funds as had come into his hands belonging to the first estate and his reasonable attorney's fees.

Pope, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Fairfield County; Gage, Judge.

Action by Thos. H. Ketchin, executor of Mary C. Rion, against Preston Rion and others. From an order of the circuit court the defendants, M. H. Rion, as administratrix with will annexed of J. H. Rion and individually, Lucy Rion Boozer, Hanna Rion Williams, Lucile Rion, Willie C. Rion, and M. H. Rion, Jr., appeal. Affirmed.

Buchanan & Hanahan, for appellants. J. E. McDonald, for respondent.

WOODS, J. The question in this case is whether the plaintiff, executor of the will of Mrs. Mary C. Rion, is entitled to have his attorney's fees and commissions paid out of property which in this litigation has been adjudicated to belong, not to the estate of Mrs. Mary C. Rion, but to the estate of James H. Rion. A full statement of the facts will be found in the case as reported in 68 S. C. 260, 47 S. E. 376. James H. Rion by his will appointed his wife, Mary C. Rion, executrix, and left her a large part of his estate for life, with a power of absolute disposition to the children, to be executed as directed in his will. Mrs. Rion undertook to execute the power by her will. Upon her death the plaintiff, as her executor, came into possession of the property she had received from the estate of her husband, and found himself confronted by very grave questions as to its disposition. He sought the instruction of the court by bringing an action to which all those interested in either will were made parties; it being manifestly necessary to construe both wills and fix the rights of the parties under them. So far from any objection being made to a full adjudication of all rights under the will of James H. Rion, it appears that such adjudication was sought by all parties interested, including those who now object to the payment of fees and commissions. In stating the question brought before the court by the executor of Mrs. Rion, his honor, Judge Klugh, said: "The obvious conflict of the provisions of her will with those of her husband's was well calculated to create doubts in the mind of her executor as to his powers and duties. He therefore brings this action against the heirs at law and the devisees and legatees under the wills of Col. Rion and Mrs. Rion, for the purpose of having said wills construed by the court, his own duties defined, and the rights of the several parties under said wills ascertained and adjudicated. The defendants all answered, setting up their respective contentions." To this view of the scope of the action no objection was made by appeal or otherwise. It is true it turned out the plaintiff was not entitled to hold the property as executor of Mrs. Rion, the court having held that there was no valid execution of the power conferred on Mrs. Rion; but he was its custodian in good faith, and with the acquiescence of all concerned initiated the proceeding necessary to determine its ownership. As between himself and the parties interested in the property, he therefore stood in the relation of a trustee in possession, rendering service in its management, bringing it into court, and litigating concerning it with the acquiescence of those interested, and for their benefit. Indeed, in this view, Judge Klugh ordered the plaintiff to act as trustee of the property by adjudging "that the plaintiff, Thomas H. Ketchin, as executor of the will of Mary C. Rion, deceased, do collect and preserve the assets of the estate of James H. Rion, deceased, so far as they have come or may hereafter come into his hands, until the

further order of the court, or until some party duly authorized to receive the same shall demand them of him." To this portion of the decree there was no exception. It seems, therefore, obvious he is entitled to his commissions and reasonable attorney's fees. 2 Perry on Trusts, § 910. The case of Brown v. Vinyard, Bailey, Eq. 460, has no application. There, so far from the court holding and all parties conceding that a necessity existed for the litigation for the benefit of those concerned, the person claiming fees and commissions as executor had undertaken to hold the estate under a forged will against the administrator.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, A. J., and JONES, J., concur.

POPE, C. J. (dissenting). The record contains the following statement of facts: "This was a motion before his honor, Judge George W. Gage, at the February, 1904, term of the court of common pleas of Fairfield county; said motion being made in the original case of Thomas H. Ketchin, as executor of the last will of Mrs. M. C. Rion, v. Preston Rion and others, to allow him commissions on all funds in his hands, both of the estate of Mrs. Rion and Col. Rion, and also a fee for his counsel, to be allowed him out of all funds, whether of the estate of Mrs. Rion or Col. Rion. Plaintiff is the executor of the will of Mrs. Rion, and brought this action to determine and ascertain his powers and duties as such executor under the will of his testatrix. In said action the estate of Col. Rion was not represented by his personal representative. Ketchin v. Rion, 68 S. C. 260, 47 S. E. 376. Subsequent to the filing of the decree of his honor, Judge Klugh, M. H. Rion was duly appointed administratrix cum testamento annexo of the estate of Col. Rion, and was made a party to the original action and to this motion. The estate of Mrs. Rion is of small value. The real and personal property of the estate of James H. Rion, deceased, which was in the possession of Mary C. Rion as executrix and life tenant, was taken possession of by Thomas H. Ketchin, on his qualification as executor of the will of Mary C. Rion, deceased. The real estate was rented out and the rents thereof collected by said Thomas H. Ketchin. It is agreed that the case of Ketchin v. Rion, reported 68 S. C. 260, 47 S. E. 376, is a part of this case. Thomas H. Ketchin has in his hands money belonging to the estate of Col. James H. Rion, amounting to the sum of $429.73, which he claims a right to hold under the decree of Judge Gage as applicable to commissions and counsel fees. All other property of Col. James H. Rion's estate has been turned over by him to M. H. Rion, administratrix."

The following notice of motion was given: "To Attorneys for Defendants [names being omitted]: Take notice that, upon all of the pleadings, testimony, and decree of Judge Klugh, and all other proceedings in the above entitled action, the undersigned will move before his honor, Judge G. W. Gage, presiding judge, on Thursday, the third day of March next, or as soon thereafter as counsel can be heard, to decide whether or not the plaintiff, as executor, is entitled to commissions upon all of the funds heretofore coming into his hands, whether belonging to the estate of Mary C. Rion, deceased, or to James H. Rion, deceased, and also to decide whether or not the plaintiff shall be allowed counsel fees in this action, and for such other and further relief as in the premises may be meet and just. J. E. McDonald, Plaintiff's Attorney."

A hearing upon this motion was had before Judge Gage, and on the 25th day of May, 1904, he passed the following decree: "This is a motion for the plaintiff to allow his counsel, J. E. McDonald, Esq., to be paid a fee out of the funds in his hands as executor, and, further, to allow plaintiff commission upon all funds heretofore coming into his hands, whether belonging to the estate of James H. Rion, or the estate of Mary C. Rion. Judge Klugh tried the case, and concluded his decree with this language: 'That the plaintiff as executor of the will of Mary C. Rion, deceased, out of the assets of her estate pay the cost of this action.' That order has no relevancy to motion now considered. Judge Klugh further ordered 'that the plaintiff, Thomas H. Ketchin, as executor, do collect and preserve the assets of the estate of James H. Rion, deceased, so far as they have come or may hereafter come into his hands, until the further order of this court,' etc. It was contended by Mr. Douglass, attorney for Mrs. Floride C. Barron, that Ketchin stands in the attitude of an executor whose authority has been revoked; that such an executor is not entitled to commissions for paying out the money in his hands to his successor; that neither is Ketchin entitled to commissions for paying the balance in his hands to the newly appointed administrator of the estate of James H. Rion. And he cites Brown v. Vinyard, Bailey, Eq. 460. But in that case the executor, who made the claim, had been acting under a will which turned out to be a forgery. In the case at bar Ketchin found, with reference to the estate of Col. and Mrs. Rion, 'matters were in confusion.' Judge Pope, page 261 of 68 S. C., page 376 of 47 S. E. This action was begun by him to construe both the wills of Col. and Mrs. Rion, and to settle the difference betwixt the two estates. All the heirs and devisees of both parties were before the court. The court directed the plaintiff to act in the premises in language hereinbefore cited. The plaintiff's action was not for his benefit, nor was it ill-advised. He acted for the interest of the Rion heirs. The order of Judge Klugh did not direct him to pay out to any named

agent the funds due to Col. Rion's estate, nor did it direct him to pay any certain sum or any sum that could be made certain. Since the decree was made, an administrator de bonis non has been appointed for Col. Rion's estate, and for the payment of the sums in Ketchin's hands to that agent he is entitled to his commissions. To deny him commissions would put him in the wrong, when nobody has charged him with wrong; and by wrong I mean illegal action. The record discloses the fact that Ketchin has effected at the hands of the court an adjustment betwixt two estates between which there was much confusion. The plaintiff, as an individual, had no interest in such adjustment. His action conferred a benefit on others. Every rightful demand for a fee is founded upon a service rendered by the demandant to him on whom the demand is made; in this case on the estates of Col. and Mrs. Rion for securing such a construction of their wills as they intended and the law required. There are two instances where no fee ought to be allowed: (1) Where the action has been brought in bad faith; and (2) where there was no reasonable ground for the action. In the case at bar there was neither of these elements. I am, therefore, of the opinion that plaintiff is entitled to a fee for his counsel; the amount to be determined by reference, if counsel cannot agree thereon."

From this decree the following exceptions are taken by some of the defendants: "(1) For that his honor erred in holding and adjudging that the plaintiff, Thos. H. Ketchin, as executor of the last will and testament of the late Mrs. Mary C. Rion, is entitled to a fee for his counsel out of the estate of Col. James H. Rion, when said plaintiff was not the legal representative and had no authority to act for the same, nor did he at any time pretend to be acting for said estate; but, on the contrary, all of his acts and doings were as the executor of the last will and testament of Mary C. Rion. (2) For that his honor erred in holding and adjudging that the plaintiff is entitled to a fee for his counsel out of both the estate of Col. Rion and the estate of Mrs. Rion, when it is submitted that plaintiff, not being the legal representative of the estate of Col. Rion, had no right or authority to bring said estate into court, and plaintiff was not acting as the representative of the estate of Col. Rion in bringing his action, but, on the contrary, was acting as the executor of the last will and testament of Mrs. Mary C. Rion in bringing such action; the said action being brought for the benefit of his testatrix, and to define his own powers and authority as executor under the will of Mrs. Rion, and to establish the same, and not to carry out the will of Col. Rion, and plaintiff is not entitled to a fee for his counsel out of the estate of Col. Rion. But, if he is entitled at all to a fee for his counsel, he is entitled to the same out of the estate of his testatrix. (3) For that his honor erred in holding and adjudging that plaintiff is entitled to a fee for his counsel for bringing the action of Thos. H. Ketchin, as Executor of the Last Will and Testament of Mary C. Rion, v. Preston Rion and Others, when the same was brought for the benefit of the estate which he represented and to define his powers and authority under said will, which was declared null and void by the court. (4) For that his honor erred in holding and adjudging 'that since the decree was made an administrator de bonis non has been appointed for Col. Rion's estate, and for the payment of the sums in Ketchin's hands to that agent he was entitled to his commission,' when he should have held that plaintiff is not entitled to commissions out of Col. Rion's estate for the payment of such sums of money as belonged to the estate of Col. Rion in his hands, which he pays over to the duly appointed administrator of Col. Rion's estate."

We will now consider these exceptions in their order. Probably one of the most delicate duties of this court is to settle questions relating to fees. Where persons are sui juris, that matter is determined by contract, expressed or implied; but whenever the office of administrator, executor, guardian, committee, or any other trustee, brings the matter of counsel fees charged or to be paid, or as already paid, the nicest care is required to deal out exact justice as between the parties affected. Indeed, we know of no cases where judges should be firmer than such as these. A distinction is made in those cases where the trustee acts upon his own judgment in bringing the estate of his cestui que trust in court, and those cases where such trustee is forced into court at the suit of others. In Turnipseed v. Sirrine, 60 S. C. 281, 38 S. E. 426, it was said: "The court will scrutinize with great care the circumstances surrounding each particular case to determine, first, the good faith of the trustee in his conduct as to the employment of such counsel; second, that such counsel so employed actually rendered the services in behalf of the trust estate; and, third, that the fees paid were reasonably worth the sums paid by the trustee." Thomas H. Ketchin was not the executor of Col. Rion's estate. Any services he may have rendered that estate were voluntary. Indeed, his suit was brought to take from such estate all that was left thereof by his testatrix, Mrs. Mary C. Rion. That the result was at variance with his purpose is not to be added to his credit. The only possible connection that he may be said to legally occupy to the estate of Col. Rion is where Judge Klugh ordered that he should collect and preserve the assets of the estate of James H. Rion, deceased, so far as they have come or may hereafter come into his hands, until the further order of this court. From so much of Judge Klug's decree there was no appeal.

All parties, therefore, to the action of Ketchin v. Rion and Others, 68 S. C. 260, 47 S. E. 376, are bound by so much of Judge Klugh's decree.

While, therefore, we are inclined to hold that there is no obligation under which the parties of this action rest as to the payment of a general counsel fee, or as to the payment of commissions to this executor, Ketchin, for moneys paid and received up to the 1st day of September, 1903, yet we think that this executor, Ketchin, is entitled to commissions on sums collected by him either from choses in action and rents from 1st of September, 1903, up to the time when the administratrix, Miss Margaret H. Rion, qualified as administratrix de bonis non, etc., of Col. James H. Rion, deceased, and to such fees as were necessary to make the collections herein referred to under Judge Klugh's decree as aforesaid. Beyond these, we cannot consent that counsel fees and commissions for the plaintiff shall be paid out of the estate of Col. James H. Rion, deceased. We therefore sustain first exception of the defendants, and from necessity, therefore, we also sustain the second, third, and fourth grounds of appeal. It will be necessary, therefore, that the commissions due to the plaintiff on all sums collected from 1st September, 1903, to the date when Miss Margaret H. Rion qualified as administratrix of her father's estate, shall be paid, and any reasonable counsel fee for his attorney in such said collections, shall be paid out of the sum of $429.73 now in his hands belonging to Col. Rion's estate, and after such payment that the balance thereof shall be paid to Miss M. H. Rion, as said administratrix.

I think the circuit judgment should be modified.

(72 S. C. 114)

HOLLINGSWORTH v. SOUTHERN RY.

(Supreme Court of South Carolina. July 10, 1905.)

CARRIERS—INJURY TO PASSENGER—EVIDENCE.

Where plaintiff was sick on the train, but made no complaint, and when the train was approaching her station the brakeman called out that station twice, whereupon plaintiff arose, and, without knowing what she was doing, left the train while in rapid motion, it showed no negligence on the part of the railroad.

Appeal from Common Pleas Circuit Court of Anderson County; Townsend, Judge.

Action by Margaret E. Hollingsworth against the Southern Railway. From order of nonsuit, plaintiff appeals. Affirmed.

Breazeale & Rucker, for appellant. T. P. Cothran, for respondent.

WOODS, J. The plaintiff seeks to recover damages for personal injuries received in stepping or falling from defendant's train while a passenger from Piedmont to Pelzer. The appeal is from an order of nonsuit.

The facts bearing on the issue were: The plaintiff was sick on the train, but made no complaint, and gave no manifestation of her indisposition beyond leaning her head on her hand. When the train was approaching Pelzer, the brakeman called out that station twice, whereupon the plaintiff arose, and, without knowing what she was doing, undertook to leave the train while it was still in rapid motion, meeting the brakeman on her way to the door, who stood aside for her to pass. In thus leaving the car she was thrown violently to the ground and injured.

The negligence charged is (1) that the brakeman, by calling out the station and standing aside, invited the plaintiff to get off, while the car was in motion, and (2) that the defendant should have known plaintiff's physical condition and taken special precautions for her safety. It need hardly be said that a brakeman's call of a station before a train stops is understood by all to mean that the train is about to stop at the station called, and is not an invitation to leave the train before the stop has been made. There was nothing whatever to indicate to the brakeman that the plaintiff was not in her senses and approaching the door, in order to be ready to get off the instant the stop was actually made. This practice is an everyday fact, and gives no indication of anything more than the usual and almost universal impatience to get off the car.

The judgment of this court is that the judgment of the circuit court be affirmed.

(72 S. C. 179)

BRANTLEY et al. v. BITTLE et al.

(Supreme Court of South Carolina. July 18, 1905.)

1. WILL—CONSTRUCTION—NATURE OF ESTATE.
Testator devised land to A. and B. for life, on the death of either to the survivor for life, and on the death of both to be equally divided among testator's heirs, "the child or children of the deceased parent taking the share to which his, her, or their parent would have been entitled if living." *Held*, that those who were heirs of testator at his death shared per capita, but the share of an heir who died after testator, and before falling in of the life estate, passed to the children of the heir, and not to his grantee.

2. SAME.
Where testator devised his land to certain persons for life, and at their death to be equally divided among his heirs, the child of the deceased parent taking the share of his parent, the share of an heir who dies without children goes to the other heirs of testator, and such inherited interest passes to the grantee of such heirs.

3. JUDGMENT—RENEWAL AGAINST ADMINISTRATOR.
Under Civ. Code 1902, § 2449, providing that no judgment shall constitute a lien on real estate after 20 years, and that, if the holder of any such lien shall, during its continuance, file with the record of the judgment a note of payment on account or acknowledgment of the debt, it shall continue the lien for 20 years from the date of such payment or acknowledgment, but that nothing shall affect the duration of liens of judgments as prescribed by Code Civ. Proc. § 309, a judgment cannot be renewed against the administrator of a judgment debtor by his acquiescence after the expiration of 20 years from the death of the judgment debtor.

4. APPEAL—NECESSITY OF NOTICE.
Where a defendant served certain exceptions, but failed to serve notice of an intent to appeal, the exceptions cannot be considered.

Appeal from Common Pleas Circuit Court of Chesterfield County; Watts, Judge.

Action by Jno. H. Brantley and others against J. Westley Bittle and others. From circuit decree defendants J. Westley Bittle and Mary U. Liles appeal. Modified.

Stevenson & Matheson and Edward McIver, for appellant J. Wesley Bittle. W. P. Pollock, for respondents and for appellant Mary U. Liles.

GARY, A. J. This is an action for partition and to enjoin the enforcement of a judgment rendered against the testator in 1867, and revived in 1900 against the administrator of his estate. The appeal raises the question as to the validity of the judgment, and involves the construction of the testator's will. John Bittle made his will in 1868, and died prior to the 22d of February, 1871, as the will was admitted to probate on that day. The fifth clause of the will is as follows: "Fifth: I give and bequeath to my daughters, Roxana Bittle and Emily Vick (widow of Albert Vick, deceased,) the whole of the remainder of my estate, both real and personal, to have, hold and enjoy the same jointly during their natural lives, and upon the death of either of my said daughters (Roxana or Emily), it is my will and desire that that portion of my estate to which she was entitled at her death shall go to the one then surviving (Roxana or Emily), and at the death of the other, it is my will and desire that the whole of my estate, both real and personal, be equally divided among all my heirs, share and share alike, my grandson, Franklin Bittle, son of my daughter, Emily Vick, taking an equal share with the other of my heirs, the child or children of any deceased parent taking the share to which his, her or their parent would have been entitled, if living." The testator left surviving him eight children, viz., Eliza J. Brantley, Elmira Long, Narcissa Buchanan, Emily Vick, Roxana Bittle, Mary Ulsey Liles, Irvin Bittle, and John W. Bittle; also three grandchildren, children of his deceased son Burrel Bittle. He likewise left surviving him his grandson Franklin Bittle, an illegitimate son of Emily Vick. Franklin Bittle and certain of the heirs conveyed their rights in the testator's estate to John W. Bittle, Eliza J. Brantley, one of the parties making said conveyances, died, leaving children, before the surviving life tenant. The surviving life tenant died on the 31st of May, 1900.

The first question that will be considered is whether the children of Eliza J. Brantley, who conveyed her share to John W. Bittle, have any interest in the estate under the will of the testator. His honor the circuit judge ruled upon this question as follows: "The referee held that under the clause of the will set out above the children of the testator who were alive at the time of the death of the testator, and Franklin Bittle, who was specially provided for in the will the same as the children of the testator, and the children of Burrel Bittle, collectively representing their father, took a vested fee in remainder, and that 'it therefore follows that if, during currency of the life estates, any of these remaindermen conveyed away his or her interest in said estate, the purchaser of such interest took a good title thereto, and the children of such remaindermen have now no interest or title thereto.' It seems clear that the testator, by the use of the word 'heirs,' meant heirs taking per stirpes, which in this case means the same as 'children,' and immediately upon the death of testator the title to the realty which is herein sought to be partitioned vested in these children of testator, who were surviving at the time of his death, and in the children of Burrel Bittle (his deceased son), and in Franklin Bittle, jointly. They took a vested, transmissible interest in remainder, and, were it not for the use of the words, 'the child or children of a deceased parent taking the share to which his, her or their parent would have been entitled if living,' it might be construed to be a vested, transmissible indefeasible fee in remainder; but by the use of the words

quoted above from the will the testator provided for another class to take as executory devisees in case any of the first class, his children or 'heirs,' as intended by the terms of the will, should die during the life estate, leaving children. If any of his children who were surviving at his death should die during the life estate leaving children, then the interest of such child of the testator which had been vested would be divested, and the children of such deceased child would take as executory devisees by substitution. And as the grantee of any such deceased child of the testator could not take any greater interest in the estate than his grantor had, as by the death of any child or 'heir' of the testator during the life estate leaving child or children the fee would be divested, and by substitution vested in such child or children as executory devisees, it necessarily follows that the title to an interest given by a child or 'heir' of testator who died during the life estate leaving child or children would not constitute good title, but, on the contrary, the child or children of such child or 'heir' of testator would take the title which had been in the parent. These views are fully sustained by the case of Brown v. McCall, 44 S. C. 504, 22 S. E. 823, and the case of Rutledge v. Fishburne, 66 S. C. 155, 44 S. E. 564, 97 Am. St. Rep. 757."

The appellant contends that the words, "the child or children of any deceased parent, taking the share to which his, her or their parent would have been entitled if living," have reference to the children of the testator dying during his lifetime, and not to the heirs dying after his death and before the falling in of the life estates; that those words were used for the purpose of showing that the division among his heirs was to be made per stirpes, and not per capita. These words were not intended to show the proportions in which those answering the description of heirs at the death of the testator should take, for in that case they would be inconsistent with the provision that the estate should be "equally divided" among such heirs, "share and share alike," and there is no necessity for resorting to such construction. Full force and effect can be given to both provisions by construing the said words in the last sentence of the foregoing clause as intending that the child or children should take the share of the heir who died after the testator and before the falling in of the life estates. Under our construction of the will, the circuit judge erred in ruling that the word "heirs" was used in the sense of "children." It was therefore necessary to resort to the statute of distribution for the purpose of ascertaining who were the testator's heirs. When there is a devise to a class, and it is necessary to resort to the statute of distribution for the purpose of ascertaining who compose the class, it will also be necessary to consult the statute in order to determine the proportions in which the individuals take, unless the context of the will shows in what proportions the testator intended they should take. The words "equally divided" and "share and share alike" manifest the intention of the testator that those answering the description of "heirs" at his death should take per capita, and not per stirpes. Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716; Dukes v. Faulk, 37 S. C. 255, 16 S. E. 122, 34 Am. St. Rep. 745. The decree of the circuit judge as to the question under consideration (except in the respects indicated) is satisfactory to this court, for the reasons therein stated, and his conclusion is fully sustained by the authorities which he cites, to which may be added the case of Woodley v. Calhoun, 69 S. C. 285, 48 S. E. 272. The exceptions raising this question are overruled, as they do not assign error in the ruling that the heirs take per stirpes, instead of per capita.

Roxana Bittle and Irvin Bittle died, without leaving children, about the year 1873. Thereafter Eliza J. Brantley conveyed to John W. Bittle "all the right, title, interest, claim and demand which she had of, in and to all the undivided estate of John Bittle, either in possession or expectancy." She died before the death of the last life tenant, leaving children. The question for consideration is whether the shares which Eliza J. Brantley took as one of the heirs of Roxana Bittle and Irvin Bittle passed by her conveyance to John W. Bittle, or descended to her children at the time of her death, under the provision of the will that they should take by substitution in case the parent died before the falling in of the life estates. The language of the deed is comprehensive enough to show an intention on the part of Eliza J. Brantley to convey the said shares. There are no words in the will manifesting an intention to create cross-remainders between those to whom the property was devised. The shares which Eliza J. Brantley inherited from her brother and sister were not subject to the provisions of the will, and she had the right to dispose of them as she saw fit. The principles applicable in such cases are stated in Boykin v. Boykin, 21 S. C. 513; Dickson v. Dickson, 23 S. C. 216; McGee v. Hall, 26 S. C. 179, 1 S. E. 711; and Gordon v. Gordon, 32 S. C. 563, 11 S. E. 334. The exceptions raising this question are sustained.

The record contains the following statement of facts: "The judgment of C. J. Lilly against John Bittle, the testator, was obtained in 1867. Nothing appears to have been done to keep this judgment alive until the year 1900, when A. H. Buchanan was appointed administrator de bonis non, with the will annexed, and was served with summons to renew. It is presumed that the personal estate of John Bittle was fully administered by the executors. No effort was even made to renew this judgment against them or any of them. It does not appear when

the last one of them died. There is an assignment upon the original execution, dated May 3d, 1873, of this judgment to J. W. Bittle, and it is still owned by him. Upon the service of summons upon Buchanan he made default, and thereupon an order to renew was taken. The heirs were not made parties to this proceeding, though it appears they endeavored to be heard thereon. The issue, which is raised in the complaint in this case is that the judgment is presumed to be paid from lapse of time, and is not now a lien on the lands of the estate. This issue is now before us." The referee decided the issue against the appellant John W. Bittle. His honor the circuit judge simply adopted the report of the referee in this respect, and made it the judgment of the court.

The appellant's seventh and eighth exceptions are as follows: "(7) The circuit judge erred in holding that the renewal of the judgment of Lilly v. Bittle against the administrator de bonis non of John Bittle, did not revive that judgment and its lien upon the land of John Bittle's estate. (8) The circuit judge erred in holding that the revival of a judgment and renewal of the execution against the personal representative of the deceased, where such judgment was granted prior to 1868, although the proceedings to revive the same were commenced more than twenty years after the entry of the judgment, did not revive the lien of said judgment." The appellant relies upon the cases of McNair v. Ingraham, 21 S. C. 70; Leitner v. Metz, 32 S. C. 383, 10 S. E. 1082; Rowland v. Shockley, 43 S. C. 246, 21 S. E. 21; and Woodward v. Woodward, 39 S. C. 259, 17 S. E. 638, 39 Am. St. Rep. 716. We do not deem it necessary to discuss said authorities at length, as neither they nor the recent cases of Gregory v. Perry, 71 S. C. 246, 50 S. E. 787, or Anderson v. Baughman, 69 S. C. 38, 48 S. E. 38, sustain the proposition that a judgment recovered against a debtor during his lifetime can be revived against the administrator of his estate when the summons for renewal was not issued against the administrator within 20 years after the death of the judgment debtor, and when the right of action on the judgment was barred at the time the summons was issued. In the case of Haselden v. Whitesides, 2 Strob. 353, Mr. Justice Withers, in behalf of the court, uses this language: "It is not to be overlooked that the inclination of the courts, in modern times at least, is not to look with favor upon legal representatives, who by new promises prevent the bar of the statute, or who fail to plead it, in cases where it may be applied. In this tendency is to be seen a regard for distributees, legatees, and heirs whose interests are directly involved. If my recollection be correct, it has been announced by the equity jurisdiction that the representative of an estate ought to plead the statute against a demand that is barred." The proceedings for renewal of a judgment are in the nature of an action (Adams v. Richardson, 32 S. C. 139, 10 S. E. 931), and it is the duty of an administrator to plead payment, or any other defense which shows that the right of action on the judgment is barred. The rule governing the presumption of payment is thus clearly stated in Shaw v. Barksdale, 25 S. C. 204, 214: "It seems to us that, where a creditor of an intestate in good faith recovers judgment against the legal representative on a bond or other like obligation before the twenty years have run out, that is a demand for the payment of his debt in the most effectual way against the only person from whom such demand could legally be made, and the judgment is a judicial ascertainment of the fact that the debt is not then paid, and gives a new point from which the currency of the period necessary to presume payment commences, not only in favor of the legal representative, but also in favor of the heir or devisee of the decedent. This doctrine, however, cannot be applied where the action is not commenced until after the twenty years have run out, because in such case the presumption of payment has arisen before any demand in legal form was made by the creditor for the payment of his debt, and before anything was done by any one authorized to represent the estate tending to rebut the presumption. *After the presumption has once arisen, no act of the creditor, or any one assuming to represent the estate of the debtor, can have the effect of creating any new debt, or even reviving the legal obligation of any pre-existing debt, which has once lost such legal obligation by the presumption arising from the lapse of time.*" (Italics ours.) See, also, Wood on Lim. of Actions, § 190.

Furthermore, this case comes within the provisions of section 2449 of the Code of Laws of 1902, which is as follows: "No mortgage or deed having the effect of a mortgage, no judgment, decree or other lien on real estate, shall constitute a lien upon any real estate after the lapse of twenty years from the date of the creation of the same: provided, that if the holder of any such lien or liens as aforesaid shall, at any time during the continuance of such lien, cause to be recorded upon the record of such mortgage or deed having the effect of a mortgage, or shall file with the record of said judgment, decree or other lien, a note of some payment on account, or some written acknowledgment of the debt secured thereby, with the date of such payment or acknowledgment, such mortgage, deed having the effect of a mortgage, judgment, decree or other lien, shall be, and continue to be, a lien for twenty years from the date of the record of any such payment on account or acknowledgment: provided, further, that nothing herein contained shall be construed to affect the duration of the liens of judgments as prescribed by section 309 of the Code of Procedure." This statute was construed in the case of Henry

v. Henry, 31 S. C. 1, 9 S. E. 726. The facts of that case were as follows: In February, 1867, judgment was recovered, and in October, 1887, summons was served on the judgment debtor, requiring him to show cause why the original judgment should not be revived. The defendant, in writing, consented to the renewal, and made affidavit that the judgment was justly and bona fide due, and that no part thereof had been paid. In October, 1887, the judgment was renewed, and execution thereon lodged with the sheriff, and in November, 1887, under this execution, and another in favor of a third party against the defendant, junior to that of the plaintiff, real property was levied upon and sold, and the proceeds held by the sheriff. One Wesley Hornsby and others held an execution, in the hands of the sheriff, next in order of priority to that claimed by the plaintiff, and they demanded that the proceeds of sale be applied to their execution, on the ground "that the renewal of plaintiff's execution was irregular and void; that the judgment was presumed to be paid by lapse of time; that, more than twenty years having elapsed from the time of its original entry to the issuance of the summons to renew the same, it had lost its lien on the real estate of the debtor under the act of December 24, 1879." The circuit court sustained the objections urged against the validity of the judgment, and the order of the circuit court was affirmed by the Supreme Court. The purposes for which the statute of 1879 was enacted are clearly stated by the court in said case. If the devisees in this case have the right to rely upon the objections that were interposed to the validity of the judgment in the case just mentioned, then, under the testimony, the court is bound to hold that the judgment is presumed to have been paid; that it afforded no basis for revival, as the right of action thereon was barred; and consequently that it is no longer a lien on the lands now in their possession. The court, in the case of Brock v. Kirkpatrick, 60 S. C. 322, 346, 38 S. E. 779, 85 Am. St. Rep. 847, recognizes the well-settled principle that the devisees have the right to rely upon the defense that the right of action against the administrator is barred, and quotes with approval the following language from Cleveland v. Mills, 9 S. C. 436: "The only defense, therefore, that could avail the defendants, would have been either to show that there was no such debt due by the testatrix, or that the action thereon against her executor was barred by the statute of limitations, which they might do even though the executor should omit to interpose such a defense (Bird v. Houze, Speers, Eq. 250); or to show such laches on the part of the plaintiff as would deprive him of the right to invoke the equity powers of the court, as in Mobley v. Cureton, 2 S. C. 140; or to have relied upon their own possession for the statutory period, as in Miller v. Mitchell, Bailey, Eq. 437." The facts in the case under consideration clearly show that the judgment creditor was guilty of laches, and that this is a proper case for the court to apply this salutary doctrine. Wagner v. Sanders, 62 S. C. 73, 39 S. E. 950. The exceptions raising this question are overruled.

The defendant, Mary U. Liles, served certain exceptions, which are set out in the record, but, as she failed to serve notice of intention to appeal, the exceptions are not properly before this court for consideration.

It is the judgment of this court that the judgment of the circuit court be modified in the manner indicated, and that in all other respects it be affirmed.

(72 S. C. 137)

TALBERT v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. July 11, 1905.)

1. CARRIERS — INJURY TO PASSENGER — COMPLAINT.

A complaint alleging that plaintiff, a man with only one arm, started, with the conductor, to board the train, and the conductor signaled the train to move, and told plaintiff that he had better get on, and that, when he reached the train, it was moving, and when he attempted to board it he was knocked off by a trunk standing near the car, sufficiently charged negligence on the part of defendant.

2. SAME—TICKET AGENTS.

There is no law requiring a railroad company to have a ticket agent at its ticket office after the train has arrived.

3. SAME—QUESTION FOR JURY.

Whether the statement of a conductor to plaintiff, desiring to board a train, that "I am going; you had better get on the train"—was a warning or an invitation to get on, was a question of fact for the jury, and not to be determined by the court on demurrer.

4. SAME—CONTRIBUTORY NEGLIGENCE.

Whether it was contributory negligence for a man with only one arm to attempt to board a moving train without assistance was a question for the jury.

Appeal from Common Pleas Circuit Court of Edgefield County; Purdy, Judge.

Action by W. M. Talbert against the Charleston & Western Carolina Railway Company. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

The circuit order sustaining demurrer is as follows:

"The defendant demurs to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The reasons assigned by the defendant why the complaint is insufficient to constitute a cause of action are set out in defendant's written demurrer, of which due notice in writing was given to the plaintiff's attorneys, and need not be repeated here. A memorandum of the authorities relied upon to sustain the demurrer have also been incorporated in the notice. It is a well-recognized principle that, if any inference of negligence can

be drawn from the complaint, it will be improper to sustain the demurrer. Tested by this rule should the demurrer be sustained? Among other things, the plaintiff alleges the following as the negligent acts of the defendant, namely: Its failure to have a ticket agent at its office; its failure to assist the plaintiff on the train, it being known that he had but one hand; its failure to hold the train until the plaintiff had boarded it; and its failure to remove a large trunk from near its track, or, rather, negligence in permitting the trunk to remain near the track.

"I do not know of any rule of law which requires a railroad company to keep an agent in its office for the sale of tickets after the arrival of a train. It is required to keep its waiting room open at least 30 minutes before the schedule time for the arrival of all passenger trains. This is a regulation of the railroad commission. Besides, it needs the citation of no authority to show that the obtaining of a ticket is now unnecessary to enable one to board a train and become a passenger. Such contention has been ruled adversely to the railroads, and is well known. So that the statement that there was no ticket agent at the depot is not a statement from which negligence would be imputed to the defendant. The statement of the complaint is that the plaintiff arrived at the depot, and that the train was already there, and that it remained there for the space of fully 5 minutes. The provisions of section 2134 of volume 1 of the Code of Laws require all trains to stop at a station for a sufficient length of time to put off its passengers and to allow passengers to get on its train. The court will take notice, therefore, of the fact that five minutes is a sufficient length of time within which the plaintiff in this case might have boarded the train. He therefore occupied the relation of a belated passenger, and to whom the railroad company owed no duty as such. Pickett v. Railroad Company, 69 S. C. 445, 48 S. E. 466.

"Then can negligence be imputed to the railroad company from the other statements set forth in the complaint? It will be noted that the plaintiff says the conductor was in a hurry, and said to him, 'I am going; you had better get on the train.' This is far different from the statement the conductor might have made, namely, 'I am going, but will hold the train for you; go and get on.' If the conductor had made use of any such language as the language here suggested by me, that might have raised a different relationship which had been created by the passenger by reason of his own delay, and the railroad company, in that event, might have been responsible, if the conductor failed to wait a sufficient length of time for the plaintiff to board the train. But in the case at bar the conductor coupled with his statement to the plaintiff a warning, and not an invitation, and the warning is to the effect, 'I am going,' and, therefore, the plaintiff had notice that it was the intention of the conductor to move the train; and the allegation is that when he started out of the depot, he signaled the train forward. There was, therefore, no duty on the part of the conductor arising from anything he did to hold the train for the plaintiff. But it appears, further, from the allegations of the complaint, that the plaintiff and the conductor went out to the train together; and, if we draw a natural inference from the complaint, the plaintiff must have further delayed getting on the train, and was again told by the conductor to get on. No inference of negligence can be drawn from these statements made by the conductor, when they are taken in connection with the plaintiff's conduct and with the warning given by the conductor that he was 'going.' If it was manifestly negligent for the plaintiff, having only one hand, to attempt to board the train without the assistance of the conductor, then he should not have made the attempt, and, if he knew it was negligent to make the attempt with such knowledge, he brought about the injury by his own fault and want of care. In one of our well-considered cases our court has said that a man must use his senses and his eyes, and must use ordinary care under the circumstances not to bring an injury to himself. But it would appear from the statements made in the complaint that up to this point there was not only no negligence on the part of the railroad company, but that from any act done up to this point the plaintiff had not only not received any injury, but was not in danger of receiving any injury by anything that was done or said, and therefore there is up to this point no inference whatsoever of negligence growing out of the facts as stated. The only inference that can be drawn from the complaint is that the plaintiff, with a large trunk before his eyes, put his foot on the lower step of one of the coaches, when he was bound to have known that within the next instant he would be knocked from the train by coming in contact with the trunk; for he says that the trunk was there (it was broad open daylight), and just as he put his foot on the lower step he was violently hurled between the coaches by coming in contact with the trunk. His injury, therefore, was perfectly attributable to his own carelessness in attempting to board the train with this obstacle at hand, when he must have known the consequences that would follow. There is no allegation that he did not see the trunk, and, if there had been such allegation, it must be concluded by natural law that, if he had his eyes open, he could not have failed to have seen such an object, when it be taken in connection with his statement that the train was moving 'slow,' and that as soon as he put his foot upon the first step he was violently struck by the trunk.

"The demurrer is therefore sustained, and the complaint is dismissed."

J. Wm. Thurmond and S. M. Smith, Jr., for appellant. Sheppard Bros., for respondent.

POPE, C. J. This appeal involves the correctness of the order of Judge Purdy sustaining the demurrer of defendant to the plaintiff's complaint, on the ground that the complaint fails to set forth the proper cause of action. It is thus necessary that the complaint and the demurrer thereto shall be reproduced.

The complaint is as follows (the first paragraph being omitted, relating as it does to the corporate character of the defendant):

"(2) That the plaintiff is informed, believes, and alleges that said Charleston & Western Carolina Railway Company operates and owns, and at the time hereinafter mentioned did operate and own, a line of railroad from the city of Augusta, in the state of Georgia, to the city of Spartanburg, in the state of South Carolina, together with tracks, cars, locomotives, and other appurtenances thereto belonging, and said line of railroad runs, and at the times hereinafter mentioned did run, through the county of Edgefield, in which county the defendant has, and at the times hereinafter named did have, offices and agents for the transaction of business.

"(3) That plaintiff is a resident and citizen of the county of Edgefield, state of South Carolina, and has been living in said county for many years.

"(4) That on August 1, 1904, plaintiff was visiting at McCormick, a regular station on defendant's said line of railroad, in Greenwood county, in the state of South Carolina, and, desiring to leave for his home on the passenger train scheduled to leave about 3 o'clock p. m., said plaintiff went out to defendant's depot, near which the passenger train he desired to take had stopped, and plaintiff went in the depot for the purpose of buying a ticket, upon which he meant to become a passenger on said train; but the defendant negligently, carelessly, wantonly, and willfully failed to have a ticket agent in said depot at said time, and the plaintiff waited in said depot for the purpose of buying a ticket for fully five minutes, and plaintiff saw the conductor of said train in the depot, and he told the said conductor, acting in the scope of his duties and agency, the plaintiff's business there, and the said conductor, acting in the scope of his duties and agency, replied: 'The agent is not here. I am going. You had better get on the train' —and seemed to be in a hurry. And then they went out to the train, and the said conductor, acting in the scope of his duties and agency, directed plaintiff again to get on the train; and said conductor saw that plaintiff had only one hand, but negligently, carelessly, wantonly, and willfully failed to see or assist the plaintiff on the train, or hold said train until plaintiff had boarded it, but as soon as they came out of the depot to the train the said conductor signaled the engineer forward, and then boarded said train on the baggage car, and then and there knew the said train would be in motion before plaintiff could board it, and the servants and agents of the defendant, acting in the scope of their duties and agency, and having control and management of the engine and said train of cars, negligently, carelessly, wantonly, and willfully moved the said train of cars before plaintiff could board the same, and, when the nearest passenger coach was some 30 yards from the plaintiff, following the directions, negligently, carelessly, wantonly, and willfully given him by the conductor of the said train, plaintiff ran to meet the passenger coaches, so that he could board the train before it moved rapidly, and reached it while it was moving slow, and he caught the iron arm of the steps leading up to the platform of the coach attached to and being a part of the said train, and, just as he put one foot on the bottom step of the steps leading up to the platform of the front part of the coach attached to and being a part of said train, a large trunk which the defendant then and there negligently, carelessly, wantonly, and willfully permitted to be on the premises of the defendant, where passengers got off and on trains passing on said line of railroad, near the railroad track on which said train was passing, and the trunk struck the plaintiff on the left hip and knocked him around between two of the coaches of the said train, and plaintiff's feet drug along on the railroad track between the coaches, the wheels of the next rear coach almost touching his feet, but finally the plaintiff made a great effort and swung or threw himself around, opposite the arm of the step to which he was holding, and by that time the said train was moving rapidly, and jerked and threw him loose from the train, and he fell hard against the ground, whereby his back was sprained, wrenched, and injured, and made sore, and his nervous system was shocked and deranged, and he was badly frightened, and the agents and servants, acting in the scope of their duties and agency, then and there managing to control said train, negligently, carelessly, wantonly and willfully ran off and left plaintiff, sick and in a crippled condition, and gave him no attention whatever, and he was forced to remain in the town of McCormick until the next day at 10 o'clock a. m., before he could get a train to Parksville, a station on the said line of railroad where he desired to go.

"(5) That the plaintiff went upon the premises of the said defendant for the purpose of becoming a passenger on said train of defendant, and had more money than enough to pay his fare, and actually boarded the said train as aforesaid as a passenger.

"(6) That the plaintiff was sick, and suffering bodily pain and mental anguish from said injuries, which said injuries were caused by the negligence, carelessness, wantonness, and

willfulness of the agents and servants of the defendant, having the control and management of the said train and acting in the scope of their duties and agency, in not having the ticket agent in the stationhouse or depot at the time aforesaid in time for passengers to buy tickets as advertised by the defendant, and by the negligence, carelessness, wantonness, and willfulness of the conductor of said train, acting in the scope of their duties and agency and failing to see and help the plaintiff on the train, when he knew the same would be in motion before the plaintiff could board it, and by the negligence, carelessness, wantonness, and willfulness of the servants and agents in charge of said train, acting in the scope of their duties and agency in moving the said train and starting from said depot before the plaintiff had boarded the train, and by the negligence, carelessness, wantonness, and willfulness of the defendant and its agents and servants, acting in the scope of their duties and agency in permitting the said large trunk to be on the premises of the defendant so near the said railroad track that persons boarding the train on that side, if the train were in motion, would come in contact with and strike against the said trunk, by reason of all and each of which said negligent, careless, wanton, and willful acts plaintiff was injured as aforesaid.

"(7) That the said injuries and bruises and sickness were caused by the negligence, carelessness, wantonness and willfulness of the defendant as aforesaid.

"(8) That in consequence of said injuries and sickness and bruises the plaintiff has suffered great bodily pain, fright, and mental anguish, and is permanently injured in his person, and cannot perform his usual work, and will never be able to pursue his calling as formerly, to his damage $5,000."

The grounds of demurrer are: "First. Because the allegations of the complaint do not show negligence on the part of the defendant. Second. Because it appears upon the face of the complaint that the injury the plaintiff may have received was caused by his own negligence and want of due care. Third. Because the allegations of the complaint show contributory negligence on the part of the plaintiff."

The circuit judge in a written order sustained the defendant's demurrer in an order which must be reported. After judgment the plaintiff appealed upon seven grounds.

1. We will pass upon these exceptions in their order. The first ground of appeal is as follows: "Because the presiding judge erred in sustaining the demurrer interposed by the defendant to the plaintiff's complaint, and in dismissing the said complaint, upon the ground that it does not state facts sufficient to constitute a cause of action, whereas, the complaint stated facts from which the inference of negligence of the defendant could be drawn. Second. The presiding judge passed upon the question of contributory negligence, which was the question for the jury. Third. As to whose negligence was the proximate cause of the injury was a question of fact for the jury, and the judge was without power to decide it on demurrer to the complaint." We think that there is merit in this first exception, because, when the conductor bade the plaintiff get aboard of this train, and he saw that the plaintiff had only one arm, and started with him to get on the train, the plaintiff was entitled to be allowed to do so before the conductor ordered the engineer to start his train. There were some allegations, therefore, of negligence of the defendant. Again: Contributory negligence arising as it is said from the plaintiff attempting to board a train in motion, acting as he did upon the direction of the conductor himself, these allegations are beyond the circuit judge's power to pass upon. These were allegations of fact, which the jury would test upon hearing the testimony bearing thereon. This view is clearly sustained by the opinion of this court in Creech v. Railroad Company, 66 S. C. 528, 533, 45 S. E. 86, 88. It is there said: "We will first consider the complaint with a view to ascertaining whether it stated such contributory negligence on the part of the plaintiff as should defeat a recovery as a matter of law. For the purpose of this question we, of course, must assume that the complaint states a case of actionable negligence on the part of the defendant; for a question of contributory negligence cannot properly or logically arise unless the defendant has been guilty of negligence which is a proximate cause of the injury. The case of Jarrell v. Railroad Co., 58 S. C. 492, 36 S. E. 910, approved in Elkins v. Railroad Co., 64 S. C. 561, 43 S. E. 19, shows that, while contributory negligence is ordinarily a matter of defense, yet, if the complaint shows contributory negligence by the plaintiff, that would render the complaint demurrable for insufficiency, since it contained allegations which would defeat recovery on the cause of action alleged. With this rule in mind the circuit court examined the complaint, and reached the conclusion that the facts stated did not show contributory negligence as matter of law." We must remember that the defendant's train had been at a standstill for at least five minutes, and that it did not begin to move until the conductor and the plaintiff were trying to get upon it. No inference by allegation appeared in the complaint as to plaintiff's negligence in thus trying to board the train, or, if any such inference could be drawn, it would have been the work for the jury and not for the circuit judge. After a careful examination of the allegations of fact, we think that the demurrer should have been overruled, and we therefore sustain this exception of the appellant.

2. "Second. Because the presiding judge erred in deciding that it was not negligence

for the defendant to have no ticket agent in the office just before a regular passenger train was to depart, whereas it was a question of fact for the jury whether it was negligence or not, for, while it was not necessary to buy a ticket to be transported as a passenger, it was necessary to have a ticket to get baggage checked, and the defendant ought to have had an agent in the office to give information to passengers. It was a question for the jury." There is nothing in this exception. No act of the Legislature requires ticket agent to remain in his office after the arrival of a train, though he must be there for 30 minutes preceding the arrival. The law supposes that a person will attend to the checking of his baggage before the arrival of the train. There is no allegation in this complaint that plaintiff had a trunk to be checked. This exception is overruled.

"Third. Because the presiding judge erred in holding and deciding that the statement of the conductor to the plaintiff, 'I am going; you had better get on the train'—was a warning that the train was going to move, and not an invitation to get on the train, whereas it was a question of fact for the jury whether the conductor's statements were a warning that the train was going to move and not attempt to board it, or an invitation to the plaintiff to board it." We sustain this ground of appeal. The circuit judge was in error when he passed on these allegations of the complaint, susceptible as they were of at least two constructions.

3. "Fourth. Because the presiding judge erred in deciding that, if a natural inference be drawn from the complaint, the plaintiff must have delayed further when he and the conductor went out to the train together, whereas the inference is to the contrary. At any rate this was a question of fact that could not be decided on demurrer, and was a question for the jury; and, further, it raises the question of contributory negligence, which judge has no right to decide." We must sustain this exception. It is no part of the duty of a judge, in passing upon demurrer to the complaint, to employ his time in drawing natural inferences outside of the allegations of the complaint. This exception is sustained.

4. "Fifth. Because the presiding judge erred in holding and deciding 'that plaintiff brought about the injury by his own fault and want of care, if it was manifestly negligent for the plaintiff, having only one hand, to attempt to board the train without the assistance of the conductor,' whereas the word 'manifestly' is not used in the complaint at all, but it is alleged there that the train was moving slowly. The question was one for the jury to decide whether the conductor was negligent in not helping on the train a man with only one hand, when he saw, the complaint alleges, that he had only one hand, or whether plaintiff was guilty of contributory negligence." This court, in the case of Madden v. R. R. Co., 35 S. C. 381, 383, 14 S. E. 713, 28 Am. St. Rep. 855, where the question was as to error of the circuit judge in overruling the demurrer based upon the ground that the complaint did not state facts sufficient to constitute a cause of action, held: "To sustain an action like this, it is necessary for the plaintiff to allege and prove that she has been injured in her person by the negligence of the defendant; the cause of action being the negligence of the defendant, whether of omission or commission, followed by some injury resulting therefrom. There being no question that the fact of injury is sufficiently alleged in the complaint, the only inquiry is whether the other element in the cause of action—the negligence of the defendant causing the injury—has likewise been sufficiently alleged. Negligence being a mixed question of law and fact, it is not sufficient to allege in general terms that an injury has been sustained by reason of the negligence of the defendant, but the plaintiff must go on and allege the facts constituting such negligence which, if believed by the jury, would be sufficient to warrant a finding that the defendant had been guilty of negligence. So that the real inquiry here is whether the facts stated in the complaint as constituting negligence are such as, if believed by the jury, negligence may be reasonably inferred by the jury; it being exclusively for the jury to say whether negligence ought to be inferred from such facts." In that same case, it is a question as to what aid should be rendered by the conductor to a person apparently infirm and whose infirmity was known to the conductor. The question of negligence was a question for the jury. This exception is sustained.

5. "Sixth. Because the presiding judge erred in holding and deciding 'there is no allegation that he did not see the trunk, and, if there had been such allegation, it must be concluded by natural law that, if he had his eyes open, he could not have failed to have seen such an object, etc.,' whereas, on demurrer, nothing can be added to or inserted in the complaint that the plaintiff did not put there, and no inference can be drawn from the complaint that the plaintiff saw the trunk from the fact there stated, and the rule is that a person is supposed to act with care until the contrary be shown. At any rate, whether the defendant was negligent in allowing the trunk to be on the premises, and whether plaintiff was guilty of contributory negligence in boarding the train at the time he did, and whether the defendant exercised extraordinary care protecting its passenger, the plaintiff, were questions that should have gone to the jury, and not decided by the presiding judge on a demurrer to the complaint." We sustain the exception for the reasons set up by the appellant.

6. "Seventh. Because the presiding judge erred in not overruling the demurrer to the complaint, and in not deciding that the com-

plaint stated facts sufficient to constitute a cause of action, as the statement of facts gave inferences of negligence on the part of the defendant as to each and all the causes of action jumbled therein. The complaint was sufficient, if there was an inference of negligence of the defendant as to any one of the causes of action therein set up." This seems to be a rehash of the exceptions already considered. Having sustained them, we sustain this also.

It is the judgment of this court that the judgment of the circuit court sustaining the demurrer herein is overruled and reversed, and that this action is remitted to the circuit court for such further action as may be necessary.

(123 Ga. 773)

MACON RAILWAY & LIGHT CO. v. MASON.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. APPEAL — PREJUDICIAL ERROR — INSTRUCTIONS—EVIDENCE TO SUSTAIN.

In an action to recover damages for a personal injury it is error requiring a new trial for the court to instruct the jury as to the right of a plaintiff to recover punitive damages, where the tort complained of is accompanied by aggravating circumstances, when the evidence does not warrant a charge on this subject.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4220.]

2. PUNITIVE DAMAGES—ASSESSMENT.

In order for the jury to assess punitive damages in such an action, it is not necessary that they should be claimed eo nomine, but it is enough that the facts alleged and proved be such as to warrant the assessment.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 420.]

3. EVIDENCE—ABSENCE OF WITNESS—EXCUSE.

It is competent for a party to account for the absence of an eyewitness to the occurrence under investigation, that the jury may not draw any unfavorable inferences from the failure to produce and examine the witness.

4. DAMAGES—PERSONAL INJURIES.

Where the person injured is a dentist, testimony as to his capacity and efficiency in his chosen profession prior to his injury is relevant as bearing directly upon the measure of damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 490.]

5. EXPERT WITNESS—COMPETENCY.

One who is the graduate of a college where anatomy and physiology are taught, and who is engaged in the practice of osteopathy, and has gained experience in the treatment of nervous disorders, may be examined as an expert witness, upon these facts being made to appear, notwithstanding he is not a licensed physician and does not administer drugs to his patients.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2343–2345.]

6. DAMAGES — INSTRUCTIONS — EARNING CAPACITY.

That the jury may clearly understand their duty with respect to reducing to its present cash value the gross amount which they may find to fairly represent the loss in earning capacity which the injured party has sustained, the court, in charging upon this subject, should make choice of language which is not calculated to confuse the jury because of inaccuracy of expression.

7. WITNESS—COMPETENCY OF WIFE.

The wife of the injured party is not, because of the marital relation existing between them, and the policy of the law to preserve inviolate confidential communications between husband and wife, incompetent to testify as to the nature of the injury received by him, and its effect upon his physical condition, when there is nothing to indicate that her knowledge on the subject was gained because of any confidence which he reposed in her as his wife.

8. EVIDENCE — OPINIONS OF NONEXPERTS — BODILY CONDITION.

The wife may testify to symptoms which she observed indicating that her husband suffered from headache, but she should not be permitted to generalize or state any bare conclusion based upon her observation of others who had headache, she not professing to be an expert.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2240.]

(Syllabus by the Court.)

Error from City Court, Macon County; Robert Hodges, Judge.

Action by J. M. Mason against the Macon Railway & Light Company. Judgment for plaintiff, and defendant brings error, and plaintiff assigns cross-error. Judgment on both main and cross bill of exceptions reversed.

The plaintiff below, J. M. Mason, instituted a suit for damages against the Macon Railway & Light Company, and recovered the sum of $2,500. The allegations of his petition were substantially as follows: On September 6, 1903, he boarded one of the electric street cars owned and operated by the defendant company. Two cars were coupled together; the one in front being a motor car, and the other being what is commonly known as a "trailer." There were no vacant seats upon either, so he got upon the front platform of the "trailer." The conductor came to him and collected his fare, offering no objection to his riding on the platform. Within a few minutes, and while plaintiff was standing with his back towards the car ahead, the conductor reached over from the rear platform of that car for the purpose of applying the brake on the front platform of the "trailer," and in swinging the brake handle around struck the plaintiff a violent blow with it in the back and upon his spinal column. The conductor gave to him no warning or intimation of an intention to apply the brakes, although he was standing in a position where he would be injured if given no opportunity to move out of the way of the brake handle. He protested to the conductor "against being used in any such way," and the conductor "responded to [him] in an insulting and uncalled-for manner, in the full hearing of the other passengers on said car, greatly mortifying [him] and wounding his feelings and sensibilities." The physical injuries received are of a permanent character. The plaintiff is a professional dentist, and his ability to labor at his profession has been greatly impaired.

The negligence charged was (1) in undertaking to apply the brakes save from the platform of the "trailer," and (2) in giving the plaintiff no warning that an attempt would be made by the conductor to apply the brakes while standing upon the rear platform of the car ahead. The nature of the injuries sustained, and their effect upon the earning capacity of the plaintiff, were also alleged in detail, and damages to the amount of $15,000 were asked. To the petition the defendant company demurred both generally and specially. The court overruled the demurrer, save as to one of the plaintiff's allegations to which special objection was raised, and exception was taken to this ruling upon the demurrer. The railway company also excepted to the refusal of the court to grant its motion for a new trial. By cross-bill of exceptions the plaintiff complains of the rejection by the court of certain testimony which he offered on the trial. Upon the argument here counsel for the company did not insist on the assignment of error touching the disposition made of its demurrer, and announced that the seventh and eighth grounds of the motion for a new trial were abandoned.

Dessau, Harris & Harris and Roland Ellis, for plaintiff in error. B. M. Davis, J. F. Urquhart, and T. S. Felder, for defendant in error.

EVANS, J. (after stating the facts). 1. Complaint is made that the verdict of the jury was excessive, and it is further urged in behalf of the company that this result was doubtless brought about by the grave error of the presiding judge in charging the jury as to the right of a plaintiff to recover punitive damages where there are aggravating circumstances attending the commission of a tort upon him. This charge, counsel insist, was unwarranted by the evidence, and in this view we concur. The testimony discloses that the conductor, while perhaps inattentive and inexcusably careless, committed no wanton act which resulted in injury to the plaintiff, or showed anything more than a negligent disregard for his safety. While the cars were descending a steep grade a passenger indicated his desire to disembark at the next stopping point, and the conductor signaled the motorman to stop. The motorman, realizing he could not stop the cars at that point unless the brake on the "trailer" was applied, rang his gong as a signal to the conductor to put on the brake of the rear car. As to whether the conductor, before attempting to do so, gave warning to the plaintiff and others of his intention to put on the brake, the testimony was conflicting; but there was no dispute as to his reaching for the brake from his station on the rear platform of the motor car and unintentionally striking the plaintiff while swinging the brake handle around in an effort to promptly apply the brake. There were no aggravating circumstances attending the infliction of the injury upon him. The plaintiff testified that he immediately turned towards the conductor, and said, "What do you mean by treating a gentleman that way?" and the latter "in an insulting manner" replied, "You had no business standing out there," whereupon the plaintiff said, "If you told me that when I gave you my fare, I would have gotten on another car," and the conductor replied, "You had no business standing up there." The plaintiff then said, "I did not know I was violating any rule of the company." To this remark the conductor made no response, and nothing else occurred. The plaintiff further testified: "I spoke very loudly. I was a little angry, I will admit; and he spoke just about the same way. The other passengers could hear what I said if they had ears. They ought to have heard it in the middle or the back of the car, and I suppose they did. It mortified me very much—a great many ladies sitting there, and other things; and it appeared to me the most of those people did not know. It looked like the conductor was trying to put me off, as if I had not paid my fare." It thus appears that the plaintiff, with some show of passion, undertook to call the conductor to account for what he had unintentionally done, and that the conductor replied to him, in a manner which he regarded as insulting, that he was himself to blame, for the reason that he should not have been in the way. What the conductor said, even though he may have spoken discourteously, did not amount to an insult, or to such abusive treatment of a passenger as would render the company liable in damages. If the plaintiff was insulted, he was supersensitive; if he suffered mortification because he feared the passengers did not understand the situation, there were no grounds for his fears in this regard, for nothing was said or done to lead his fellow passengers into the mistaken belief that the conductor was trying to put him off because he had not paid his fare. Had the manner of the plaintiff been more gentle, it is not improbable that the conductor would have been civil, if not equally courteous. If, as seems to be true, it "was the plaintiff's fault that the conductor was out of tune," the former cannot complain of disrespectful treatment by the latter. Peavy v. Railroad Co., 81 Ga. 488, 8 S. E. 70, 12 Am. St. Rep. 334. A conductor has been judicially recognized as human. City Electric Ry. Co. v. Shropshire, 101 Ga. 36, 28 S. E. 508. And this court is committed to the doctrine that if a passenger is himself responsible for exciting the anger of an agent or employé of a railway company, whereby he is for the time being unfitted for performing the exacting duties he owes to his employer with respect to his treatment of passengers, the company cannot be held accountable for improper conduct on the part of its servant. Central Ry. Co.

v. Motes, 117 Ga. 923, 933, 43 S. E. 990, 62 L. R. A. 507, 97 Am. St. Rep. 223.

2. To so much of the plaintiff's testimony as related to the mortification he suffered from what he conceived to be disrespectful conduct on the part of the conductor, counsel for the company objected on the grounds (1) that "the declaration did not allow a recovery for wounded feelings," and (2) that "the case was not one for the recovery of damages for wounded feelings, but the declaration is projected on the idea of recovery for physical injury only." The testimony was not, for the reasons assigned, inadmissible. In his petition the plaintiff specifically alleged that when he protested against the careless way in which the conductor had acted to his injury, the conductor, in the hearing of the other passengers on the car, responded in an insulting and uncalled-for manner, greatly mortifying him and wounding his feelings and sensibilities. For the wrongs he alleged he had suffered he claimed to be entitled to recover a specified amount. "In order for the jury to assess punitive damages in an action for a tort, it is not necessary that they should be claimed eo nomine in the declaration. It is enough that the facts alleged and proved be such as to warrant the assessment." S. F. & W. Ry. Co. v. Holland, 82 Ga. 258, 10 S. E. 200, 14 Am. St. Rep. 158.

3. Objection was also raised to the plaintiff being allowed to testify that a gentleman who was shown to have been an eyewitness to the occurrence under investigation, and who had been in attendance on the court, but was not then present, had left without the plaintiff's consent. That the jury might not draw any unfavorable inferences because of the failure of the plaintiff to introduce this absent witness, it was competent for the plaintiff to explain that he was not responsible for his absence. R. & D. R. R. Co. v. Garner, 91 Ga. 27, 16 S. E. 110.

4. The court very properly, notwithstanding the contention of the defendant that the plaintiff's capacity and expertness as a dentist were not in issue, admitted testimony to the effect that he was capable and expert in his chosen profession prior to his injury.

5. A witness introduced in behalf of the plaintiff to show to what extent he was injured testified that he (the witness) was an osteopath physician, but did not prescribe drugs nor practice medicine, as did the ordinary practitioner, and was not licensed to do so. It appeared that he had taken a course of study in osteopathy at the Southern School of Franklin, Ky., and had graduated from that college after attending four terms of school of five months each. He had taken a ten-months course in physiology, and had read certain named text-books on that subject and on anatomy, pathology, and on the practice of medicine. He had been in actual practice of his calling since the 1st of February of the year prior to the trial, and had gained considerable experience in the treatment of nervous disorders. Counsel for the company nevertheless objected to the witness being examined as an expert touching the nature and probable duration of the injuries sustained by the plaintiff, but the court held that the witness was competent to testify. Had he been licensed under the laws of this state to practice medicine, it is clear that he would have been competent to testify as an expert witness upon the fact being made to appear that he was a licensed physician. Von Polinitz v. State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72. Not being a licensed practitioner, it was necessary to lay the proper foundation showing him to be an expert as to the subjects on which he proposed to express his opinion. We think the necessary foundation was laid. "The opinions of experts on any question of science, skill, trade, or like questions, are always admissible." Civ. Code 1895, § 5287. "An expert is one possessing, in regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons." 12 Am. & Eng. Enc. L. (2d Ed.) 424. "This knowledge may be derived from experience, or from study and direct mental application." Id. 425. "Strictly speaking, an 'expert' in any science, art, or trade is one who, by practice or observation, has become experienced therein." Rogers on Expert Testimony (2d Ed.) 2. But, generally, nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular trade or profession. Id. 4; 1 Greenl. Ev. § 440. Knowledge gained by consistent and close study of medical works renders one competent to testify as an expert concerning the matters of which he has thus learned. White v. Clements, 39 Ga. 232; Mayor & Council of Jackson v. Boone, 93 Ga. 662, 20 S. E. 46. It is not essential that he should be actively engaged in the practice of medicine. Everett v. State, 62 Ga. 71; 12 Am. & Eng. Enc. L. (2d Ed.) 426. Nor is it essential that one who really has a scientific education on the subject should be a graduate of "any medical college, or have a license to practice from any medical board." Id. 100 (1). What he knows is what really qualifies him to express an opinion as an expert, and a diploma or license is only important as furnishing satisfactory evidence of his competency as a witness. Accordingly, a "person who is neither a physician nor surgeon can express an opinion on a medical question, when the matter inquired about lies within the domain of the profession or calling which the witness pursues." Id. 105 (9). The plaintiff showed that the witness introduced in his behalf pursued a calling which required a special study of anatomy and physiology, and his testimony indicates that he had a practical as well as a theoretical knowledge concerning

Northern Ry. Co. v. Hutchins, 119 Ga. 504, 46 S. E. 659. As was remarked by Mr. Justice Cobb in Kelly v. Strouse, 116 Ga. 891–892, 43 S. E. 288: "If the defendant calls in question the sufficiency of the petition by demurrer, as he has a right to do, and the court renders an erroneous decision holding that the petition sets forth a cause of action, when in truth it does not, and the defendant acquiesces in this decision, of course no one will contend that, after the time allowed by law has expired for bringing under review this erroneous decision, the defendant can be heard to say that the petition sets forth no cause of action." When a case is in limine, the trial judge may, of his own motion, interpose to prevent a miscarriage of justice, provided "there is no estoppel of which either party may take advantage." Id., page 874 of 116 Ga., page 280 of 43 S. E. But it is not within the power of the trial judge to give to either party the benefit of a contention which he is himself estopped to urge. Thus, in McCandless v. Conley, 115 Ga. 48, 41 S. E. 256, it was held that: "Where an amendment to pleadings has been, in term, duly allowed, it is not, after the term has expired, within the power of the court to revoke the order of allowance and strike the amendment on the ground that it was in the first instance erroneously allowed." During the term of the court at which a judgment is rendered it is within the breast of the presiding judge, and may be vacated upon proper cause shown; but after the term has expired the judgment "is upon the roll," and is not subject to review or revision by the trial court. 1 Black. Judg. § 157.

Applying to the present case the well-settled principles of law above stated, we are of the opinion that the court erred in not granting the plaintiff a new trial. The plaintiff presented a written request to charge to the effect that, if one of the company's conductors gave to the plaintiff the Canadian coin which he tendered as fare, the conductor to whom it was offered was bound to accept it as legal tender. The judge declined to charge as requested, and instructed the jury that, if the plaintiff did not enter the incoming car of the defendant company prepared to pay his fare in lawful currency of the United States, he would not occupy the position of a passenger. The jury were further instructed, in effect, that the company could not be held liable in damages for the act of its conductor in placing the plaintiff under arrest, unless the conductor was acting within the scope of the authority expressly conferred upon him by the company, and it was contemplated by his master that he should make such an arrest. The court declined to give a charge requested in writing by the plaintiff's counsel, in which the proposition was stated that, if the conductor took hold of the plaintiff, and turned him over to a policeman, while engaged in the performance of the company's business, and in the line of his duty, because of the nonpayment of fare, and because he refused to accept the Canadian coin as fare, then the company would be responsible for the conduct of its conductor. The requests to charge were in accord with the theory of liability upon which the plaintiff's petition was framed. The instructions which the court gave to the jury practically precluded the plaintiff from a recovery under the evidence submitted. Irrespective of whether or not the plaintiff's petition set forth a cause of action, he was, as the court had adjudged in passing on the company's demurrer, entitled to damages upon making proof of the allegations of fact upon which he relied for a recovery. It was not within the power of the trial judge to review his ruling upon the demurrer, or, by indirection, give the company the benefit of a defense which it had thereby urged, since it had acquiesced in the decision of the court that there was no merit in any of the objections to the petition which the company urged by way of demurrer. The court did not err in refusing to allow the plaintiff to prove the value of the Canadian coin which he tendered as fare. Its value, if any it had, was immaterial, even upon his theory of the case, as he took the position that the company was responsible for his having no other money with which to pay his fare, and therefore could not set up the defense that he was not prepared to pay his fare in lawful currency of the United States. As to the right of the plaintiff to recover, irrespective of the judgment rendered on the demurrer to his petition, we express no opinion. The important fact is that this question is res adjudicata, as the plaintiff insisted in his motion for a new trial.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 616)

DU BIGNON v. FINCH et al.

(Supreme Court of Georgia. Aug. 2, 1905.)

EJECTMENT—NONSUIT—EVIDENCE.

Where, in a complaint for land by an administrator, the defendants admit in their plea that the legal title was in the plaintiff's intestate at the time of her death, but aver that they are in possession under a contract of purchase from her, with the greater part of the purchase money paid, and make a tender of the balance and pray specific performance of the contract, a motion for a nonsuit should not be granted after evidence has been introduced by the plaintiff, which shows that he has been duly appointed administrator of the decedent.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; P. E. Seabrook, Judge.

Action by H. F. DuBignon against John and Rebecca Finch. Judgment for defendants, and plaintiff brings error. Reversed.

R. D. Meader, for plaintiff in error. Ernest Dart, for defendants in error.

EVANS, J. The plaintiff was nonsuited in the court below, and in his bill of exceptions complains of the judgment of nonsuit. The action was brought in the name of H. F. Du Bignon, as administrator on the estate of Hannah Coburn, against John and Rebecca Finch, to recover a leasehold interest in a certain city lot described in the petition. The plaintiff alleged that his intestate died in the fall of the year 1901, and was the owner at the time of her death of an estate for years in the premises, which had not expired; that the defendants were in possession of the premises, claiming that they had purchased the same from plaintiff's intestate during her life; and that it was necessary to recover the premises for the purpose of paying the debts of the estate and making distribution among the heirs of his intestate. The seventh paragraph of the petition was as follows: "Plaintiff shows that both he and the said defendants claim title, as before shown, to said land under the same common grantor, viz., Hannah Coburn." The defendants filed an answer, in which they denied the right of the plaintiff to recover, and by way of amendment set up the special defense that in the year 1888 they bought the premises in dispute from Hannah Coburn for the sum of $230, of which sum $190 had been paid. They made tender to the plaintiff of the remainder of the purchase money, and prayed specific performance of the contract of purchase, and that the administrator be decreed to make them a deed to the interest of his intestate in the premises upon payment of the balance of the purchase money. On the trial of the case the plaintiff introduced in evidence his letters of administration and an order of court granting his application for leave to sell the land described in the petition. A witness testified that he built the house on the lot which was in the possession of the defendants for Hannah Coburn; that he had been told by John Finch, one of the defendants, that they rented the house from Hannah Coburn, and Denison Armstrong was collecting the rent for her, but they "couldn't get along," and he (Finch) wanted witness to take charge of collecting the rent. The witness further testified that Hannah Coburn died in 1901, and Denison Armstrong a year or so later. The plaintiff testified as to the rental value of the premises, and offered in evidence a deed from Sarah Price to his intestate, dated September 15, 1890, covering the premises in dispute, and reciting that Hannah Coburn had previously purchased the property from the grantor, and had paid the purchase money in installments, the last payment being made on April 24, 1880, and that no deed had been made, though Hannah Coburn had gone into possession of the premises in the early part of 1880, and had remained in possession since, and had made improvements thereon. The plaintiff also introduced in evidence divers receipts, signed by Denison Armstrong, each acknowledging the payment of $5 by Finch, and covering a period from 1887 to 1900.

We think this evidence, considered in the light of the pleadings, was sufficient to withstand the motion for a nonsuit. The defendants admitted in their plea that the plaintiff's intestate had the legal title to the premises at the time of her death. Upon proof of the issuing of letters of administration to the plaintiff and the granting of the order of court providing for the sale of the property, a prima facie case was made out showing his right to the possession of the premises, and the burden was cast upon the defendants to prove their special defense.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 603)

CLEGG LUMBER CO. v. ATLANTIC & B. RY. CO.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. WRIT OF ERROR—DISMISSAL—BILL OF EXCEPTIONS.

Where a bill of exceptions recites that it was presented to the judge within 30 days from the rendition of the judgment complained of, and the judge certifies that the recitals of fact therein are true, it is not cause to dismiss the writ of error that the certificate of the judge bears a date prior to the rendition of the judgment complained of, the date appearing on the certificate being palpably the result of oversight or of a typographical error.

2. CARRIERS—ACTION FOR DEMURRAGE.

While the evidence authorized a finding for the plaintiff in some amount, there was no evidence as to what the exact sum due was; and therefore a verdict for the plaintiff for $40 was contrary to law.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Action by the Atlantic & Birmingham Railway Company against the Clegg Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Dorris and J. T. Hill, for plaintiff in error. J. L. Sweat and Crum & Jones, for defendant in error.

CANDLER, J. 1. From the bill of exceptions it appears that the brief of evidence in this case was filed, in accordance with the terms of the judge's order, on November 15, 1904, and that the judgment overruling the motion for a new trial, which is assigned as error, was rendered on the same day. The bill of exceptions also recites that it was tendered to the judge within 30 days from the rendition of the judgment complained of, and this, together with the other recitals of fact therein contained, the judge certifies to be true. The certificate itself, however, bears date November 14, 1904, or one day prior to the rendition of the judgment complained of; and on the call of the case in this court the defendant in error moved to

dismiss the writ of error on the ground that it appears that the bill of exceptions was presented and certified prior to the rendition of the judgment and the filing of the brief of the evidence. In a statement filed by counsel for the plaintiff in error it is asserted that the dating of the judge's certificate to the bill of exceptions November 14th was a typographical error on the part of the stenographer who made out the certificate, and that as a matter of fact the bill of exceptions was presented and certified on December 14, 1904. It is, of course, plainly evident that the dating of the certificate to the bill of exceptions as November 14, 1904, was an error, typographical or otherwise, for a bill of exceptions certified before the judgment complained of was rendered is not to be considered as a possibility. As to the exact date upon which the bill was certified, however, we are left completely in the dark, so far as the record is concerned, and the record is the only thing to which we can look in reaching a conclusion in regard to the matter. To all intents and purposes, therefore, the bill of exceptions is accompanied by an undated certificate to the effect that the recitals of fact in the bill are true. While, as has been repeatedly ruled, it must affirmatively appear that the bill of exceptions was presented to the judge within the time required by law, we know of no law which requires that the certificate be dated, or that the exact date of the presentation to the judge shall appear. There is nothing in either the bill of exceptions or the transcript of the record to indicate that the former was not presented within time, and as the judge has certified to the truth of the recital in the bill of exceptions that it was presented in time, the writ of error should not be dismissed on account of what is palpably a typographical error in dating the certificate. See Stamps v. Hardigree, 100 Ga. 160, 28 S. E. 41.

2. This was a suit by the Atlantic & Birmingham Railroad Company against the Clegg Lumber Company, on an open account for demurarge on two cars of lumber, the amount declared on being $64. The lumber company, in its answer, denied indebtedness, and set up a cross-demand against the railroad company for over $400 damages on account of the alleged negligent burning of the lumber. The jury found "for the plaintiff forty dollars as demurrage." The defendant moved for a new trial solely on the grounds that the verdict was contrary to law and the evidence. The motion was overruled, and it excepted. The evidence on most points was conflicting, and would have supported a verdict in favor of either party to the suit. An examination of the record, however, discloses a fatal defect in the plaintiff's case, in that there was no evidence upon which a verdict in its favor for any fixed amount could be based. The jury was authorized to find that the defendant was indebted to the plaintiff for demurrage in some amount, but there was nothing to indicate what that amount was. True, one witness testified flatly that the lumber company was due the railroad company $64 for demurrage on two cars of lumber; but upon cross-examination it appeared that he based his testimony on a calculation that $1 per day was a reasonable charge for demurrage, and that he did not know how many days the cars had stood on the company's tracks; and there was likewise a total failure on the part of any other witness to fix the length of time for which demurrage was due. It will thus be seen that the verdict for the plaintiff for $40 was without evidence to support it, and the court should have granted a new trial.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(128 Ga. 531)

EDWARDS v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

Motion for rehearing denied.

For former opinion, see 51 S. E. 505.

CANDLER, J. A motion for rehearing was made by the solicitor general of the Albany circuit and the solicitor of the city court of Sylvester, the ground of the motion being, in effect, that this court had reached an erroneous conclusion in holding that the venue of the crime charged was not proven, inasmuch as it appeared from exceptions which were filed to the answer of the trial judge, and which were sustained and adopted as a part of the answer, that there was evidence that the goods alleged to have been stolen were taken from a wagon belonging to the prosecutor while he and the accused were journeying together from Albany, in Dougherty county, to the home of the prosecutor, in Worth county; that the accused also lived in Worth county, near the prosecutor; and that the goods were shortly afterwards found in a trunk in the home of the accused. Of course, if this had appeared in the record before us, it could never have been held that the venue was not shown; for, whether the theft took place in Worth county or Dougherty, if the goods were afterwards taken into Worth county the accused was subject to a trial in the latter county. In the record sent to this court, however, there was no suggestion of any exceptions to the answer of the trial judge; the answer incorporated in the record, which practically adopted the allegations of the petition for certiorari, merely showing that the goods stolen were taken from the wagon on the road from Albany to the home of the prosecutor, and that they were afterwards found in the house of the accused, without indicating in any way that either the accused or the prosecutor lived in Worth county. When the case was argued in this court it was not suggested that the transcript sent up did not contain all the record, nor was our attention

called to anything which would indicate that we did not have the entire record before us. As a matter of course, we decided the case on the record as it stood. After the filing of the motion to rehear, the attention of the solicitor having been called to the fact that the exceptions to the answer of the judge of the city court did not appear in the record, he caused to be sent to this court under the seal of the clerk of the superior court of Worth county a paper purporting to be a copy of such exceptions, together with a certificate by the clerk that it was inadvertently omitted from the original transcript sent to this court. This paper completely makes out the case against the accused. An insurmountable obstacle to its consideration, however, is that it has never in any proper or regular way been made a part of the record. It is the duty of counsel to see to it that all material parts of the record are sent to this court in the first instance. If this is not done, they may at any time before the argument of the case suggest a diminution of the record, and have the omitted portions sent up. After judgment, however, it is too late to ask that the case be reopened for the purpose of considering matters which should have been brought to the attention of this court long ago.

The motion to rehear is accordingly denied.

(123 Ga. 669)

MINERAL BLUFF BOARD OF EDUCATION v. MAYOR AND COUNCIL OF MINERAL BLUFF.

(Supreme Court of Georgia. Aug. 8, 1905.)

1. APPEAL — JURISDICTION — INTERLOCUTORY JUDGMENT.

This court has no jurisdiction to pass upon an assignment of error complaining of the overruling of a demurrer to the answer of the mayor and councilmen of a municipal corporation to an application for the writ of mandamus, when the trial court holds that the answer presents an issue of fact, and refers the issue of fact to a jury, and when there has been no final judgment thereon.

2. SAME.

But it has jurisdiction to pass upon an assignment of error complaining of a refusal to sustain a motion to make the mandamus absolute, because, if this motion had been granted, it would have finally disposed of the case.

3. MANDAMUS—MOTION TO MAKE ABSOLUTE.

The motion to make the mandamus absolute was properly refused because the answer of the respondents had not been stricken. The sufficiency of an answer cannot properly be brought in question by a motion to enter a judgment in favor of the plaintiff, based on the ground that the answer sets forth no defense, after a demurrer to the answer has been overruled. Hollis v. Nelms, 41 S. E. 263, 115 Ga. 5; Stromberg v. Bisbee, 41 S. E. 573, 115 Ga. 846.

(Syllabus by the Court.)

Error from Superior Court, Fannin County; Geo. F. Gober, Judge.

Application by the Mineral Bluff Board of Education against the mayor and council of Mineral Bluff. From an order overruling a demurrer to the answer, the board of education brings error. Affirmed.

Wm. Butt, Jeff Hedden, and J. Z. Foster, for plaintiff in error. O. R. Dupree and Thos. A. Brown, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 548)

JAMES v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

1. HOMICIDE — VOLUNTARY MANSLAUGHTER—EVIDENCE.

The evidence for the state, if credible, warranted a verdict for murder. The evidence for the accused, and his statement, if believed, showed complete justification. There was nothing in the evidence or the statement of the accused, considered separately or together, tending to show, or from which the jury could legitimately infer, that the homicide was voluntary manslaughter. It was therefore error to give in charge the law relating to voluntary manslaughter, and a verdict finding the accused guilty of that offense was without evidence to support it. McBeth v. State, 50 S. E. 981, 122 Ga. 737.

2. SAME—MUTUAL COMBAT.

Neither was there anything in the evidence or the statement of the accused to support the theory of mutual combat. Accordingly it was error to give in charge section 73 of the Penal Code of 1895. See Jordan v. State, 48 S. E. 747, 117 Ga. 405, and cit.

3. SAME—EVIDENCE.

The court did not err in admitting or excluding evidence.

(Syllabus by the Court.)

Error from Superior Court, Dougherty County; W. N. Spence, Judge.

One James was convicted of voluntary manslaughter, and brings error. Reversed.

J. W. Walters and L. J. Hopmayer, for plaintiff in error. W. E. Wooten, Sol. Gen., by Arnold & Arnold, for the State.

FISH, P. J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 533)

WILLIAMS v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

1. CRIMINAL LAW—APPEAL—REVIEW.

The ground of the motion for a new trial alleging the existence of newly discovered evidence was not insisted upon in this court, and will be treated as having been abandoned.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3012.]

2. SAME—SUFFICIENCY OF EVIDENCE.

There was no complaint that the court below committed any error of law, but the accused relied upon the contention that the verdict was contrary to law and the evidence, and without evidence to support it. While the evidence for the state, as it appears in the record, was in some respects confusing, it was sufficient to support the conviction of the accused. The trial judge approved the verdict, and the judgment refusing a new trial will not be set aside.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

One Williams was convicted of crime, and brings error. Affirmed.

Busbee & Busbee and Pearson Ellis, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 657)

ROSS v. JACKSON.

(Supreme Court of Georgia. Aug. 8, 1905.)

LANDLORD AND TENANT—DANGEROUS PREMISES—INJURY TO LICENSEE.

A landlord is liable to one lawfully present on the rented premises by invitation of the tenant for injuries arising from defective construction, or from failure to keep the premises in repair, where the defect is known to the landlord, or in the exercise of reasonable diligence could have been known, and the injured person was himself in the exercise of due care.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 670, 676.]

(Syllabus by the Court.)

Error from City Court of Macon.

Action by Mary O. Jackson against Laura B. Johnson. Thereafter John P. Ross, guardian of Laura B. Johnson, was made defendant. Judgment for plaintiff, and defendant Ross brings error. Affirmed.

A suit for damages was instituted by Mary O. Jackson against Laura B. Johnson, the plaintiff having received personal injuries while attempting to cross a porch connecting two of the rooms of a house belonging to the defendant, and rented by her to a tenant. The plaintiff alleged that she was lawfully upon the premises at the invitation of the tenant, and was at the time in the exercise of due care; that the flooring of the porch suddenly gave way, causing her to fall to the ground beneath, and she sustained permanent injuries. She complained that the defendant was negligent "by reason of the fact that said house, and the flooring, particularly where petitioner fell through, was defectively constructed and defectively maintained, and she was negligent in not repairing the same so as to make it safe and sound. Her negligence consisted further in the fact that she made no inspection of this floor and its underpinning and its condition, as it was her duty to do, and allowed the same to become weak and rotten and to fall through as stated; and she was negligent in allowing said floor to be built there in a most unworkmanlike manner, and in a weak and defective manner, and in allowing the same to be built and remain there without being supported by proper joists and props and underpinning." Subsequently to the filing of the petition, John P. Ross, who had been appointed guardian of Laura B. Johnson, was made a party defendant to the action. As such guardian he demurred to the petition on the grounds (1) that no cause of action was set forth; (2) that the allegations made respecting the defective construction of the house and the failure of the landlord to keep it in repair were not sufficiently full and explicit; and (3) that the plaintiff did not allege that the landlord had any notice or knowledge of the defects alleged to have existed in the floor of the house. The demurrer was overruled, and the defendant excepted.

John P. Ross, for plaintiff in error. Marion W. Harris, for defendant in error.

EVANS, J. (after stating the facts). A landlord is not an insurer, but he is under a legal duty to keep the rented premises in repair, and is liable in damages to a person who receives injury while lawfully upon the premises and who is in the exercise of due care, if the injury arises because of the defective construction of a building erected on the premises by the landlord, or because of his failure to repair defects of which he knows, or in the exercise of reasonable diligence ought to know. Civ. Code, § 3118; Ocean Steamship Co. v. Hamilton, 112 Ga. 901, 38 S. E. 204; Stack v. Harris, 111 Ga. 149, 36 S. E. 615. A tenant is entitled to exclusive occupancy during the term of the tenancy, and it is his duty, if the premises get out of repair, to notify the landlord of their defective condition. The landlord is under no duty to inspect the premises while the tenant is in possession in order to keep informed as to their condition. The petition filed in the present case alleged that the landlord was negligent in allowing the floor of the porch to be built in a most unworkmanlike manner, and in a weak and defective manner, and in allowing the same to be built and remain without being supported by proper joists, props, and underpinning. In effect, this is a statement that the floor was defectively constructed by the landlord. No fair inference can be drawn that it was built by a predecessor in title of the landlord. The allegation is that she was negligent in allowing the floor to be built in such an unworkmanlike manner and in allowing it to remain in its unsafe condition. If, at the time of its original construction, she had no interest in the premises, she would not, of course, be responsible for the unworkmanlike way in which the porch was built. The liability of a landlord for defective construction exists only in cases where the structure is built by him in person, or under his supervision or direction. If a building be defectively constructed by a predecessor in title, and the landlord knew, or by the exercise of reasonable diligence could have known, of its improper construction, before the tenancy was created, he would be answerable to the tenant, or to any one lawfully on the premises by invitation of the tenant, for injuries sustained by reason of his failure to put

the premises in a safe condition, if the person sustaining the injuries could not have avoided the same by the exercise of ordinary care. Construing the petition, then, as alleging that the porch was built in an unworkmanlike, weak, and defective manner by the landlord, and that the plaintiff was injured because of the landlord's negligence in this respect, a cause of action was set forth, and there was no merit in any of the grounds of the demurrer.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 642)

VEAL v. HANLON.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. LANDLORD AND TENANT—REPAIR OF PREMISES.

By the statute law of this state a landlord is bound to keep in repair premises which he has rented to another. Civ. Code 1895, §§ 3118, 3123.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 536, 537, 629.]

2. SAME—INJURY THROUGH DEFECTS.

If, after notice of the defective condition of the premises, and after the lapse of a reasonable time in which to make the needed repairs, the repairs are not made, the landlord will be liable to the tenant or a member of his family for damages occasioned by the disrepair of the premises, if the injured party's own negligence did not bring about the injury.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 631, 641.]

3. SAME—EVIDENCE—NONSUIT.

In an action by the wife of the tenant against the landlord for personal injuries alleged to have been occasioned by the defendant's failure to keep in repair the steps to the house, the granting of a nonsuit is proper when the evidence for the plaintiff affirmatively shows that she had knowledge of the defect in the step and of its dangerous condition, and might, by the exercise of ordinary care, have avoided injury.

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by one Veal against one Hanlon. Judgment for defendant, and plaintiff brings error. Affirmed.

Burton Smith and J. A. Branch, for plaintiff in error. Arnold & Arnold, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 642)

SOUTHERN RY. CO. v. HENRY.

(Supreme Court of Georgia. Aug. 2, 1905.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

This was an action for damage against a railroad company for the killing of cattle, and was appealed by the defendant from a justice's court to a jury in the superior court. The jury returned a verdict for $50 in favor of the plaintiff, and the defendant moved for a new trial solely on the grounds that the verdict was contrary to law and the evidence. It was not denied that the defendant's train ran over the cattle. The evidence as to the circumstances of the killing was conflicting, but that for the plaintiff was sufficient to warrant a finding that, if ordinary diligence had been used by the engineer in charge of the train, he could have discovered the presence of the cattle on the track, and have stopped the train in time to have avoided striking them. The judge of the superior court expressed his satisfaction with the verdict by overruling the motion for a new trial, and that judgment will not be disturbed.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by one Henry against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

P. H. Brewster, Jr., and L. C. Rucker, for plaintiff in error. Lowndes Calhoun, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, J., disqualified.

(123 Ga. 640)

BASS DRY GOODS CO. v. ELECTRIC STORAGE BATTERY CO.

(Supreme Court of Georgia. Aug. 2, 1905.)

CERTIORARI TO JUSTICE—JUDGMENT—REMAND.

Where a certiorari was sustained because all the evidence submitted by the defendant in certiorari on the trial of the case before the magistrate was inadmissible, it was not error for the judge of the superior court to refuse to render a final judgment, and to remand the case for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Electric Storage Battery Company against the Bass Dry Goods Company. Judgment for plaintiff before a magistrate was reversed on certiorari, and case remanded for new trial, and defendant brings error. Affirmed.

Dodd, Newman & Dodd, for plaintiff in error. Mayson, Hill & McGill, for defendant in error.

FISH, P. J. The Electric Storage Battery Company sued the Bass Dry Goods Company in a justice's court upon a contract and open account, and obtained judgment. The defendant carried the case to the superior court by certiorari, alleging that the judgment was contrary to law because the magistrate had admitted in evidence certain interrogatories which had not been properly executed, and other inadmissible documentary evidence (which constituted all the evidence submitted by the plaintiff), and asked that the court render a final judgment in its favor. The judge sustained the certiorari on the ground that the plaintiff's evidence was inadmissible, but remanded the case for a new trial, and the defendant excepted.

In the case of Seaboard Air-Line Railway v. Blue, 120 Ga. 228, 47 S. E. 569, it was held: "When the only error alleged in a petition for certiorari is that the verdict therein complained of is contrary to law and to the evidence, and it appears that the evidence demanded a verdict for the plaintiff in certiorari, the superior court should, of course, sustain the certiorari; but it would be erroneous in such a case, though there be no conflict in the evidence, to render a final judgment in his favor. This is so for the reason that in such a case the error complained of is not 'an error in law which must finally govern the case,' and, further, because it could not be known with certainty that the evidence on another trial would be the same"—citing Holmes v. Pye, 107 Ga. 784, 33 S. E. 816; Ala. Great Southern R. Co. v. Austin, 112 Ga. 61, 37 S. E. 91; Williams v. Bradfield, 116 Ga. 705, 43 S. E. 57. As the present record does not make a case "where the error complained of is an error of law which must finally govern the case," but only the erroneous admission of certain evidence which made out the plaintiff's case, the trial judge did not err in remanding the case to the justice for a new trial. Granting that, had the magistrate refused to admit the evidence of the plaintiff, which the superior court held inadmissible, a verdict would have been demanded for the defendant in the absence of further evidence by the plaintiff, still the judge did not err in declining to render a final judgment, for he could not have known that in the event of such ruling by the justice the plaintiff would not have been able to have sustained its case with other and admissible evidence; and, further, "because it could not be known with certainty that the evidence on another trial would be the same."

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, J., disqualified.

(123 Ga. 581)

MIXON v. STATE (two cases).

(Supreme Court of Georgia. Aug. 2, 1905.)

1. CRIMINAL LAW — NEW TRIAL — EXCESSIVE SENTENCE.

It furnished no ground for a motion for a new trial to allege that the sentence imposed by the court upon a person convicted of a criminal offense was excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2292.]

2. SAME—INSTRUCTIONS.

A headnote to a decision in this court, which declares that under the facts of a case then under consideration, as therein stated, it was error to give to the jury a certain charge, is not an appropriate form to be given in charge to the jury in another case; and a request for that purpose was properly refused.

3. HOMICIDE—ASSAULT WITH INTENT TO KILL —EVIDENCE.

Two cases having been heard in this court together, the evidence in the first case (Robert Mixon v. State) was sufficient to support the verdict.

4. SAME—JUSTIFIABLE HOMICIDE.

The distinction between justifiable and excusable homicide has been abolished in this state. Every homicide which is without guilt is now classified as justifiable. On a trial based on an indictment for assault with intent to murder, therefore, there was no error in refusing to give in charge a request that: "If the homicide would have been excusable if the shot had killed the man, the shooting at him without killing is also excusable."

5. CRIMINAL LAW—INSTRUCTIONS.

The statement that "it is a well-established maxim of law that it is better to let one hundred guilty persons go unpunished than to punish one innocent person," is not a proper rule to be given in charge to the jury, and a request embodying such principle should be refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1881.]

6. SAME—CHARACTER OF ACCUSED.

Where the general character of a person accused of a crime was not attacked or put in issue, there was no error in refusing to charge that the character of the accused is presumed to be good unless shown to be otherwise by the evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1838.]

7. SAME—PRESUMPTIONS.

Where two persons were jointly indicted as principals for the offense of assault with intent to murder, and were tried separately, and where on the trial of the second defendant evidence was introduced on behalf of the state showing that the other had been convicted, the court should have charged, on request, that the conviction of one of those jointly accused created no presumption of guilt as to the other.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Robert Mixon and Andrew Mixon were separately convicted of an assault with intent to murder, and bring error. In the case of Robert Mixon affirmed; in the case of Andrew Mixon reversed.

Robert Mixon and Andrew Mixon were jointly indicted for an assault with intent to murder, alleged to have been committed upon one Billy Williams by shooting him with a musket. They were tried separately, Robert being first tried. Each of them was convicted, each moved for a new trial, and upon its refusal each excepted. The two cases were argued together in this court. The evidence on behalf of the state was substantially the same in each case, and was, in brief, as follows: Williams went to the house of one Hattie Jenkins. While he was there the two defendants came up. Another man who was there with a bicycle desired to leave, and asked Andrew Mixon, who was sitting in the door, to get up, and let him out. Williams said, "Yes, get up, and let him get his wheel out." Mixon replied in the most profane language, cursing Williams, and said, "You think, because you got your pistol sticking up there, somebody's afraid of you." Williams in fact had a pistol in the upper pocket of his coat, which he was carrying to another person. After making this statement Andrew Mixon ran to his own home, which was not far

away, and his brother, Robert, followed him. Williams then left the house. Shortly afterwards the two Mixons returned with a gun, inquired for Williams, and, on learning that he had left, followed him. On overtaking him Robert Mixon had the gun. Williams inquired what he was going to do, to which he replied with an oath and a vile epithet that he was going to kill Williams. The latter inquired, for what? to which Mixon answered, "Because you tried to hurt my brother." Williams denied this. About that time Andrew Mixon came up with a stick. Williams grabbed the gun, and asked Robert Mixon not to shoot him. Andrew struck him over the head. He staggered, and turned loose the gun, whereupon Robert Mixon shot him. He denied having made any threats, or having taken his pistol out of his pocket. A witness also testified that when the two Mixons went to the Jenkins house looking for Williams, Robert stated that he intended to kill him that night; that shortly after they left a gun was fired, and after a time Andrew came back to the house, and stated that they could come down and get Williams, and that Robert had killed him. In Andrew's case a bailiff testified that Robert had first been convicted of doing the shooting, but that during his trial Andrew had confessed that he shot Williams with the gun.

Henry S. Jones, for plaintiffs in error. J. S. Reynolds, Sol. Gen., by Jno. M. Graham, for the State.

LUMPKIN, J. (after stating the facts). 1. In the case of Robert Mixon one ground of the motion for a new trial was that, in view of the recommendation of the jury, the sentence of five years in the penitentiary was excessive. This is not a proper matter for a motion for a new trial.

2. Another ground was that the court refused a request to give in charge the following: "It is not necessary, however, that it appear that it was absolutely necessary to make the assault in order to save life. Therefore when, in a trial for assault with intent to murder, the accused sets up the defense that he inflicted the wounds on the prosecutor to prevent the commission of a felony on his person, and the evidence both of the state and the accused is directed to the truth of the issue thus made, it is error to charge the jury, in effect, that, in order for the accused to be justified, it must appear that the danger was so urgent and pressing at the time of the difficulty that, in order to save his own life, it was absolutely necessary to kill." With the exception of the first sentence, this request is a literal copy of the third headnote in the case of Heard v. State, 114 Ga. 90, 39 S. E. 909. We, of course, hold that headnote to be sound law; but it contains a ruling of this court as to what was an erroneous charge given in the case then under consideration. It is evident that the court in the present case was not called on to inform the jury that a certain charge was error.

3. The evidence was amply sufficient to support the verdict, and there was no error in overruling the motion for a new trial in the first case.

4. In the case of Andrew Mixon error is assigned because the court refused a written request to give in charge the following: "If the homicide would have been excusable if the shot had killed the man, the shooting at him without killing is also excusable." Under the law of this state the distinction between excusable homicide and justifiable homicide has been abolished. Pen. Code 1895, § 70. Every homicide which is without guilt is now classified as justifiable. The use of the word "excusable" in connection with a charge in regard to homicide is therefore inapt in this state, and might tend to cause the jury to believe that a homicide, although not justifiable, was yet excusable. Under the common law this would have been different. The request, in the shape in which it was made, was properly refused.

5. The court was requested to give the following charge: "It is a well-established maxim of law that it is better to let one hundred guilty persons go unpunished than to punish one innocent person." The refusal to do so was assigned as error. The request contains an abstract statement, slightly modified from the usual expression that "it is better that ninety-nine guilty men should escape than that one innocent person should suffer." See Boon v. State, 1 Ga. 621. Whether or not this is a sound maxim in morals or sociology, it is not a rule of law suitable to be given in charge by a presiding judge to a jury. We have it on tradition that in the early history of the state a request of this character was made, and the judge of the trial court gave it in charge, but added that, in his opinion, the 99 guilty men had already escaped.

6. Where the general character of the accused was not attacked or put in issue, there was no error in refusing to charge that the character of the accused is presumed to be good unless shown to be otherwise by the evidence.

7. Some of the other requests to charge were covered by the general charge. Only one other need be specially noticed. The court refused to charge, on request, that, "where several are jointly indicted, the conviction of one creates no presumption of guilt as to any of the others." The two defendants were jointly indicted in this case. Robert Mixon was first tried, and convicted. If this fact had not appeared or been placed before the jury, it would have been unnecessary to have given any charge on the subject. Nor is it quite clear why counsel for the state saw fit to prove by a witness that Robert had been convicted. As he did so,

however, and the two were jointly indicted as principals, and the evidence for the state sought to show that the two were acting in conjunction, the court, on request, should have informed the jury that the conviction of Robert raised no presumption of guilt against Andrew. See Coxwell v. State, 66 Ga. 309 (3), 315.

In the case of Robert Mixon the judgment is affirmed; in the case of Andrew Mixon the judgment is reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 686)

VAN DYKE v. VAN DYKE.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. PRINCIPAL AND AGENT—LIABILITIES—CONTRACT UNDER SEAL.
It was held in Lenney v. Finley, 45 S. E. 593, 118 Ga. 718, that "the rule that an undisclosed principal shall stand liable for the contract of his agent does not apply when the contract is under seal."

2. SAME.
This court declines to overrule that decision.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 516.]

3. SAME—EVIDENCE.
If one lends money to another on his own credit, and takes therefor at the time a promissory note under seal, payable to the lender's order, the lender cannot afterwards disregard such note, and render a third person liable for the money loaned, on the ground that such person was the principal of the borrower, which fact was unknown to the lender at the time when the loan was made.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 516.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Mary J. Van Dyke against Alice M. Van Dyke. Judgment for defendant, and plaintiff brings error. Affirmed.

Mary J. Van Dyke brought suit against Alice M. Van Dyke, alleging in brief as follows: The defendant is indebted to the plaintiff in the sum of $1,440, besides interest, which indebtedness was created as follows: On April 25, 1899, E. A. Van Dyke, the husband of the defendant, who the plaintiff knew had been the owner of 32 shares of the capital stock of the Merchants' National Bank, of St. Paul, Minn., came to the plaintiff, and informed her that the stock had been assessed 45 per cent. of its face value, and that it was necessary, in order to prevent it from being sold, to pay the assessment, and that he should send to the bank at once the amount of the assessment, and requested plaintiff to lend him the sum for that purpose. Plaintiff loaned him the amount, and the money was used in paying off and discharging the assessment of the stock. The stock was in fact then standing on the books of the bank in the name of the defendant. It was afterwards sold, and the proceeds were sent by a check payable to the order of defendant, and were used, as defendant claims, by her, to the extent of $1,440, in paying for certain improvements on land which she claims to own. At the time the loan was made the plaintiff did not know that the stock stood in the name of the defendant, but believed that it belonged to her husband. Believing him to be the true owner, she took from him a note for the amount of the loan. A copy of the note is attached to the declaration. She has since learned that at the time she made the loan Van Dyke was acting as agent for his wife in borrowing the sum to pay off the assessment on the stock. Plaintiff elects to proceed against the defendant as the undisclosed principal for whom the money was borrowed. By reason of the facts aforesaid "defendant became liable to plaintiff in the sum of $1,440 besides interest." The copy of the note attached to the declaration showed it to have been a note under seal, payable to the order of the plaintiff, and signed by E. A. Van Dyke, with nothing on its face referring to defendant. On motion the court dismissed the action on two grounds: First, that the declaration set out no cause of action, for the reason that the allegations disclosed that it was based on a contract under seal, and in such a case the law would not permit the plaintiff to proceed against the undisclosed principal when discovered; and, second, that the allegations of the petition disclosed that the plaintiff parted with her money on an express contract under seal, and no action can be maintained against the defendant for money had and received. The plaintiff excepted.

W. W. Haden and R. O. Lovett, for plaintiff in error. Culberson & Johnson, for defendant in error.

LUMPKIN, J. (after stating the facts). The general rule with reference to holding an undisclosed principal liable upon the contract of his agent is thus stated in Civ. Code 1895, § 3024: "If an agent fails to disclose his principal, yet, when discovered, the person dealing with the agent may go directly upon the principal, under the contract, unless the principal shall have previously accounted and settled with the agent." This is a codification of the law as it stood prior to the original Code of 1863, and is not an innovation resulting from legislative enactment. In Lenney v. Finley, 118 Ga. 718, 45 S. E. 593, it was held that: "The rule that an undisclosed principal shall stand liable for the contract of his agent does not apply when the contract is under seal. Accordingly, a lease under seal, executed by an agent as lessee in his individual name, and which does not purport to be executed on behalf of the principal, is not binding upon the latter, although it appears from extrinsic evidence that the lessee was the general agent to conduct a business for his principal, and that the premises were leased to be used

in such business." We are asked to review and reverse this decision, but the court declines to change the ruling then made. An examination of the authorities cited in the opinion will show that it was not without foundation. In Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665, it was said: "In the execution of instruments under seal by an agent the general rule is that it must purport upon its face to be the contract of the principal, and his name must be inserted in it, and signed to it." See, also, Compton v. Cassada, 32 Ga. 428 (compare Tenant v. Blacker, 27 Ga. 418; as to the execution of a power, see Terry v. Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420); Graham v. Campbell, 56 Ga. 258. In 1 Am. & Eng. Enc. L. (2d Ed.) 1141, it is said: "It has been laid down as a common-law doctrine that, when a contract is made by an instrument under seal, no one but a party to the instrument is liable to be sued upon it, and therefore, if made by an agent or attorney, it must be in the name of the principal, in order that he may be a party, because otherwise he is not bound by it. * * * Some of the later decisions, however, qualify this doctrine by holding that when a sealed contract has been executed in such form that it is in law the contract of the agent, and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of the performance by the other party, and has ratified and confirmed it by acts in pais, and the contract is one which would have been valid without a seal, the instrument will be binding on the principal." In the note attached to the declaration there is nothing to indicate that it was executed by Van Dyke as agent, or that his wife was in any way connected with it. Indeed, no reference to her or to any agency is made in the paper. See Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Mechem on Agency, §§ 701, 702, and note; Clark on Contracts, § 275, p. 519; Bishop on Contracts, §§ 426, 1070; Evans v. Wells & Spring, 22 Wend. 324—in which several interesting opinions were filed. Some courts hold that negotiable instruments do not fall within the general rule, and that an unnamed principal cannot be sued on them. See Clark on Contracts, § 275, p. 519 and notes.

It is contended that the rule applies only to instruments which were specialties at common law, as to which a seal was necessary; and that in cases where the instrument would be valid without a seal the addition of a seal would not bring it within the rule. There are some authorities holding or tending to hold this to be the rule. See Stowell v. Eldred, 39 Wis. 614; Wagoner v. Watts, 44 N. J. Law, 126; Shuetze v. Bailey, 40 Mo. 69, 75. The distinction drawn in this line of authorities, however, has not been followed in Georgia. In the case of Lenney v. Finley, supra, the instrument under consideration was a lease for a term less than two years, which, under our law, conveyed no interest in land, and could have been executed without any seal. In Rowe v. Ware, 30 Ga. 278, it was held that "the signature of a sealed instrument by an agent, the principal not being present, is not binding on the principal, unless the authority of the agent be under seal." In the body of the opinion it is said: "But it was said that the bond need not have been under seal, though in point of fact it was so, and therefore the seal might be disregarded. Not so. The question was whether Taylor had authority to sign the names of Hooks and Herndon to this bond as it is—sealed as it is. Whether a bond without a seal (to use, for convenience, a short but inaccurate phrase) would be valid has nothing to do with the case, for there was no such paper in the case." This was reaffirmed in Overman v. Atkinson, 102 Ga. 750, 29 S. E. 758.

It is further contended that a note under seal does not fall within this rule. At common law a note under seal was unknown. Such an instrument more nearly approximated a "single bond." Broom's Common Law (9th Ed.) 272, 484; Sivell v. Hogan, 119 Ga. 170, 46 S. E. 67. It is unnecessary to discuss the exact status of a sealed note. In Albertson v. Holloway, 16 Ga. 377, its nature was considered, and it was held that a plea of failure of consideration could be made to a suit based on it. In other cases there have been intimations that a presumption of a consideration arose from the presence of a seal, but that it might be rebutted. See Neil v. Bunn, 58 Ga. 583; Simms v. Lide, 94 Ga. 553, 21 S. E. 220. In Weaver v. Cosby, 109 Ga. 310, 34 S. E. 680, Mr. Justice Lewis said that an instrument then before the court, being under seal, "raised a strong presumption of law" that it was founded upon a consideration. In Sivell v. Hogan, 119 Ga. 167, 169, 170, 46 S. E. 67, the opinion was strongly expressed, although no direct ruling was made, that a seal raises a conclusive presumption of the existence of a consideration at the time the contract was entered into, but not that it has not since failed, either wholly or partially; and, accordingly, that want of consideration can not be pleaded, but failure of consideration may be. Whether the presumption thus raised is disputable or conclusive, the fact of being under seal gives to the note a character which it would not have otherwise. Moreover, the statute of limitations in regard to a note under seal and one without a seal is not the same. Civ. Code 1895, §§ 3765, 3767. Section 3634 of the Civil Code of 1895 reads as follows: "A specialty is a contract under seal, and is considered by the law as entered into with more solemnity, and consequently of higher dignity, than ordinary simple contracts." Under the strict commercial law prevailing in some jurisdictions, a note under seal and payable to a

named person or order is deemed not negotiable, but in this state it is treated as negotiable. Farrar v. Bank of New York, 90 Ga. 331, 17 S. E. 87; Porter v. McCollum, 15 Ga. 528. It is apparent that a note under seal occupies a different position in several respects from one which is not so. Hence it is not to be treated merely as a simple contract, and the seal rejected as surplusage. We think it does fall within the rule announced in Lenney v. Finley, supra. From what has been said it follows the plaintiff could not have recovered against the defendant on the note given by the husband of the latter.

It is contended, however, that, whether the plaintiff can recover on the note or not, she has a cause of action against the defendant aside from the note, under the facts alleged. The case of Farrar v. Lee, 10 App. Div. 130, 41 N. Y. Supp. 672, was very similar to that now under consideration. It is there said: "That the liability rested entirely upon the bond, in which any preliminary contract was merged; that, as the bond was signed by Tanner [the agent] in his own name, and not as agent for Lee [the principal], it was not competent to transfer by parol evidence, or in any other way, from Tanner to Lee, the obligation which Tanner had assumed personally." In the case of Lenney v. Finley, supra, it was contended that, if the concealed principal was not liable on the contract of lease by reason of its being under seal, nevertheless, having occupied the premises and used them for the purpose of conducting business, she was liable to the plaintiff. This contention was denied by the court. In the case of Maddox v. Wilson, 91 Ga. 39, 16 S. E. 213, no opinion was written. The third headnote appears to conflict with the ruling here made. The decision was made by two justices, and not by a full bench, and was disapproved in Lenney v. Finley, supra.

Under the allegations of the petition the trial court committed no error in sustaining the demurrer.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(122 Ga. 667)

LAMAR, TAYLOR & RILEY DRUG CO. v. LAMAR et al.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. APPEAL — ASSIGNMENT OF ERROR — SUFFICIENCY.

An assignment of error to the effect that the court erred in sustaining a motion to "rule out all of the evidence tending to show" a given state of facts, without specifying, either literally or in substance, the evidence which was ruled out, presents no question upon which this court can pass.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2905.]

2. SAME—BILL OF EXCEPTIONS.

The bill of exceptions failing to clearly show upon what evidence the judgment directing a verdict was predicated, it cannot be determined whether that judgment was or was not erroneous; and, as it is incumbent upon the complaining party to affirmatively show error, an affirmance of the judgment must result.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2912.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by H. J. Lamar and W. D. Lamar, executors, against the Lamar, Taylor & Riley Drug Company. Judgment for plaintiffs. Defendant brings error. Affirmed.

Lane & Park, for plaintiff in error. Hall & Wimberly and Dessau, Harris & Harris, for defendants in error.

CANDLER, J. This was an action by H. J. Lamar and W. D. Lamar, as executors of H. J. Lamar, deceased, against the Lamar, Taylor & Riley Drug Company, to recover $4,638.83 principal, besides interest, alleged to be the balance due on a promissory note for $25,000, made by the defendant, and payable to the plaintiffs. The note, a copy of which was set out in the petition, recited that it was "given as part purchase money as per terms of contract and agreement dated December 27, 1901, by and between the Taylor & Peek Drug Company and H. J. Lamar and W. D. Lamar, executors of the estate of H. J. Lamar." The defendant admitted the execution of the note sued on, but pleaded, as stated in the bill of exceptions, accord and satisfaction, failure of consideration, recoupment, set-off, and fraud. At the trial, after hearing evidence, the court directed a verdict for the plaintiff for $3,335.26 principal, $507.88 interest, and costs, and the defendant brought the case by direct bill of exceptions to this court for review.

The bill of exceptions sets out at length the evidence introduced on the trial, and recites that after the introduction of this evidence the plaintiffs "moved to rule out all of the evidence showing or tending to show any representations made by the parties, or either of them, prior to the execution of the contract, upon the ground that such testimony tended to vary the terms of the written contract of sale between the executors and the defendant company, and upon the ground that all such were merged in the written contract." It is also recited that, "after argument had, the court sustained the motion to rule out all of the evidence tending to show any representation made on the part of the plaintiff or plaintiffs, either or both of them, prior to the making and execution of the contract"; and this ruling is assigned as error. The defect in such an assignment of error should be readily apparent. No particular evidence is pointed out as having been excluded by the trial judge; but the court is asked to search exhaustively through the entire evidence, culling therefrom that which, in its opinion, shows or tends to show a given state of facts, con-

sider that evidence as ruled out, and decide whether its rejection was error. It is hardly necessary to say that this is a task which the law does not impose upon us, and which we cannot undertake to perform. No principle of law is more firmly established then that an assignment of error upon the admission or rejection of evidence must set the evidence out, either literally or in substance; and this is true whether the assignment be made in a motion for a new trial or in a bill of exceptions. 9 Enc. Dig. Ga. Rep. 702. And in the present case it cannot be said that the assignment of error sets out the evidence even in substance, for it refers to a voluminous mass of testimony, from which, as already stated, the court must, in order to pass upon the question presented, pick out that which, in its opinion, shows or tends to show a given state of facts. Counsel making the motion to rule out should have been required to specify the exact evidence desired ruled out, and the bill of exceptions should and would in that event have with certainty indicated that which was excluded. We are clear, therefore, that the assignment of error upon the rejection of evidence presents nothing upon which this court can intelligently pass; and this, in turn, leaves us in a similar predicament as to the remaining assignment of error, viz., that the court erred in directing a verdict in favor of the plaintiffs. For we have before us a mass of evidence, some of which we are assured was ruled out by the trial judge. Whether that which is left will authorize the direction of a verdict we are unable to say, because we are not in a position to separate the wheat from the chaff—to say which of the evidence it was that was left in, and upon which the direction of a verdict was based. It is incumbent upon the complaining party to show error, and to specify it plainly and distinctly. In the present case this was not done, and an affirmance of the judgment must result.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 647)

McINTOSH COUNTY COM'RS v. AIKEN CANNING CO.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. PARTIES—MISNOMER—MODE OF OBJECTION.
Where, in a civil case, the party proceeded against is designated and described by a wrong name, the objection of misnomer should be taken by a plea in abatement, and not by a motion to dismiss.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 156.]

2. SAME—OBJECTIONS WAIVED.
Where, in such a case, the party defendant, whether a corporation or a natural person, appears, and pleads to the merits by the true name, without raising the objection of misnomer, the error as to the name of such party is waived.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 177.]

3. MANDAMUS—QUESTIONS FOR JURY.
Where, upon the hearing of an application for mandamus, it appears from the answer of the respondent to the mandamus nisi that issues of fact are involved in the cause, which are material to a proper determination of the same, it is erroneous to grant a mandamus absolute, without submitting such issues to a jury.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 378, 386.]

(Syllabus by the Court.)

Error from Superior Court, McIntosh County; P. E. Seabrook, Judge.

Application by the Aiken Canning Company for writ of mandamus against the board of commissioners of the county of McIntosh and city of Darien. From a judgment granting the writ, defendant brings error. Reversed.

The Aiken Canning Company brought a petition for mandamus against "the board of commissioners for the county of McIntosh and city of Darien," alleging that the defendant was a corporation, having charge and control of the county affairs of McIntosh county, Ga. In the petition it was alleged that the petitioner, desiring to transplant oysters, in accordance with the provisions of the Political Code, § 1694, applied by petition to the defendant in the terms of this Code section for its consent and approval of petitioner's proposed action; that the defendant, in violation of petitioner's rights, failed and refused, and still failed and refused, to give its consent and approval as required by law. A copy of the plaintiff's application to the defendant was attached to the petition for mandamus. The prayer was for the writ of mandamus, directed to the defendant, commanding and requiring it to give its consent and approval to the action desired by the plaintiff. The facts alleged in the petition were verified by the affidavit of the general manager of the canning company. A rule nisi was granted on April 20, 1905, requiring the defendant to show cause, etc., on the fourth Monday in May, 1905, and ordered served upon the defendant; and process was issued requiring the defendant to answer the plaintiff's petition at the next term of the superior court of McIntosh county. On May 15, 1905, the defendant filed its answer, which, after stating the case, began as follows: "And now comes the commissioners of McIntosh county, a corporation, that has been served as the defendant in the above-entitled cause, and, answering, says," etc. In this answer the "commissioners of McIntosh county" admitted that the petition a copy of which was attached to the plaintiff's petition for mandamus was presented to "it," and that "it" failed and refused to give its consent as therein prayed for, but denied that such refusal was in violation of the plaintiff's rights. It alleged that there was no such territory within the county of McIntosh as is covered by section 1694 of the Political Code, and to which the defendant could grant the

privileges that had been asked for by the plaintiff, and that all the oyster beds within the limits of the county and within 1,000 feet of the shore line at mean low tide are either leased, owned by persons, or are such beds as are resorted to by the citizens of the state for procuring oysters for consumption or for sale; and that a mandamus would be nugatory and fruitless, and should, under the Civil Code, § 4870, be refused. The case came on to be tried at the May term of the superior court, when the defendant "moved to dismiss the proceedings in said case as to it, because the petition and rule nisi served upon it was a proceeding against the 'board of commissioners for the county of McIntosh and city of Darien,' and not against the 'commissioners of McIntosh county.'" The court overruled this motion, and the defendant excepted. The plaintiff offered an amendment to its petition, changing the name of the defendant so that it should read "commissioners of McIntosh county," which amendment was allowed by the court over the objection of the defendant, to which ruling the defendant also excepted. "Plaintiff then orally moved the court to make the mandamus absolute, claiming that the answer of the defendant did not admit of the introduction of any evidence, and had not raised any question of fact that could be determined at that time; and, after argument of counsel, the court sustained the motion of plaintiff, and adjudged and decreed that the mandamus absolute issue as prayed," to which ruling and judgment the defendant excepted.

Chas. M. Tyson, for plaintiff in error. Kay, Bennett & Conyers, for defendant in error.

FISH, P. J. (after stating the facts). 1, 2. The proper method by which to have raised the question made by the motion to dismiss was by plea in abatement, which has not been abolished in this state. But, irrespective of the method adopted, the objection came too late. The defendant had appeared and filed its defense to the merits, admitting in its answer that it had been served as the defendant in the case. All the authorities recognize the dilatory nature of the objection upon the ground of misnomer of the defendant, and the necessity of making it as such. 14 Enc. Pl. & Pr. 296. The objection must be taken in limine, and the cases hold that where a party, whether a natural person or a corporation, is sued under a wrong name, and appears and pleads by the true name, without raising the objection of misnomer, the error is waived, and the defendant will be concluded. Rhodes v. Louisville, 121 Ga. 553, 49 S. E. 681; McCreery v. Everding, 54 Cal. 168; Gilbert v. Nantucket Bank, 5 Mass. 97; City of Kingfisher v. Pratt, 4 Okl. 284, 43 Pac. 1068; Hammond v. Starr, 79 Cal. 556, 21 Pac. 971 (where the defendant was sued as "Ætna Iron Works, a corporation," when the true name, by which it appeared and pleaded, was "Ætna Iron Works Company"); Board of Commissioners v. Huffman, 134 Ind. 4, 31 N. E. 570 (where the complaint was against "The County of Huntington," when it should have been against "The Board of Commissioners of Huntington County"); Chicago & Alton R. Co. v. Heinrich, 57 Ill. App. 399, affirmed 157 Ill. 388, 41 N. E. 860 (where the defendant, the "Chicago and Alton Railroad Company," was misnamed in the declaration as the "Chicago, Alton and St. Louis Railroad Company"). This rule is especially applicable in this state, where all misnomers in civil proceedings, "whether in the Christian names or surnames," may, on motion, "be amended and corrected instanter, without working unnecessary delay to the party making the same." Civ. Code, § 5102. This section applies to corporations as well as to natural persons. Central Railroad v. Rogers, 66 Ga. 252; Johnson v. Central Railroad, 74 Ga. 397; Chattanooga R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109. It follows that the court did not err in allowing the amendment which corrected the misnomer as to the defendant. As the plaintiff had the right to make this amendment at any stage of the cause, it also follows that, even if the court had erred in overruling the defendant's motion to dismiss, such error would have been cured by this amendment.

3. In our opinion, the court erred in holding that the answer did not raise any question of fact to be determined by a jury, and in making the mandamus absolute upon the admissions of the defendant in its answer. The section of the Political Code under which the application to the board of commissioners was made by the canning company is as follows: "It shall not be lawful to take or catch any oysters in any of the waters of this state with or by a scoop, rake, drag, or dredge, or by the use of any other instrument than the oyster-tongs heretofore in general use for taking oysters, except within the waters more than one thousand feet distant from the shore-line at ordinary mean low tide. Oysters may be taken by any means or device from any private bed by the owner or lessee thereof, and for the purpose of transplanting to other beds in this state from territory unleased within said limits of one thousand feet; but, in the last case, only upon the consent and approval of the county commissioners for the county within which said territory may be located, or upon the consent and approval of the ordinary of those counties which may have no board of county commissioners, which consent shall be given in all cases in which application is made for the purpose of transplanting oysters to other beds within the waters of this state, from such beds as are not resorted to by the citizens of this state for the purpose of procuring oysters for consumption or for sale." Pol. Code, § 1694.

The position of the defendant in error is that, as its application was for permission to take oysters, for the purpose of transplanting to other beds within this state, from such public oyster beds as are not resorted to by the citizens of this state for the purpose of procuring oysters for consumption or for sale, the board of commissioners had no discretion whatever in the matter, but was bound to grant the application, upon its mere presentation, whether there were any such beds within the county of McIntosh or not; and the judge below evidently took the same view of the matter. We think this is too literal a construction of the statute. If the law means this, it is strange that the Legislature should have required that any application should be made to the board of county commissioners or ordinary, as the case may be, for permission to take oysters within the limit defined, by any means or device, for the purpose of transplanting to other beds within this state, from such beds as are not resorted to by the citizens of this state for the purpose of procuring oysters for consumption or for sale. Why require the application to be made to the board of commissioners, if under no circumstances the board can refuse to grant it? It seems to us that the purpose in requiring the application to be made in such a case as this must be to protect the oyster beds of a county from depredation by any and everybody who might undertake to gather oysters therefrom, by the use of any sort of means or device that they might see fit to employ, under the pretense of taking them, for the purpose of transplanting within the waters of this state, from unleased lands not resorted to by the citizens of the state for the purpose of procuring oysters for consumption or sale. We are of opinion that under this section of the Code the proper county authority has at least the power of passing upon the bona fides of the application, and of refusing to grant it if the circumstances are such as to warrant the conclusion that the application is not in fact made for the purpose therein expressed, or if there are no oyster beds within the waters of the county to which the consent asked for could apply. In the application of the canning company to the board of commissioners it was alleged that the applicant was "the owner and lessee of large territory of oyster beds and lands situate, lying, and being in the waters of McIntosh county." This allegation must have been made for the purpose of showing the good faith of the applicant, and indicating in what waters within this state the oysters were to be transplanted. And we will say here that we think that in every application of this character the county authority applied to should be informed of the locality where it is proposed to transplant the oysters; otherwise there might be no way of ascertaining whether the oysters are to be transplanted to other beds within the waters of this state or not. In its answer to the petition for mandamus the board of commissioners emphatically denied the allegation that the canning company is the owner and lessee of large territory of oyster beds and lands in the waters of McIntosh county, and alleged that from the fact that this "misstatement" was made in the application to the board, and from the further fact that there are no oyster beds in McIntosh county to which the consent asked for could apply, it is believed that the application was "but a subterfuge on the part of the plaintiff so as to prey upon the oyster beds of McIntosh county, * * * which are not subject to the provisions of Code section 1694." Under these circumstances, taking the allegation that there are no such oyster beds in McIntosh county to be true, we think the board had the power and was justified in refusing the application. The answer presented two questions of fact to be determined by a jury, viz.: (1) Whether there were any oyster beds in McIntosh county to which the permission asked for could apply; and (2) whether the applicant was really the owner or lessee of any oyster beds or lands in that county upon which it proposed to transplant the oysters.

It is true that the section of the Code in question declares that whenever the application is made for the purpose specified in the statute, and is limited to such unleased oyster beds as are not resorted to by the citizens of this state for the purpose of procuring oysters for consumption or sale, it shall be granted; but this does not necessarily mean that the applicant shall be the exclusive judge of the purpose for which the application is made. Suppose that the application is not in fact made for the purpose specified in the statute, but recites on its face that it is, is the board or the ordinary compelled to grant it? Suppose the real purpose behind the application is to take the oysters for the purpose of transplanting them within the waters of another state, or for the use of a canning factory owned or operated by the applicant, or for the purpose of selling them in their natural state, and the board of commissioners or the ordinary know or have good reason to believe this, must the permission be granted upon the mere presentation of the application? We cannot believe that the Legislature intended that, whenever an application of this character is presented to the ordinary or board of commissioners it must be granted, even though it is not made in good faith, but is a mere subterfuge or pretense under which to cover an illegal purpose. For these reasons we think the court should have submitted the two questions above indicated to the jury, and should not have granted a mandamus absolute unless both were answered by the jury in the affirmative. If the canning company was not the owner or lessee of any oyster beds or lands in McIntosh

county upon which it could transplant the oysters which it wished to take, then its application should not have been granted; for it did not indicate in the application a purpose to transplant the oysters upon any other oyster lands within this state. If there is no territory within the county of McIntosh to which the application could apply, the refusal to grant it was proper, as granting it would be a mere perfunctory and senseless act. At any rate, if this be true, the court ought not to grant a mandamus absolute, for this extraordinary writ is never issued for the mere purpose of settling, in favor of the applicant for it, a question in which he can have no real, substantial interest. "Mandamus will not be granted when it is manifest that the writ would, for any cause, be nugatory or fruitless." Civ. Code, § 4870.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 575)

NELMS v. STATE.

(Supreme Court of Georgia. Aug. 2, 1905.)

HOMICIDE — INSTRUCTIONS — REMARKS OF JUDGE—EVIDENCE.

There was no error in charging or in failing or refusing to charge. The court did not express or intimate an opinion as to what had or had not been proved. There was ample evidence to authorize the verdict, and there was no abuse of discretion in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

John Nelms was convicted of voluntary manslaughter, and brings error. Affirmed.

Geo. P. Munro, J. J. Dunham, and S. R. Stevens, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

FISH, P. J. John Nelms, under indictment for murder, was found guilty of voluntary manslaughter. His motion for a new trial being overruled, he excepted.

1. Neither the evidence nor the prisoner's statement authorized a charge on the subject of involuntary manslaughter. Therefore the failure to instruct the jury on that subject was not error.

2. It was not cause for a new trial that the judge, before instructing the jury on the subject of flight, remarked in their presence, "Now one matter that my attention has been called to by the solicitor, that I overlooked in charging you." Such remark did not tend to unduly emphasize the instructions on the subject of flight.

3. After charging the rule as to positive and negative testimony, it was not error for the court to instruct the jury that "the rule does not apply when two parties having equal facilities for seeing or hearing, if one swears that it did occur and the other that it did not." Civ. Code, § 5165.

4. Error was assigned, in the motion for a new trial, upon the refusal of a written request to give in charge the following: "The good character of one on trial for a crime, if satisfactorily proved, may of itself, in a case where guilt is not plainly established, be sufficient to generate in the minds of the jury a reasonable doubt of his guilt." And complaint was also made that the court instructed the jury that, where good character of the accused is shown, such character may of itself "generate a doubt in the minds of the jury as to the guilt of the accused. But while that is true, if the jury should be satisfied from the testimony beyond a reasonable doubt of the guilt of the accused," then the jury would be authorized to convict notwithstanding such proof of good character. The error assigned upon the charge was "that the court instructed the jury that good character might raise in their minds simply a doubt of the movant's guilt, and not a reasonable doubt, which would authorize them, on proof of good character alone, to find movant not guilty." If there were any evidence tending to show the general character of the accused, it was the testimony of a witness who swore: "I have known John ever since he was a boy—nothing like grown. I know his general character pretty well. It is about as good as any negro I have ever known or had about me." For myself, I think it exceedingly doubtful if this evidence authorized a charge on the subject of the general good character of the accused. The legal signification of general character or reputation is not readily understood by laymen of average intelligence, and the testimony above quoted indicates to my mind that the witness was merely giving his individual opinion of the character of the accused, based upon his knowledge and acquaintance with him, and not the "community reputation" of the accused. Moreover, the witness did not swear to a positive knowledge of the general character of the accused. He said he knew it "pretty well." Nor did he state unqualifiedly that the general character of the accused was good, but said that it was "about as good as any negro I have ever known or had about me." This may have been absolutely true, and yet the general character of the accused may not have been good. The adverb "pretty" means "in some degree; moderately; considerably; rather;—less emphatic than very; as, I am pretty sure of the fact." Webster's Dictionary. One of the meanings of the adverb "about" is "nearly; approximately; with close correspondence in quality; * * * degree;" etc. Id. So the testimony of the witness may be thus paraphrased: "I know the general character of the accused moderately or rather well. It is nearly or approximately as good as that of any negro I have ever known or had about me." Granting, however, that the testimony above referred to authorized an instruction as to the general character of the accused, we are of the opinion that the charge given by the

court was substantially correct. See Thornton v. State, 107 Ga. 683, 33 S. E. 673, and cit. In Stevenson v. State, 83 Ga. 575, 10 S. E. 234, it was held that a charge as to good character of the accused, in its relation to reasonable doubt less accurate than the charge on that subject in the present case, did not require a new trial. We are further of the opinion that the instructions sufficiently covered the request to charge. The charge could not have misled the jury into believing that the court meant that proof of good character of the accused would generate a mere doubt of his guilt which would not authorize his acquittal.

5. The court charged the jury that, where the accused offers evidence for the purpose of establishing his character for peace, the jury should consider such evidence "in connection with the other testimony in the case in passing upon the guilt or innocence of the defendant." Error was assigned upon this charge because the court instructed the jury to consider the evidence of the character of the accused for peace in connection with the other evidence in the case, "and failed to instruct them that said testimony could be considered independent of the other testimony as to the question of movant's guilt or innocence, or as generating a reasonable doubt in the mind of the jury as to the movant's guilt or innocence." The charge as given was correct. Proof that the accused bore a good character for peaceableness should have been considered by the jury not by itself alone, but in connection with all other pertinent evidence tending to establish his guilt or innocence. See Brazil v. State, 117 Ga. 82, 43 S. E. 460. As has been frequently ruled, an instruction correct in itself is not rendered erroneous by a failure to charge some other appropriate instruction.

6. Nor did the court err in refusing to give in charge the following request defining a reasonable doubt as "such a doubt as a juror would hesitate to act on in the most important business affairs of his own in the ordinary walks of life." It is stated in 23 Am. & Eng. Enc. L. 955, that "there have been many attempts to define and interpret the term 'reasonable doubt,' * * * but it is apprehended that such attempts are futile; that the words are of plain and unmistakable meaning; and that any definition on the part of the court tends only to confuse the jury, and to render uncertain an expression which, standing alone, is certain and intelligible." In Battle v. State, 103 Ga. 53, 29 S. E. 491, Mr. Justice Little, after citing a number of cases, says: "It would seem, therefore, to be a conclusion that the phrase 'reasonable doubt' explains itself. Certainly the meaning is obvious, and will be readily appreciated by the average juror without further explanation." The definition given in the request above quoted was certainly not accurate, as it leaves the jury to infer that any doubt which might cause any juror to hesitate to act in the most important business affairs of his own would be such a doubt as would justify the acquittal of the accused. The request, if given, would have tended only to confuse the jury, and to make the term "reasonable doubt" uncertain and less intelligible. The court, in its charge, several times instructed the jury that, before they would be authorized to convict the accused, the evidence must satisfy their minds and consciences beyond all reasonable doubt of his guilt.

7. Complaint was made that the judge erred in remarking in the presence of the jury and during the examination of a witness by counsel for the accused: "I do not think there is any issue raised in the case whether he [meaning the defendant, John Nelms] shot at William Dorsey again on either the part of the state or the defendant's witnesses. I haven't heard any testimony on the question. It's taking up time on a question that is not in the case. If it is in issue, it has not developed so far. The state's witnesses said that John did not shoot but once." The error assigned was that the court in such remark expressed an opinion in the presence of the jury as to what had or what had not been proved in the case. It is obvious that there is no merit in this assignment of error.

8. The court did not err in ruling out, at the instance of the solicitor general, evidence of the self-serving declaration of the accused, though it was given in evidence by a witness while being examined by the solicitor. Considering the evidence and the statement of the accused, the jury was authorized to render one of three verdicts—for murder, for voluntary manslaughter, or not guilty; and the court did not err in so instructing them. The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 685)

ROBERTS et al. v. HEINSOHN.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. WRIT OF ERROR—BRIEF OF EVIDENCE—TRANSCRIPT OF RECORD.

This court will not consider as evidence affidavits and documents specified in a bill of exceptions as material to a clear understanding of the errors complained of, which are not incorporated in an approved brief of the evidence, but are brought to this court in the transcript of the record merely as independent papers under the certificate of the clerk that they are of file in his office.

2. SAME—DISMISSAL.

The writ of error will not be dismissed, but the case will be retained for a consideration of such questions as do not depend upon the evidence for determination.

3. INJUNCTION—TRESPASS.

The petition for injunction was legally sufficient to support the judgment rendered thereon.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Action by one Heinsohn against Roberts and others. Judgment for plaintiff, defendants bring error. Affirmed.

Payton & Hay, for plaintiffs in error. Perry & Tipton, for defendant in error.

CANDLER, J. This case comes up on exceptions to the grant of an injunction. On the call of the case in this court counsel for the defendant in error moved to dismiss the writ of error on the ground that none of the evidence was incorporated in the bill of exceptions, and no approved brief of the evidence was brought up in the transcript of the record, and that the petition and answer made no law points to be adjudicated without reference to the evidence. It appears that the statement as to the evidence is correct, and that in lieu of a brief of the evidence the plaintiff in error had sent to this court in the transcript of the record a set of detached affidavits and documents, each bearing the date that it was filed in the clerk's office, but without any effort to brief the evidence, and without any approval or verification by the trial judge. Of course, these affidavits and documents cannot be considered by this court as evidence, but will be disregarded entirely. Braswell v. Brown, 112 Ga. 740, 38 S. E. 51; Bond v. Winn, 113 Ga. 18, 38 S. E. 328; Eubank v. Eastman, 120 Ga. 1048, 48 S. E. 426. The fact, however, that there is no evidence before this court will not work a dismissal of the writ of error, for the reason that the bill of exceptions calls in question the legal sufficiency of the petition to furnish a basis for the equitable relief sought and granted. The suit was, in effect, an action to enjoin a trespass. It was not, as contended by counsel for the plaintiff in error, an effort to substitute the equitable remedy of injunction for the common-law action of ejectment, for the plaintiff alleged in himself both title and possession, and sought only to prevent an alleged trespass on his premises by the defendants. Nor is there any merit in the contention that there was no allegation of irreparable damage. Such damages were distinctly alleged, and the fact that it was also alleged that the money value of the injury already sustained by him was "$1,000, or other large sum," does not negative the idea that the damage done and threatened was irreparable, but was merely an approximation of the extent to which he had already suffered. This case is therefore distinguishable from that of Ocmulgee Lumber Co. v. Mitchell, 112 Ga. 528, 37 S. E. 749. For none of the reasons assigned in the bill of exceptions was the petition defective; and as we are unable to pass upon any of the questions involving a consideration of the evidence, an affirmance of the judgment must result.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 588)

PERKINS v. STATE.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. SHOOTING AT ANOTHER—INSTRUCTIONS.
The evidence was of such a character as to authorize an instruction on the law relating to the statutory offense of "shooting at another." Harris v. State, 47 S. E. 520, 120 Ga. 167.
2. SAME—EVIDENCE.
The charges complained of were not erroneous for any of the reasons assigned. The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

One Perkins was convicted of crime, and brings error. Affirmed.

R. S. Wimberly, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 579)

WHIPPLE v. STATE.

(Supreme Court of Georgia. Aug. 2, 1905.)

CRIMINAL LAW — APPEAL — REVIEW — EVIDENCE.
The evidence for the state was entirely circumstantial, but, if the witnesses were credible, it was sufficient to establish the guilt of the accused beyond a reasonable doubt. The credibility of the witnesses was a matter for the jury, subject to the revision of the judge upon application for a new trial. The trial judge being satisfied with the verdict, and there being no error of law requiring the granting of a new trial, his discretion exercised in refusing to grant a new trial will not be interfered with.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3068–3084.]

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

One Whipple was convicted of murder, and brings error. Affirmed.

Whipple was tried for the murder of Boone, convicted, and sentenced to imprisonment for life. He filed a motion for a new trial, which was overruled, and he excepted. Besides the general grounds, the motion contained two special grounds. The first complained that the court refused to rule out the testimony of a witness to the effect that on the morning after the killing she saw one of the sons of the accused put a pair of shoes over the door of the house of the accused. The objection to the testimony was that it was irrelevant, that there was nothing to connect the accused with the act of the son, and that it did not appear that the shoes belonged to the accused. The judge allowed the testimony to remain in solely for the purpose of impeaching the son of the accused, who had previously testified that he did not put the shoes over the door. The second special ground complained that the court refused to allow the accused to

ask Davis, a witness for the state, if he did not tell Simmons that if he came to the trial and testified like he did on the preliminary trial it "would put the guilt on him," counsel stating that he expected to show that Simmons was kept away by this threat. On objection by the solicitor general, the judge said that the testimony seemed to be inadmissible, but he would not then make a final ruling, but would allow the solicitor general to call the witness as a state's witness after dinner. The evidence was not afterwards offered, nor was the court again requested to allow it admitted, nor were any further rulings made.

W. L. Warren and Grice, Fort & Grice, for plaintiff in error. E. D. Graham, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

COBB, J. The evidence upon which the state relied for a conviction was entirely circumstantial in its nature. It consisted of testimony as to tracks, threats, and efforts to fabricate evidence favorable to the theory of the defense set up by the accused. The motive for the homicide was claimed to have arisen from the fact that the deceased was in the habit of visiting the house at which the wife of the accused was accustomed to stay, the accused and his wife being at the time in a state of separation. If the witnesses called by the state were credible, the circumstances proved were sufficient to establish the guilt of the accused. On the other hand, there were witnesses called by the accused, whose testimony, if worthy of credit, established a complete defense. According to the testimony of one witness it was impossible for the accused to have been at the scene of the homicide at the time of its commission, and there was other testimony tending to establish the alibi set up. The credibility of the witnesses was a question for the jury, and, the judge being satisfied with their finding, under the well-established rule this court will not interfere with his judgment refusing a new trial unless some material or substantial error was committed during the process of the trial.

Only two errors of law were complained of. The accused cannot take advantage of the refusal to admit the testimony of the witness Davis, for the reason that the court made no positive ruling on this subject, but postponed the ruling until a later stage of the case, and the attention of the court was not thereafter called to the matter. See Stone v. State, 118 Ga. 705 (9), 45 S. E. 630, 98 Am. St. Rep. 145. The evidence as to the concealment of the shoes by the son of the accused was restricted to the purpose of impeachment. While this might be treated as immaterial, and therefore the evidence would not be admissible, still we do not think the admission of the testimony was an error of such character as to probably affect the result, and a reversal is not required on that ground. In fact, the venerable and able counsel for the plaintiff in error, who argued the case here with so much earnestness, candidly admitted that there was nothing in either of the special grounds which would require a reversal of the judgment, and we concur with him in this view. He asked a reversal upon the general aspect of the case, as being one founded mainly upon the testimony of a witness who was old, infirm, superstitious, and shown to be unworthy of belief. This witness was impeached by proof of general bad character, but she was also sustained by evidence of good character. All of these questions were, however, for the jury, and we do not feel justified in interfering with the judgment refusing a new trial.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 612)

SEABOARD AIR-LINE RY. v. OLSEN.

(Supreme Court of Georgia. Aug. 2, 1905.)

CARRIERS—INJURY TO PASSENGER—PETITION—SUFFICIENCY.

The petition in an action brought by a passenger against a railway company for personal injuries alleged, as an act of negligence on the part of the company causing the plaintiff's injuries, that the platform, upon which the plaintiff attempted to alight from the car, "was * * * located too far from the step of the * * * coach from which she alighted," and that "the distance from the car step to the platform was more than an ordinary step for an individual making an average step." *Held*, that such allegations were mere conclusions of the plaintiff; a special demurrer thereto, calling for a more specific statement of the distance between the platform and the car step, should have been sustained, in the absence of a proper amendment. Blackstone v. Railway Co., 31 S. E. 90, 105 Ga. 380.

(Syllabus by the Court.)

Error from Superior Court, Glynn County.

Action by one Olsen against the Seaboard Air-Line Railway. Judgment for plaintiff. Defendant brings error. Reversed.

Crovatt & Whitfield, for plaintiff in error. Courtland Symmes and Krauss & Sheppard, for defendant in error.

FISH, P. J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 636)

BAXLEY v. BAXLEY et al.

(Supreme Court of Georgia. Aug. 3, 1905.)

APPEAL—REVIEW—REFUSAL OF NEW TRIAL.

The plaintiff in error not having insisted on any of the grounds of his motion for a new trial except those which complain that the court erred in charging on the subject of notice in the plaintiff of the defendant's deed, and it appearing that the charges complained of stated sound principles of law, and were warranted by the evidence, the judgment overruling the motion will not be disturbed.

(Syllabus by the Court.)

Error from Superior Court, Appling County; D. M. Roberts, Judge.

Action between Baxley and Baxley and others. From a judgment, Baxley brings error. Affirmed.

Thomas & Parker, for plaintiff in error. N. J. Holton and W. W. Bennett, for defendants in error.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 549)

COBB v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

1. CRIMINAL LAW—CERTIORARI—HEARING—PROCEDURE.

In the light of the judge's certificate to the bill of exceptions there was no abuse of discretion in refusing to continue the hearing on the certiorari; nor, in view of the circumstances, was it error to hear the argument on the certiorari, reserving judgment thereon, and, in the interval between the hearing and the judgment, consider and dispose of affidavits submitted in support of a traverse to the answer of the trial judge. This case differs from Phillips v. Atlanta, 8 S. E. 431, 78 Ga. 773, in that there the main case was decided before the traverse was ever disposed of, while in the present case the traverse was heard and overruled before there was any judgment on the certiorari.

2. SAME—EXCEPTIONS TO JUDGE'S ANSWER.

Of those exceptions to the answer of the trial judge which were overruled by the judge of the superior court some are too vague and confused to present any question for decision by this court, while the remainder relate to matters which have no substantial bearing on the decision of the certiorari. The assignment of error upon the overruling of these exceptions is therefore without merit.

3. SAME—OVERRULING CERTIORARI.

For none of the reasons assigned in the bill of exceptions and argued in the brief of counsel for the plaintiff in error was it erroneous to overrule the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Scott Cobb was convicted of crime, and brings error. Affirmed.

Busbee & Busbee, for plaintiff in error. F. A. Hooper, Sol. Gen., and E. F. Strazier, Sol., for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 571)

NAPPER v. STATE.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. ASSAULT WITH INTENT TO KILL—EVIDENCE.

In a case where, if death had ensued, the defendant would not have been guilty of murder, he could not be convicted of assault with intent to murder; but, if the evidence warrants a conviction of the offense of stabbing, not in his own defense or under circumstances of justification, he may be found guilty of that offense.

2. SAME—INSTRUCTIONS.

While in the present case the defendant was entitled to have this legal principle given in charge to the jury upon proper request, yet where the entire charge shows that, though the request was not given in the language in which it was made, it was fully covered in the general charge, and the defendant had the benefit of the legal principle, a reversal will not result from the refusal to charge in the language of the request.

3. SAME.

The charges complained of, when viewed in the light of the entire charge and of the evidence, furnish no ground for a reversal.

4. SAME—EVIDENCE.

The verdict was not contrary to law or the evidence.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Frank Napper was convicted of assault with intent to kill, and brings error. Affirmed.

Frank Napper was indicted for an assault with intent to murder. He was convicted, moved for a new trial, and upon the overruling of the motion excepted. The evidence on behalf of the state was, in brief, as follows: On April 16, 1905, a baptising occurred, at which a large number of negroes congregated. There was a pond on land leased by T. C. Barlow and his brother J. E. Barlow. They gave permission for the baptising to take place there, provided the people would not go on the cultivated land. Napper and one Garden left the pond and crossed over a piece of land into the watermelon patch, pulled out a bottle of whisky, took a drink, and urinated in front of the house where T. C. Barlow's mother was, though it does not appear that she saw them. In crossing the land they trampled upon some corn which was planted, and as they went back the two Barlows met them. J. E. Barlow asked the defendant if he did not know that it was against their rules to go over the land, and he said, "No." The two were standing arguing, and Barlow told the defendant that he did not allow any one to go there. Defendant raised his hand for something, and Barlow struck his hand, and knocked it "back down," saying, "Don't raise you hand at me." Another negro, named Mitchell, who was in a hack, jumped out, carrying the butt end of a whip, and saying: "Kill the damn son of a bitch. Let them go to their house and get their guns. We have got as many as anybody." J. E. Barlow started toward the house. The defendant cut T. C. Barlow with a knife, a weapon likely to produce death, the wound being very severe, causing insensibility for some time, and causing Barlow to be confined to his bed from the injury. When the defendant raised his hand, Barlow "slapped it back down." Barlow's fist was not doubled up, but his hand was open. He did not strike the defendant. J. E. Barlow testified

for the state: "What caused my brother to strike the negro on the hand, I suppose the negro was raising his hand to hit him. The negro raised his hand and he put it back down, then Hamless [Mitchell] jumped out of the hack, and says, 'Kill him a damn son of a bitch.'" After the cutting the defendant and Mitchell ran away, and were afterwards caught. The evidence for the defendant was, in brief, as follows: When Barlow went up to the defendant he slapped the defendant, and when the latter stepped back he was again slapped. Barlow then kicked him. It was after being attacked, struck in the face, and kicked that the defendant cut Barlow.

Jno. R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

LUMPKIN, J. (after stating the facts). 1, 2. Under the decisions of this court it is well settled law that in a case where, if death had ensued, the defendant would not have been guilty of murder, but only of manslaughter, he could not be convicted of an assault with intent to murder, though he might be guilty of the offense of stabbing, not in his own defense or under circumstances of justification. Elliott v. State, 46 Ga. 159; Seborn v. State, 51 Ga. 164; Smith v. State, 52 Ga. 88. On the other hand, it would have been error to charge that, if the defendant cut Barlow with a weapon likely to produce death, under such circumstances as would have made him guilty of murder had death ensued, he would have been guilty of the offense of assault with intent to murder. Gilbert v. State, 90 Ga. 691, 16 S. E. 652; Gallery v. State, 92 Ga. 463, 17 S. E. 863; Lanier v. State, 106 Ga. 368, 32 S. E. 335. At first view there may appear to be some inconsistency in these two statements, but the conflict is only apparent, and not real. The reason which underlies both rulings shows them to be entirely consistent. On the trial of one accused of an assault with intent to murder, the intent to kill is an essential element of the offense. If one actually kills another with a weapon likely to produce death, and used in a manner calculated to produce that result, the law presumes an intention to kill from the fact of the killing. Thus it has been held that: "Where one voluntarily fires a loaded pistol at another, without excuse, and not under circumstances of justification, and kills the person at whom he shot, the law will hold the slayer responsible for the consequences of his act. It conclusively presumes malice on the part of the slayer, and the grade of the homicide so committed will not be reduced to involuntary manslaughter, even if the intent of the slayer, under such circumstances, was to wound or cripple the deceased, and not to kill." Stovall v. State, 106 Ga. 443 (3), 32 S. E. 586. The law will charge an evildoer with all the natural consequences of his unlawful act which the act produces. But it will not necessarily impute to him by presumption an intention to produce a consequence which did not result. Therefore, where death does not result, the intent to kill is not matter of legal presumption, but is a matter to be found by the jury. In determining this they may infer malice from the facts proved. Gilbert v. State, supra. The unlawful intent to kill being an essential ingredient of the crime of assault with intent to murder, that offense includes all the elements of murder except the actual killing. But inasmuch as from an actual killing the intent to kill may be presumed, it does not follow that in the absence of a killing the presumption arises.

In the present case the defendant requested the following charge: "If you believe that the defendant, under the circumstances proven, had killed Barlow, and he would not have been guilty of murder, then I charge you that you are not authorized to convict the defendant of the offense of assault with intent to murder." This request contained substantially the legal proposition stated in this opinion. Had it not been, in effect, covered by the charge given, its refusal would furnish ground for a new trial. But a careful examination of the entire charge satisfies us that it substantially covered the principle included in the request. The presiding judge defined the offense of assault with intent to murder to be "an assault with a weapon likely to produce death with intent unlawfully, willfully, feloniously, and of malice aforethought to kill and murder." In reference to malice, as applied to the case on trial, he informed the jury that it meant "the intent to take human life unlawfully, where there are no circumstances of justification or mitigation for the act if the life should be taken as intended. It means the deliberate and intentional use of a deadly weapon for the purpose of taking human life, from whatever motive it springs, if there are no circumstances surrounding the transaction which mitigates or justifies the act." He informed them that "whether there was the intent to kill and murder is a question of fact which the jury should determine by looking to all the facts and circumstances in the case, looking to the parties, the manner of the use of the weapon if one is used, the circumstances attending its use; all the light you can get on the transaction for the purpose of determining the great question involved in the case, which is, is the defendant guilty of assault with intent to murder?" He charged them as to what would reduce a homicide from murder to manslaughter. In stating the things necessary to be proved to warrant the conviction of the accused of assault with intent to murder, he said: "And that there were no circumstances at the time which either justified Napper in so cutting Barlow, or which had the effect of showing that he act-

ed in a sudden heat of passion brought about in such a manner as to in any degree mitigate the result of the defendant's act." He explained to the jury the difference between the offense of assault with intent to murder and the offense of stabbing another not in one's own defense or under other circumstances of justification. At another time he said "that the offense of assault with intent to murder is based upon facts which require as an essential to be shown upon the part of the state that the defendant acted without justification or mitigation in so acting and using a weapon likely to produce death, and with an intent to take human life." From these quotations it will be seen that the charge was fully as favorable to the defendant as he was entitled to ask; and, while the court did not give the request in the language asked, the charge did cover the substantial principle involved in it. In the light of the whole charge as contained in the record, the refusal of the request furnishes no ground for reversal.

3. The other charges complained of, when viewed in the light of the entire charge and of the evidence, furnish no ground for a reversal.

4. The verdict was not contrary to the law or the evidence.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 614)

SOUTHERN RY. CO. v. ELLIS.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. CARRIERS—OVERCHARGE OF FREIGHT—EVIDENCE.

As set out in the petition for the writ of certiorari, the evidence in this case failed to prove the allegations of the statement of the cause of action attached to the summons. It neither identified the two shipments as being those referred to in the suit, nor did it show that the plaintiff paid to the defendant the amount charged, nor that the payments were made under protest as alleged.

2. WITNESS—ADMINISTRATION OF OATH.

If a witness is allowed to give his testimony in the presence of a defendant or his counsel without objection, although not under oath, this would amount to a waiver of objection on the part of the defendant, and the omission of the administration of the oath would not furnish ground for a new trial. Smith v. State, 8 S. E. 187, 81 Ga. 480 (2); Rhodes v. State, 50 S. E. 361, 122 Ga. ——.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 805.]

3. SAME—RECALLING WITNESS.

Where, by inadvertence, a witness was not sworn before giving testimony in regard to the case on trial, upon the discovery of such fact pending the trial there was no error in permitting him to be recalled to the stand and sworn and allowed to testify as a witness.

4. SAME—PROCEDURE.

After being so recalled, if the witness were merely asked if what he had previously stated without being sworn was true, and answered that it was, in the absence of any objection this would furnish no ground for a reversal.

(Syllabus by the Court.)

Error from Superior Court, Appling County.

Actions by John Ellis against the Southern Railway Company. Judgment for plaintiff on consolidation of cases, and from an order refusing a writ of certiorari defendant brings error. Affirmed.

John Ellis, Jr., brought two suits in a justice's court against the Southern Railway Company, seeking to recover in each of them on account of an alleged overcharge for freight. The summons in one of them alleged that on or about October 19, 1903, the defendant received from the Willingham Manufacturing Company, at Macon, Ga., certain property to be delivered to the plaintiff at Baxley, Ga.; that it was so delivered, but that the defendant required him to pay 44 cents over and above the amount it was entitled to receive for transporting the property; and that he paid such amount under protest to get possession of his property. Also that it required him to pay the sum of 25 cents in excess of what he should have paid on a certain bill of freight shipped "as aforesaid" on the 2d day of January, 1904, "for that said defendant received from its connecting line, to wit, the W. & A. Railway Co., who had received from the North Georgia Milling Co. a certain lot of flour from Dalton, Ga., which was delivered to plaintiff at Baxley, Ga., same being his property, except there was one sack of said flour, weighing 24 lbs., which was lost or not delivered by said defendant to plaintiff, which was of the value of 60 cents, to the total damage of the plaintiff in the sum of $1.29." The other suit was for $2.86. The summons alleged that on or about the 14th day of October, 1903, "Heckinger Bros. & Co. delivered to the Merchants and Marines S. Co., to be shipped viâ the Southern Railway Company to plaintiff at Baxley, Ga., a certain lot of furniture, and said defendant refused to deliver said furniture to plaintiff until he paid them the sum of $2.86 over and above the correct amount to which they were entitled for transporting said furniture, which amount plaintiff paid under protest, to his injury and damage in the sum of $2.86." The two cases were consolidated and tried as one. A judgment was rendered against the defendant, and the case was appealed to a jury. At the trial the plaintiff was placed on the stand as a witness in his own behalf, but was not sworn. He stated that "a bill of furniture was shipped to him from Macon, Ga., and the defendant charged him for ninety pounds too much freight, which amounted to an excess of forty-four (44) cents freight according to what had been previously charged; that the defendant weighed the goods wrong, and charged for ninety pounds more than they carried; that he weighed the goods on the defendant's scales, and received all that he ordered; that a bill of furniture was shipped to him from Macon, Ga., and the defendant charged for

one hundred and ninety pounds too much freight, which amounted to an excess of $2.86 freight according to what he had been previously charged; that the defendant weighed the goods wrong, and charged for one hundred and ninety pounds more than they carried; he weighed the goods on the defendant's scales, and received all that he ordered." After the argument began, counsel for the defendant made the point that the witness had not been sworn. Plaintiff's counsel thereupon recalled him to the stand over objection on the part of the defendant, administered the usual oath to him, and then asked him if what he had previously stated was true, to which the plaintiff responded in the affirmative, and the case was again closed. The jury found for the plaintiff $3.11. The defendant applied to the judge of the superior court for a writ of certiorari, which was refused, and the defendant excepted.

De Lacy & Bishop, for plaintiff in error. V. E. Padgett, for defendant in error.

LUMPKIN, J. (after stating the foregoing facts). These combined cases involve between $3 and $4 in money, and three or four points of law. The latter are sufficiently disposed of in the headnotes.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 547)

CLEMENTS v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

1. HOMICIDE—INSTRUCTIONS—MANSLAUGHTER.
The evidence in this case proved the defendant guilty of murder, and there was nothing to require a charge on the subject of manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 654.]

2. CRIMINAL LAW—NEW TRIAL—GROUNDS.
The mere allegation, in a ground of a motion for a new trial, that while the defendant in a criminal case was making his statement a woman in the gallery or back part of the courtroom burst out crying and sobbing loudly, but was immediately removed by the sheriff under the order of the court, who thereupon refused to declare a mistrial, furnishes no ground for reversal, it not appearing who the woman was, or how the defendant was injured by the occurrence.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

One Clements was convicted of murder, and brings error. Affirmed.

E. M. Smith and Brown & Brown, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

LUMPKIN, J. Clements was indicted for the murder of Will Stephenson. He was convicted, with a recommendation that he be imprisoned for life. He moved for a new trial, which was refused, and he excepted. The evidence on behalf of the state showed, in brief, the following facts: Stephenson was in a store when the defendant came up. As he and others stepped out of the store, the defendant was standing nearby. He grabbed Stephenson, cursed him, had a drawn pistol, and said, "You run home and got your pistol to kill me with." Stephenson denied this, but the defendant insisted that it was true, and said, "I have got a notion to shoot you anyhow." Stephenson answered: "I have not done anything to you. What do you want to shoot me for? I have not got my pistol. If you will go with me I will show you." The defendant told him to hold up his hands, and asked a person nearby to come and get the pistol out of Stephenson's pocket. The person addressed declined to do this. Stephenson ran, and the defendant pursued him, shooting at him three times. Two shots took effect, one in the leg and the other in the back, resulting in Stephenson's death. He was trying to get around the corner of the house. During the same evening, and previously to the homicide, the defendant had said that if he found Stephenson that night he would kill him. The evidence for the defendant did not materially differ from that for the state as to the occurrences at the time of the homicide. One witness testified that on the night of the shooting Stephenson came to his store, asked if any one had seen the defendant, and said that he wished to find him; that the witness told the defendant that Stephenson was hunting for him, and that he had better not go where the latter was; that Stephenson came to the store a second time and asked for the defendant, and the witness also told this to the defendant; and that Stephenson had said that it would be bad for defendant if he found him. Another witness testified that when Stephenson came into the store near which the shooting occurred he inquired for the defendant, and also that when the defendant thrust his pistol into Stephenson's face and required him to throw up his hands the latter held them up part of the way, "but twisted around like he was trying to put them in his pocket."

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 546)

YOUNG v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

1. HOMICIDE—VOLUNTARY MANSLAUGHTER.
The evidence authorized an instruction on the law of voluntary manslaughter.

2. SAME—INSTRUCTIONS.
The extracts from the charge of which complaint is made were not erroneous for any reason assigned.

3. SAME—EVIDENCE.
The evidence warranted the verdict, and no reason appears for reversing the judgment refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

One Young was convicted of crime, and brings error. Affirmed.

Burton Cloud and Harvey Hill, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 547)

MATHIS v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

CRIMINAL LAW—APPEAL.

The evidence amply warranted the verdict, and none of the assignments of error disclose any sufficient reason for reversing the judgment.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

One Mathis was convicted of crime, and brings error. Affirmed.

Watts Powell and Busbee & Busbee, for plaintiff in error. E. F. Strozier, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 546)

McELROY v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

CRIMINAL LAW — APPEAL — REVIEW — FINAL JUDGMENT.

Until there has been a judgment finally disposing of the case in the trial court, the Supreme Court has no jurisdiction to pass upon an assignment of error complaining of the striking of a plea of former jeopardy, filed by the accused. Fugazzi v. Tomlinson, 46 S. E. 831, 119 Ga. 622, and cit.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2589.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

One McElroy was tried for crime, and brings error. Dismissed.

S. C. Crane, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

FISH, P. J. Writ of error dismissed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 538)

HARRIS v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

CRIMINAL LAW—APPEAL—REVIEW—NEW TRIAL.

The only special assignment of error in the motion for a new trial being upon the admission of evidence, and it not appearing from the motion what objection was made thereto at the time the same was offered, the assignment of error cannot be considered. The evidence warranted the verdict, and there was no abuse of discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

One Harris was convicted of crime, and brings error. Affirmed.

Howard & Baker, for plaintiff in error. G. H. Williams, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 538)

SHIVERS v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

1. INDICTMENT — MISDEMEANOR — DEMAND IN WRITING.

For one charged under an accusation in the county court with a misdemeanor to avail himself of the right to demand an indictment, he must make such demand in "a writing signed by him." Pen. Code 1895, § 751. An oral demand made by his counsel is not sufficient.

2. CRIMINAL LAW—ACCUSATION—WARRANT.

It is not essential that such accusation charge the commission of the crime on the same day as that alleged in the warrant upon which the accusation is based.

3. SAME—EVIDENCE.

The evidence warranted the verdict, and the certiorari was properly overruled.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

One Shivers was convicted of misdemeanor, and brings error. Affirmed.

Perry & Lipton, for plaintiff in error. W. E. Wooten, Sol. Gen., C. E. Hay, and Claude Payton, Sol. Gen. pro tem., for the State.

FISH, P. J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 539)

RENTFROW v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

1. CRIMINAL LAW—HARMLESS ERROR.

Even though the admission of the testimony objected to may have been erroneous, the error was subsequently cured by the action of the trial judge in ruling the evidence out and instructing the jury to disregard it.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3141.]

2. HOMICIDE—VOLUNTARY MANSLAUGHTER.

An essential element of voluntary manslaughter is passion on the part of the slayer. The fact that the person slain may himself have been actuated by violent passion, in the absence of any demonstration by him against the slayer, has no bearing upon the grade of the homicide. Unless it be shown that the person killing was so overcome by passion as to exclude all idea of deliberation or malice, the killing is not voluntary manslaughter. Tested by this rule, there was no manslaughter in the present case.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 59.]

(Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Stephen Rentfrow was convicted of murder, and brings error. Affirmed.

A. O. Blalock, J. W. Wise, and Hugh M. Dorsey, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

CANDLER, J. Stephen Rentfrow was tried for the murder of his daughter-in-law, Mary Rentfrow, and was found guilty, with a recommendation that he be sentenced to the penitentiary for life. He made a motion for a new trial, which was overruled, and he excepted.

1. The motion complains that the court erred in admitting evidence to the effect that the character of the accused for violence was bad, over the objection, made at the time the evidence was offered, that only the general character of the accused was in issue, and that evidence as to his character for any particular trait was inadmissible. Regardless of the merit of this objection, it appears that before the argument began the court ruled out the evidence objected to, and instructed the jury to disregard it; and so, conceding that the admission of the evidence in the first place was erroneous, that error was completely cured, and the accused has no ground for complaint.

2. The two remaining grounds of the amendment to the motion for a new trial both complain, in effect, that the court erred in failing to give in charge to the jury the law of voluntary manslaughter; and this is really the controlling question in the case. The case is, on its facts, a very peculiar one. The accused is an aged man—nearly four score years old—and the deceased, as has already been stated, was his daughter-in-law. It is inferable from the testimony of the witnesses that there had long been bad feeling between the families of the two, and that the entire story of the causes leading up to the homicide is not disclosed by the record brought to this court. The only eyewitness to the tragedy was Ross Rentfrow, the husband of the deceased and the son of the accused. From his testimony it appeared that the killing took place between 6 and 7 o'clock in the morning. Witness and his wife were living on land belonging to the accused. As witness was preparing to go to his work, he observed the accused, at a distance of nearly 200 yards from the house, where he and his wife were, apparently about to go through a garden which the latter had cultivated. Witness "thought he was going to tear up the garden," whereupon he called his wife's attention to the matter. "She watched him until he got to the garden. Then she taken her gun, and said she was going to make him get out of her garden. He had threatened to tear the garden all to pieces. * * * She just said he had to get out of the garden; that she and her children had worked it and made it. * * * I said if I was her I would not go. She said she would go or die. The gun was loaded." The deceased then went to the garden, carrying the loaded gun, while witness remained at the house, a distance of 175 yards intervening. As to whether witness could hear what conversation took place between the accused at that distance the record is not clear. He testified: "She asked him to get out of the garden; that she had worked and made it; and that is what I testified. She kept saying something else." The accused then picked up a basket which he had been carrying, and which contained a pistol and some cabbage, "and got it up in his arm. He started out toward home, and she started to turn and start home. He threw the things down and commenced shooting. * * * She was running from him at the time he done the shooting, and he kept advancing on her." Three shots were fired by the accused, two of which struck the deceased—one in the hand and one in the back of the head. The deceased and the accused were 15 or 20 feet apart when the shooting took place. While the accused was firing, the gun which the deceased carried with her was discharged, apparently accidentally. Of the witnesses who heard the firing, but did not see the occurrence, some testified that the shots were in such rapid succession that they could not tell which was fired first, the pistol or the gun; others were positive that the pistol shots were fired first. No witness testified that the gun was fired before the pistol. The statement of the accused was to the effect that his first knowledge of the presence of the deceased near him was when he heard her call angrily to him to get out of the garden; that he looked up, and saw that she had the gun pointed at him; that she repeated her demand that he get out of the garden, called him an "old gray-headed rascal," and threatened to kill him; that immediately thereafter she fired upon him; and that he was compelled to shoot to save his own life.

"Manslaughter is the unlawful killing of a human creature, without malice, either express or implied, and without any mixture of deliberation whatever." Pen. Code, § 64. "In all cases of voluntary manslaughter there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied. * * * The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible." Pen. Code, § 65. It will be seen that the one essential element of voluntary manslaughter is passion—hot blood. When an unlawful killing is shown by the state, the presumption is that it was prompted by malice; and to reduce the hom-

icide below the grade of murder it is necessary for the evidence to show the absence of malice. If the state of mind of the accused in the present case could be inferred from that of the deceased at the time when she seized her gun and announced her determination to make him get out of her garden, a jury might well have found that he was actuated by passion, rather than malice. There is in this case, of course, no question of mutual combat. The meeting was sudden and unexpected, and immediately preceded the homicide. It must be borne in mind that the mental state of the accused—not that of the deceased—is the test to determine whether a homicide be manslaughter. Was there an "actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing"? Only by the statement of the accused can such a theory be upheld; and it is well settled that in the absence of a request the judge is not bound to charge upon any theory whose sole foundation is in the prisoner's statement. Were there "other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied"? If so, no witness testified to them. The woman's husband testified that she made no demonstration whatever against the accused, and that when shot she was retreating. Her state of mind when she left the house, the purpose for which she carried her gun, and her intentions toward the accused cast no light on what took place after she reached the garden; and that is the main thing to be determined in ascertaining whether or not there is manslaughter in the case. The case made by the state was one of brutal assassination. That made by the statement of the accused was one of justifiable homicide in self-defense. There is nothing to show that the accused was actuated by the sudden and ungovernable passion which the law recognizes as necessary to reduce a homicide below the grade of murder, and we will not reverse the judgment of the trial court on account of the failure to charge the law of manslaughter.

The foregoing discussion renders it manifestly unnecessary to discuss the contention that the verdict was contrary to law and the evidence.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 569)

GODWIN v. STATE.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. CRIMINAL LAW—ARGUMENTS OF COUNSEL—READING LAW TO JURY.

Where, during the argument before the jury in a criminal case, counsel for the accused started to read to the jury from a Supreme Court report of this state, and objection thereto was made by the solicitor, it was not error for the court, while allowing the extract to be read in the presence and hearing of the jury, to require that it be read "to the court."

2. SAME—SENTENCE—DISCRETION OF COURT.

The sentence to be imposed upon one convicted of crime in this state is a matter for the discretion of the trial judge, subject only to the limitations imposed by the statute regulating such crime; and no sentence is excessive, in legal contemplation, which is not greater than the maximum sentence fixed by law. It follows that a sentence of 12 months in the chaingang, without the alternative of a fine, for carrying concealed weapons, is not excessive.

3. CARRYING WEAPONS—EVIDENCE.

The evidence fully warranted the verdict.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

One Godwin was convicted of carrying weapons, and brings error. Affirmed.

Busbee & Busbee, for plaintiff in error. E. F. Strozier, Sol., for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 533)

JENKINS v. STATE.

(Supreme Court of Georgia. June 17, 1905.)

1. HOMICIDE — VOLUNTARY MANSLAUGHTER—INSTRUCTIONS.

The theory of voluntary manslaughter was presented by one view of the evidence, and the trial judge properly instructed the jury as to the law bearing on that grade of homicide.

2. CRIMINAL LAW—ARGUMENT OF SOLICITOR GENERAL.

The argument of the solicitor general, to which objection was made, was authorized by the facts proved and such legitimate inferences as might be drawn therefrom.

3. SAME—REMARKS OF COURT.

Prejudicial error was committed by the presiding judge, who, on being asked to allow the accused to supplement his statement to the jury, said: "Let him finish his statement. I never knew one of them to get through making his statement." This remark was calculated to impress the jury with the idea that the judge entertained the opinion that what the accused might say in his defense was of little importance. Candler, J., dissenting.

4. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.

The charge of the court as to the law relating to self-defense was sufficiently full and explicit, in the absence of an appropriate request in writing to charge more fully as to what might constitute reasonable fears; and the request presented, not being adjusted to the facts of the case, was rightly withheld from the jury.

Candler, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Clem Jenkins was convicted of voluntary manslaughter, and brings error. Reversed.

See 51 S. E. 386.

A. Y. Clement and A. S. Thurman, for plaintiff in error. J. E. Pottle, Sol. Gen., for the State.

EVANS, J. The plaintiff in error, Clem Jenkins, Jr., was charged with the murder of Jim Wilson, and was convicted of the

offense of voluntary manslaughter. The court declined to grant the accused a new trial, and he excepts to the judgment overruling his motion therefor.

1. Counsel for the accused insists that the evidence did not warrant a finding of voluntary manslaughter, and that the court erred in charging the jury as to the law bearing on that grade of homicide. While there was testimony which would doubtless have warranted a conviction of murder, and the statement of the accused presented the theory of self-defense, there was also testimony from which the jury might well have concluded that the following summary of what occurred really represented the truth of the matter under investigation: On the night of the homicide, while a younger brother of the accused was on his way to church, he was met by the deceased, who gave him a beating. The accused was told by his brother at the church that he had been mistreated and beaten by the deceased. After the services, a number of persons, including the deceased and the accused, left the church, and started home along a public road. The accused asked the deceased why he had whipped this younger brother, saying he was a minor, and, if he had done anything to the deceased, the deceased should have told the boy's mother or elder brother. The deceased made some reply to the effect that he was not going to tell anybody anything, and that he had done what he wanted to, and intended to do as he pleased. The accused said he did not want to have any fuss, and it was not worth while for the deceased to "start his big talk." The latter persisted in his offensive braggadocio, and several of those in the crowd endeavored to persuade him to let the accused alone, and go on peaceably to his home. The deceased declined to drop the matter, and continued in his effort to provoke the accused into a quarrel. The accused said, "If you have got that baby gun in your pocket, I will make you use it," and the deceased replied, "I will use it, too." He threatened a number of times to kill the accused, and avowed his purpose to do so when they reached a field on the way home. The deceased stopped a few moments at a house upon the roadside, but caught up with the crowd again at a house some distance beyond, where some of those in the party stopped to get water. The accused, who was accompanied by his wife, did not stop at the well, but proceeded through the yard along a path which led to his home and to that of the deceased. As the deceased came up to the gate, one of the men in the party called on him to wait, intending to take him home by the road, in order to prevent any difficulty, but he went on into the yard. One of the women then took hold of him, and told him to let the accused alone, and go on home to his mother. He jerked loose, saying, "Little Buddy thinks I am scared of him; I will kill him." The accused turned, and asked, "What is that you say?" The deceased replied, "You think I am scared of you, but I will kill you!" at the same time advancing with one of his hands in his right-hand pants pocket, as though he intended to then and there carry out his threat. They were but 14 or 15 steps from each other. The accused immediately drew his pistol and fired without waiting for the deceased to make any further hostile demonstration. Only one shot was fired. It inflicted upon the deceased the wound which caused his death. He was not, in point of fact, armed with a pistol, as an examination of his person disclosed when his pockets were searched by some of those present after he fell and was lying upon the ground. In the pocket in which he had his hand only a pocketbook was found, and he had no weapon concealed about him, though it was more or less generally known that he was in the habit of carrying a pistol. He was scarcely 16 years old, but was large for his age, and as tall as a man, and appeared to be larger than the accused. The deceased was of a violent and quarrelsome nature. The accused, however, had never before had any personal difficulty with any one, was of a peaceable disposition, and did not display anger on the way home up to the time the party stopped at the scene of the homicide.

If the deceased did not have a pistol or any other weapon, the life of the accused was not in actual peril at the time of the shooting, nor was the deceased close enough to commit any violent assault upon his person. It was for the jury to determine whether the circumstances were such as to excite the fears of a reasonable man, if they believed the statement of the accused and the testimony of one of his witnesses that the deceased was advancing with something "shiny" in the hand which he was attempting to withdraw from his pocket. If the jury did not believe this to be true, then they would have to deal with the question whether, the accused having shot under no real or apparent necessity, he acted under a certain heat of passion, being provoked beyond endurance by the persistent endeavor of the deceased to draw him into a personal difficulty, and believing the deceased to be armed, and inviting him to enter into a combat with deadly weapons. The accused had reason to believe the deceased had a pistol. The latter led him to think so, and threatened repeatedly to use one, though he apparently was not wrought up into a frame of mind where he was prepared to shoot in cold blood, and wanted to provoke a quarrel as a pretext for resorting to the use of a deadly weapon. To reduce the killing to the grade of voluntary manslaughter, it was not necessary that any actual assault should have been made by the deceased upon the accused. Stokes v. State, 18 Ga. 17, 37; Elliott v. State, 46 Ga. 163. Where there is a

mutual intention to fight, the approach of the deceased in furtherance of his design to do the accused serious injury may be the equivalent of an actual assault upon the latter, so far as reducing the killing to voluntary manslaughter is concerned. Ray v. State, 15 Ga. 223. Our statute defining voluntary manslaughter declares that not only an actual assault or attempt to commit a serious personal injury upon the slayer, but also "other equivalent circumstances to justify the excitement of passion," may be sufficient to exclude the idea of a deliberate and wanton intention to take the life of the person killed. Pen. Code 1895, § 64. So, as was held in Ragland's Case, 111 Ga. 211, 36 S. E. 682: "Whether an advance by one man armed with a stick on another in the nighttime, and declining to stop when called on to do so, constitute circumstances equivalent to an assault, so as to authorize a homicide to be reduced to voluntary manslaughter, is a question for the jury." True, in the case now before us the deceased appears not to have been armed with a pistol or other weapon. But the accused had reason to believe to the contrary, and the situation which confronted him is to be viewed, not necessarily in the light of the facts subsequently developed, but as it appeared to him, and would have been looked at by a reasonable man in his position. Murray v. State, 85 Ga. 378, 11 S. E. 655. His state of mind, produced by the circumstances as they appeared to him, was a proper subject-matter to be inquired into by the jury. If an unjustifiable homicide resulted from the acceptance by him of a challenge to enter into a mutual combat with deadly weapons, the killing was no more than voluntary manslaughter. Tate v. State, 46 Ga. 148; Trice v. State, 89 Ga. 742, 15 S. E. 648. Mutual intention to fight may not only negative the theory of self-defense, but may likewise exclude the idea of malice, if such intention grows out of hot blood produced by provocation other than that induced by mere words, threats, menaces, or contemptuous gestures. If the provocation be produced by an actual assault, by an attempt to commit a serious personal injury upon the slayer, or by "other equivalent circumstances" calculated to excite sudden passion, the fact that the accused shot with the intention to kill would not render the offense that of murder. Jackson v. State, 82 Ga. 449, 9 S. E. 126. "Bad" blood, which induces a cherished intention to deliberately kill, is not to be confused with "hot" blood, excited by a sudden and unexpected emergency with which the slayer is, through no fault of his own, unfortunately confronted. In McGuffie's Case, 17 Ga. 514, one theory of the homicide which the evidence presented was that after the accused had, with malicious intent, pointed his gun at the deceased, but had desisted at the instance of bystanders, and would not have again pointed the gun at the deceased or have fired upon him, the accused was provoked by the remark of the deceased that he would throw a brickbat at the accused if he raised his gun again; and this court held that, if the accused would not have again presented his gun at the deceased, nor have fired at him but for the throwing of the brickbat, the crime may have been no more than voluntary manslaughter. In the case of Irby v. State, 82 Ga. 496, a youth but 14 years of age was put on trial for murder. The evidence disclosed that while his father and another man were engaged in a fist fight, and a bystander was in the act of separating them, the accused suddenly appeared on the scene with a pistol and shot down his father's assailant without any apparent necessity. Yet this court, having regard to the sudden passion which may have been aroused in the breast of this youth upon seeing another man attempting to inflict injury upon his father, held that the evidence warranted a verdict of voluntary manslaughter. In the present case we think the verdict of the jury was fully justified. Indeed, it apparently speaks the real truth regarding the homicide with the commission of which the accused was charged.

2. The theory of the state was, of course, that the accused was a man who entertained a wanton disregard for human life. The solicitor general sought to impress this idea upon the jury by arguing before them that the evidence disclosed that the accused "carried that old pistol down there to the church that night," and that he "carried it there with a purpose." Counsel for the accused objected to this argument on the ground that there was no evidence before the jury which warranted it, and, the solicitor general insisting that there was, asked that the stenographic report of the testimony be read, in order that the dispute might be settled. The court declined to permit this to be done; "said that the jury would determine what was in evidence, and directed the solicitor to proceed with his argument." Exception is taken to the manner in which the court thus disposed of the matter. There was evidence which at least warranted the inference that the accused did carry his pistol with him to the church on the night of the homicide. One of the witnesses for the state testified that while he and the accused were outside the church, looking "after people's stock," the accused said the deceased had whipped his little brother, and he intended to whip the accused after they left the church, and, if he resisted, would use a pistol, which he then and there exhibited to the witness. Presumably, the accused took his pistol with him to the church. In his statement to the jury he undertook to explain that he had previously loaned his pistol to a "fellow" who was to return it on the night before, but who, on the night of the homicide, told the accused if he wanted the pistol to come by his house for it; and the accused stated

that he had not carried the pistol to the church that night. If he meant that he had called by for his pistol on the way home from church, there was nothing to substantiate his statement, but it was in conflict with the testimony of the state's witness as to the accused having the pistol at the church before the services were concluded. If he intended to be understood as saying that he did not leave home with the pistol, but got it from the borrower while on the way to church, it was still for the jury to say what was the truth in this regard, as they were not bound to accept his statement as true. Certainly, the argument of the state's counsel was not wholly without foundation established by the evidence, and the ruling of the court excepted to affords no ground for setting aside the verdict of the jury, especially as it negatives the idea that the argument objected to influenced their finding, which was that the accused acted without preparation, deliberation, or any other indicia of malice toward the deceased.

3. Immediately after the accused had concluded his statement to the jury he informed his counsel that he had inadvertently omitted to refer to a matter which he wished to explain to the jury—the reason he happened to be armed on the night of the homicide. Counsel asked permission of the court for the accused to make an additional statement. The presiding judge replied: "Let him finish his statement. I never knew one of them to get through making his statement." Complaint is made that the language used by the judge in granting the privilege asked not only stripped it of all benefit to the accused, but had the effect of creating the impression upon the jury that, in the opinion of his honor, what the accused might say in his defense was entitled to little weight, and he had already consumed, to no purpose, much of the valuable time of the court. The remark of the court certainly may have had that tendency. It was discretionary with the judge whether or not he should allow the accused to supplement his statement (Owens v. State, 120 Ga. 209, 47 S. E. 545; Johnson v. State, 120 Ga. 509, 48 S. E. 199); but, if the indulgence were granted at all, it should have been accorded in terms which would give to the accused the benefit he sought, and not create any unfavorable impression against him. So much importance is attached to the prejudicial influence upon a jury which an unguarded remark by the presiding judge may have upon them, that it is provided by statute (Civ. Code 1895, § 4334) that a new trial shall be granted in every case, whether civil or criminal, whenever he shall during the progress of the trial and in the presence of the jury either express or intimate his opinion as to what has or has not been proved. The duty of noncommittal which this statute imposes upon a presiding judge has been heretofore clearly pointed out. Hubbard v. State, 108 Ga. 786, 33 S. E. 814; Varner v. R. Co., 108 Ga. 813, 34 S. E. 166; Jaques v. State, 111 Ga. 832, 36 S. E. 104; Alexander v. State, 114 Ga. 266, 40 S. E. 231; Potter v. State, 117 Ga. 693, 45 S. E. 37. The right of the accused to make to the jury a statement in his defense is one conferred by express statute (Pen. Code 1895, § 1010), and that statute declares the jury "may believe it in preference to the sworn testimony in the case." To disparage his statement, which the jury could believe in preference to the sworn testimony, is to deprive him of the substantial right of having the jury pass upon it uninfluenced by the expression or intimation of any opinion by the judge that it is entitled to little or no consideration. So, in Alexander's Case, supra, this court held he was entitled to another trial because of the fact that the trial judge inadvertently, during the course of his charge to the jury, made use of language which was "calculated to impress the jury that they ought to be cautious in giving credit to what" the accused said concerning the alleged offense. In Smith v. State, 109 Ga. 479, 35 S. E. 59, the accused rested his sole defense, which he sought to establish by his statement and corroborating evidence, upon the theory of accidental homicide; and he was accorded another opportunity of presenting that defense to the jury without the "implied judicial disapproval" which was cast upon it by the remark made by the presiding judge when he merely incidentally referred to this defense before concluding his charge to the jury. In the present case the sole defense of the accused was that of self-defense, and he relied almost altogether upon his statement for the establishment of the same. The prejudicial remark of the court, though lightly made, may have had undue weight with the jury. Even had the judge instructed the jury to disregard it, "no man could dare say they were not thereby influenced to some extent at least," and the caution given to the jury not to allow it to effect their verdict could not be regarded as removing its harmful tendency. Alexander v. State, 114 Ga. 266, 40 S. E. 231. Another opportunity to present his defense is the only way in which one accused of crime may be effectually guarded against the hurtful tendency of such a remark coming from the lips of the judge himself. Potter v. State, 117 Ga. 693, 45 S. E. 37. And this being true, it is not, as was held in that case, incumbent on the accused to move for a mistrial, as he is reasonably to be expected to do when remarks to his prejudice are made by the state's counsel or others connected with the trial over whom the judge may exercise direction and control. "The law gives to one accused of crime the absolute guaranty to a new trial in the event he is deprived of a fair and impartial trial by reason of the fact that the judge before whom he is convicted commits the grave error which the

above-mentioned section of our Code declares can in no case be overlooked or forgiven. It is not within our province to change the law." Id., p. 698 of 117 Ga., page 39 of 45 S. E.

4. The charge of the court as to the law relating to self-defense was sufficiently full and explicit, in the absence of an appropriate request in writing to charge more fully as to what might constitute reasonable fears. The request presented was not adjusted to the facts brought to light by the evidence or the prisoner's statement, in that it was based on the theory that he had reason to apprehend that a felony was about to be committed, not only upon his own person, but "on the person of his wife or brother." We accordingly hold there was no error committed in declining to give in charge this request.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent, and CANDLER, J., who dissents.

(123 Ga. 669)

E. J. MEYER & CO. v. JORDAN, Mayor, et al.

(Supreme Court of Georgia. Aug. 1, 1905.)

MANDAMUS TO MUNICIPALITY — PAYMENT OF JUDGMENT—LEVY OF TAX.

Mandamus will not be granted to compel municipal authorities to levy and collect a tax to pay a judgment alleged to be held by the applicants against the municipality, where it appears that the judgment relied on is not a valid judgment against it.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 243, 244.]

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Application of E. J. Meyer & Co. for writ of mandamus against the mayor of the town of Molena and others. From an order denying a writ, petitioners bring error. Affirmed.

E. J. Meyer & Co. applied for a writ of mandamus against the mayor and council of the town of Molena to compel them to levy and collect a tax sufficient to pay a judgment which the plaintiffs alleged they had obtained against the town. The mandamus was denied, and they excepted. On the hearing of the application the record of the suit and judgment on which the plaintiffs relied was introduced in evidence. The petition alleged that Molena was a municipal corporation chartered under the general laws of the state in regard to chartering towns contained in Pol. Code 1882, §§ 774–797; that G. W. Bolton was the mayor, W. T. Cockrell the recorder, and A. B. Harris, J. A. Carmichael, Jr., J. A. Melton, G. M. McDowell, and J. H. Lawrence were the councilmen; that the town was due the plaintiffs the sum of $598.50, besides interest, for whiskies, gin, etc., purchased from the plaintiffs by the mayor and council; that the mayor, recorder, and councilmen of the town purchased all of the articles for the town; and that at the time of the purchase the town was engaged in conducting a dispensary, and in buying and selling whisky, gin, and wine for profit. The petition closed as follows: "That the said mayor, recorder, and council of Molena refuses to pay petitioners, wherefore process is prayed against the town of Molena, requiring the defendant to be and appear," etc. The process which was issued stated the case as that of "E. J. Meyer & Co. vs. G. W. Bolton, Mayor, et al., of the Town of Molena," and stated that "the defendants G. W. Bolton, A. B. Harris, J. A. Carmichael, Jr., J. A. Melton, G. M. McDowell, J. H. Lawrence, and W. T. Cockrell, recorder, are required personally or by attorney to be and appear," etc. On the petition was indorsed an acknowledgment of service, which was signed by "G. W. Bolton, mayor of Molena, W. T. Cockrell, recorder of Molena," and the other persons named in the process as "council of Molena." The verdict was for the plaintiffs for the amount sued for. The judgment entered was that the plaintiffs recover of "the defendant G. W. Bolton, mayor of Molena, W. T. Cockrell, recorder, and the other persons named as "councilmen of the town of Molena." In the record appears a paper which is headed with the word "Amendment." It states the case thus: "E. J. Meyer & Co. vs. The Town of Molena. Suit in Pike superior court, Oct. term, 1904." It alleges that "at the time the defendants entered their acknowledgment of service in the above-stated case it was by them intended to waive everything that was necessary to give the court jurisdiction, and by inadvertence on the part of * * * the attorney of record who wrote the acknowledgment of service in said case he wrote the words 'copy process,' instead of the word 'process.'" The petitioners therefore moved the court to allow them to amend the entry of acknowledgment of service accordingly. At the bottom of this paper is written the following entry: "The foregoing amendment is allowed, this February 2nd, 1905," signed by the judge of the superior court. There is also in the record another paper, above which is written the word "Amendment." This states the case in which it is made as "E. J. Meyer & Co. vs. The Town of Molena. Application for mandamus in Pike superior court, Oct. term, 1904." It contains the following: "The plaintiffs in the above-stated case show unto the court the following facts: * * * Counsel who represented petitioners in said inadvertence omitted to set out in the judgment therein obtained in their favor against the defendant the town of Molena that said town was a municipal corporation chartered under the laws of Georgia in the name of the town of Molena, although this fact was averred in the petition upon which said judgment was obtained. * * * Petitioners move the court to grant an or-

der allowing the movants to amend said judgment by adding therein, and next following the word 'Molena' last mentioned in said judgment, the words, 'a municipal corporation chartered under the laws of Georgia, in the name of the town of Molena,' so as to make said judgment conform in all respects to the petition and verdict upon which said judgment was entered up. Petitioner moves the court to allow the execution issued upon said judgment to be amended by adding the same words, so the said judgment and execution when so amended will in all respects conform to the petition and verdict upon which they issued." At the bottom of this paper are written the words: "Read and considered; the amendment allowed, this February the 2nd, 1905," signed by the presiding judge.

G. D. Dominick and E. C. Armstead, for plaintiffs in error. E. F. Dupree and R. L. Berner, for defendants in error.

LUMPKIN, J. (after stating the foregoing facts). In the bill of exceptions the two amendments dated February 2, 1905, are referred to as if they were independent motions to amend the acknowledgment of service and the judgment. In the record, however, they appear to have been tendered as amendments to the petition for mandamus. In one instance, after stating the name of the case, the proposed amendment is headed: "Suit in Pike superior court, Oct. term, 1904." In the other it is stated as "Application for mandamus, in Pike superior court, Oct. term, 1904." Neither of these descriptions is applicable to the suit in which the judgment was obtained, which was instituted in September, 1901. The mere entry of the words "amendment allowed" at the foot of each of these papers, properly construed, means that they were respectively allowed as amendments to the application for mandamus. Such an entry does not operate to alter the judgment and change it into a shape entirely different from that in which it was rendered. But if these entries should be construed as orders seeking to amend the acknowledgment of service and the judgment, respectively, they would still not have the effect of making a valid judgment against the municipal corporation. No process was ever issued against the town of Molena, but only against certain individuals described respectively as "mayor," "recorder," and "councilmen" of that place. The acknowledgment of service was similarly signed. The only change sought to be made was by striking the word "copy" before the word "process," so as to make a waiver of process. It still remained an acknowledgment of service and waiver of process by the individuals, and not by the municipality. No plea by the town appears to have been filed. The town of Molena therefore has never been brought into court either by process directed to it or by service or acknowledgment of service on its behalf. This being true, there was no lawful verdict against it, and no judgment could be entered against it, nor could any amendment of the judgment which was actually rendered have that effect. The plaintiffs' application for mandamus therefore had no valid judgment as a basis on which to rest, and, without regard to the other questions raised, the refusal to make the mandamus absolute was right.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 653)

BAILEY v. DEVINE et al.

(Supreme Court of Georgia. Aug. 8, 1905.)

1. NOTE—CONSTRUCTION—LEX LOCI.

A note executed and made payable in another state by a citizen of Georgia is governed, as to its validity, force, and effect, by the lex loci; and, in the absence of proof as to the law of that state, the common law is presumed to be of force.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 213; vol. 10, Cent. Dig. Common Law, § 14; vol. 20, Cent. Dig. Evidence, § 101.]

2. CONTRACTS—DURESS—IMPRISONMENT.

In order for duress of imprisonment, either actual or threatened, to have been available, at common law, as a defense to a contract, the imprisonment must have been unlawful.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 431–440.]

3. SAME.

An imprisonment may be originally lawful and become unlawful. If one is in jail under a charge of murder, and another threaten to detain him in prison for an indefinite period and prevent a trial from taking place, this would amount to a threat of unlawful imprisonment.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 435.]

4. SAME.

A parent may avoid a contract given under duress of imprisonment of a child.

5. ATTORNEY AND CLIENT—CONTRACT.

Where an attorney at law has been employed by a parent to defend his son, who is in prison charged with murder, and the fee for such service has been agreed upon, a promise to pay to such attorney for another attorney an additional sum, due him by witnesses against the son, for securing their release from jail, is without consideration.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Thomas H. Devine against S. A. Bailey and W. H. Bailey. Judgment for plaintiff, and defendant S. A. Bailey brings error. Reversed.

Thomas H. Devine brought suit against Mrs. S. A. Bailey and W. H. Bailey on a promissory note. The note was for $500, was executed by the defendants in Pueblo, Colo., and made payable to Devine & McAliney at the First National Bank at that place. The defendant Mrs. Bailey filed an answer, setting up the following facts: The note was obtained from her by Devine by threats, fraud, and duress. Defendant's son,

W. H. Bailey, had killed a man in Pueblo, Colo., and telegraphed for his mother, who resided in Macon, Ga., to come to him. On arriving in Colorado, she found her son incarcerated in jail, charged with murder. He had spoken to the plaintiff Devine, an attorney at law, with a view to employing Devine to defend him. Mrs. Bailey found Devine in charge of her son's case, but Devine "declined to allow said case to proceed to trial until he should be paid a fee." Mrs. Bailey agreed with the attorney on a fee of $1,000, telegraphed to Macon for that sum, and had it sent to her. After this had been done, Devine informed her that five men had been incarcerated in jail and held by the state of Colorado as witnesses against her son; that these five men had employed one McAliney to represent them, and had agreed to pay him $500 for his services; that the state had released the five witneses from jail, and that they had declined to pay McAliney the $500. The case of defendant's son was set for trial on the day this conversation took place, and Devine demanded of the defendant that she pay McAliney the fee of $500 before the case could proceed; plaintiff stating that, unless this sum was paid, or a note therefor given, he would postpone the case, and keep defendant's son in jail indefinitely. Defendant, being many miles from home, without friends, and absolutely in the power of Devine, and acting under and being coerced by the threat of Devine, gave the note sued on. She never agreed to pay but $1,000 as a fee for representing her son. Defendant had nothing to do with McAliney, and had not employed him, and gave the note because she was made to believe that, unless she did so, her son would remain in jail for an indefinite period. Defendant also pleaded that the note was without consideration, as shown by the facts above detailed. The court struck the defendant's plea, and entered up judgment against both of the defendants on the note. Mrs. Bailey excepted.

J. C. Morcock and Davis & Turner, for plaintiff in error. Hardeman & Jones, for defendants in error.

COBB, J. 1. The note having been executed in Colorado, and, being made payable there, its validity, force, and effect are dependent upon the law of that state; and no law of that state being pleaded, it will be presumed that the common law is in force with reference to the defenses set up in the defendant's answer. Mass. Life Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; Hollis v. Loan Ass'n, 104 Ga. 318, 31 S. E. 215; Kollock v. Webb, 113 Ga. 768, 39 S. E. 339; Akers v. Jefferson Bank, 120 Ga. 1066, 48 S. E. 424.

2-4. At common law there were three kinds of duress—duress of imprisonment; duress per minas, resulting from fear of loss of life, limb, mayhem, or of imprisonment; and duress of goods. 10 Am. & Eng. Enc. Law (2d Ed.) 321, 322; 9 Cyc. 444, 445. Duress of imprisonment was available as a defense to a contract if the imprisonment or threatened imprisonment was unlawful. See Clark on Contracts (2d Ed.) 242 et seq.; Hammon on Cont. §§ 134, 135, p. 190 et seq. An imprisonment which was originally lawful might, by a subsequent abuse of it, become unlawful, and constitute duress. 1 Story on Cont. (5th Ed.) § 512. An unlawful imprisonment, or threat of unlawful imprisonment, of one's child, constituted duress. Clark on Cont. (2d Ed.) p. 245; 10 Am. & Eng. Enc. Law (2d Ed.) 330; Southern Express Co. v. Duffey, 48 Ga. 358, 361. The provisions of our Code with reference to duress are broader than the common law. Civ. Code 1895, § 3536, provides: "Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing to do an act contrary to his free will." Section 3670 declares: "The free assent of the parties being essential to a valid contract, duress, either of imprisonment or by threats, or by other acts, by which the free will of the party is restrained, and his consent induced, will void the contract. Legal imprisonment, if not used for illegal purposes, is not duress." It is probable that the provisions of the sections quoted, so far as they relate to duress of imprisonment, are no broader than the common law; and it may be that an imprisonment for an illegal purpose would be an unlawful imprisonment within the meaning of the common law. See, in this connection, Southern Express Co. v. Duffey, 48 Ga. 358, 361; Hunt v. Hunt, 94 Ga. 257, 21 S. E. 515; Graham v. Marks, 98 Ga. 67, 25 S. E. 931. Bailey was lawfully in jail in Colorado under a charge of murder, but it was not lawful to keep him in jail indefinitely without a trial. His detention for any other purpose than a trial at the time and in the manner provided by law would be unlawful. The threat of Devine was to bring about an abuse of the lawful imprisonment of Bailey, in order to cause his mother to give the note sued on. Such an act would, even under the strict common-law rule, constitute duress. We can well understand how a woman, ignorant of the law, a thousand miles away from home, relying upon the supposed knowledge of the law and integrity of the plaintiff as an attorney at law, might have thought that he was able to carry his threat into execution, and might, therefore, have been coerced into a promise to pay the sum sued for to release her son from the threatened detention in jail without trial. Comment upon the grossly reprehensible conduct of the plaintiff, as shown by the answer, is unnecessary, and would, perhaps, not be proper, as he has not been heard; but we are clear that the plea of duress was good, and that the court erred in striking it.

5. We are unable to discover, from the facts pleaded, any valid consideration for the note. The fee of the attorney had been agreed upon, and had either been paid to him or was about to be paid. The consideration, therefore, for the note, could not have been the performance of services in defense of the defendant's son. Where, then, was the consideration? The witnesses for the state had been released from jail. The plaintiff and McAliney did not undertake to get the witnesses out of the way, and, if they had, the contract would have been void as against public policy. Rhodes v. Neal, 64 Ga. 704, 37 Am. Rep. 93. There was no benefit accruing to the defendant by the payment of the fee due by these witnesses to McAliney. She was wholly a stranger to the contract with him for fees. It cannot be said that the promise to bring on the son's trial was the consideration, because the plaintiff had already been paid to represent the son, and certainly his employment comprehended the use of such efforts and agencies as he could properly use to bring about the son's speedy trial and release from custody. Besides, a promise to release from an unlawful imprisonment which the promisor himself made unlawful would not afford any valid consideration for a contract to pay for such a service. In any view of the facts set up in the defendant's answer, the plea of no consideration should not have been stricken.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(128 Ga. 585)

GLENN v. STATE.

(Supreme Court of Georgia. Aug. 2, 1905.)

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—PROSECUTION FOR BREACH.

The evidence being insufficient to support the verdict, the trial judge erred in not granting a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 142, 143.]

(Syllabus by the Court.)

Error from City Court of Moultrie; W. S. Humphreys, Judge.

One Glenn was convicted of violating a contract of employment, and brings error. Reversed.

J. D. McKenzie and J. A. Wilkes, for plaintiff in error. T. W. Mattox, Sol. Gen., L. F. Johnson, and Jas. Humphreys, for the State.

FISH, P. J. The accused was tried and convicted in the city court of Moultrie upon an accusation charging him with a violation of the statute of August 15, 1903 (Laws 1903, p. 90), which is entitled "An act to make it illegal for any person to procure money, or other things of value, on a contract to perform services with intent to defraud, and to fix the punishment therefor, and for other purposes." The accusation charged that he contracted with the firm of Pinson & Woolard, a firm composed of T. J. Pinson and H. D. Woolard, to perform services as a laborer for said firm, and by reason of such contract did obtain advances from the firm in the sum of $103 in money, and, after having so contracted, and procured said money, did fail to comply with said contract, or to return to Pinson & Woolard such money with interest, to the loss and damage of Pinson & Woolard in the sum of $103; the contract having been made by the accused with intent then and there to procure such money from Pinson & Woolard and not comply with said contract. He made a motion for a new trial upon the general grounds and others, which was overruled, and he excepted.

In our opinion, the trial judge erred in overruling the motion, as the evidence was not sufficient to authorize a conviction. The accused was convicted upon the testimony of H. D. Woolard, who testified that he was a member of the firm of Pinson & Woolard, and, acting for such firm, had purchased certain property, which it appears from his evidence was a turpentine farm, from a man named Parrish. Woolard testified: "At the time I looked over the property I found that a number of Mr. Parrish's hands were in debt to Parrish, and I went and saw each hand before I would buy out the still, boxes, timber, etc. The defendant in this case owed Mr. Parrish an account of $89, and he wanted me to pay Mr. Parrish for him, and he contracted with my firm, Pinson & Woolard, to work for us if we would pay the account to Mr. Parrish; but we would not agree to do that until we saw the hands each individually about his account, and then we bought out Mr. Parrish, after the hands had agreed to work out their accounts with us. I specially remember going to Archie Glenn, the defendant in this case, and having a talk with him about his account, which was eighty-nine dollars and some cents. The defendant said he would work it out with our firm if I paid the account to Mr. Parrish, and I thereupon paid the account to Mr. Parrish of eighty-nine dollars and some cents, and the defendant went to work for us as a wagoner at and for the sum of twenty dollars per month. I am not positive when he went to work, but I made this trade some time the early part of November last, and to the best of my recollection the defendant went to work for us some time in November last—about the 10th day of November—and continued to work for us up to the 2d day of May, 1905." The witness further testified that the accused at different times, while he was working for Pinson & Woolard, got different amounts of money from such firm, and that when he left the employment of such firm he owed it the sum of $103, and had "since then failed and refused to return and carry out contract or return to us said advances, with interest," and that the $103 that the accused still owed Pinson & Woolard "was obtained from us all along at differ-

ent times under contract to work with us as a laborer." As we have said, this evidence was not sufficient to authorize a conviction. The statute in question, being criminal, must be strictly construed. The first section of the act provides that: "If any person shall contract with another to perform for him services of any kind with intent to procure money, or other things of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer; or, after having so contracted, shall procure from the hirer money, or other things of value, with intent not to perform such service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and upon conviction shall be punished as prescribed in section 1039 of the Penal Code of 1895." The second section provides: "That satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced with interest thereon at the time said labor was to be performed, without good and sufficient cause and loss or damage to the hirer, shall be presumptive evidence of the intent referred to in the preceding section." Laws 1903, p. 91. Before one can be lawfully convicted of a violation of this statute, several things essential to constitute the offense defined must be shown. Among them is that there was a distinct and definite contract for service; and another is that the person contracting to perform this service has, without good and sufficient cause, failed and refused to carry out his contract by performing the service. An implied contract will not do, but there must be an express contract, clear and definite in its terms. The only contract between Pinson & Woolard and the accused which the evidence discloses is that Pinson & Woolard were to pay for the accused a debt of eighty-nine dollars and some cents which he owed to Parrish, and the accused was to work for Pinson & Woolard at and for twenty dollars per month until he worked out this debt. He did not contract with them that he would work for them at twenty dollars per month until he worked out this debt, and, in addition thereto, whatever other advances they might make to him in the future. Whether a contract so indefinite and uncertain as to its duration would fall within the provisions of this criminal statute is a question which does not arise in this case. The only contract disclosed by the evidence being one by which the accused agreed to work for the prosecutor's firm, at twenty dollars per month, until he worked out the sum of eighty-nine dollars and some cents, which he, upon the faith of this agreement, procured them to pay for him, and the evidence showing that he remained in the service of such firm much longer than was necessary to comply with this contract, his conviction cannot be sustained. He did not violate this contract when he quit the service of Pinson & Woolard at the time he did. Although Pinson & Woolard let the accused have various sums of money during the time that he was working for them, and he failed to pay the debts thus created, this did not authorize his conviction. The theory that he procured these advances with intent not to perform the services covered by the only contract which was proven is utterly untenable, as the evidence shows that he did perform such services. Of course, the mere statement of the witness Woolard that the $103 which the accused still owed Pinson & Woolard "was obtained from us all along at different times under contract to work with us as a laborer" amounted to no more than a statement of his own conclusion, as his evidence disclosed no contract except the one above indicated.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 635)

BIGBY v. DOUGLAS et al.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. PRINCIPAL AND SURETY—CONTRIBUTION.

At common law, where one surety paid off the principal's debt, or more than his share, he could compel contribution from his co-sureties. Civ. Code 1895, § 2992, is but a codification of this principle of the common law, and is not of statutory origin.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 605-623.]

2. SAME—ACTION AGAINST CO-SURETY.

The surety entitled to contribution may sue his co-sureties upon the written evidence of indebtedness (in which case the period of limitation would be that applicable to instruments of its class) or upon the implied contract raised by law in favor of one surety against his co-sureties for contribution (in which instance the period of limitation would be that of an implied assumpsit).

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 641, 644½.]

3. LIMITATIONS—CONTRIBUTION.

Civ. Code 1895, § 3766, which provides that "all suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues," is applicable to cases where the liability thus created is in favor of an individual, or a class to which he belongs, as distinguished from one arising under the general law in favor of the public at large.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by Elizabeth Kate Bigby against Hamilton Douglas and others. Judgment for defendants, and plaintiff brings error. Affirmed.

On the 11th day of February, 1904, Mrs. Elizabeth Kate Bigby, as executrix of the last will and testament of John S. Bigby, brought suit against Hamilton Douglas, as administrator of the estate of J. T. Warnock, and S. Eberhart and A. J. Bethune, alleging, in substance, that her testator and J. T.

Warnock, S. Eberhart, and A. J. Bethune were joint accommodation indorsers on a certain promissory note given by the Eagle & Phœnix Manufacturing Company to the National Bank of the Republic, of New York City, for the principal sum of $40,000, dated June 1, 1894, and payable on demand; that on the 13th day of May, 1896, the holder of the note demanded payment of the maker, and upon refusal to pay the note was protested in the manner and form prescribed by law, and due notice given to the indorsers; that on the 16th day of May, 1896, plaintiff's testator transferred certain shares of bank stock to the payee of the note as additional security for the indebtedness, the stock being the individual property of plaintiff's testator, and being transferred by him on account of his liability as indorser; that subsequently, in December, 1898, the National Bank of the Republic, the payee and owner of the note and pledgee of the bank stock, sold the stock under a power of sale conferred upon it, and applied the proceeds to the satisfaction and payment of the $40,000 note; and that because of this payment Warnock, Eberhart, and Bethune became liable to plaintiff's testator to contribute their pro rata share of the amount of the note by virtue of their legal obligation so to do as indorsers of the note. The plaintiff prayed judgment against each of the defendants for his pro rata share of the joint indebtedness which had been discharged by her testator in the manner above stated. To this declaration the defendants filed their several demurrers, upon the ground, amongst others, that any cause of action which may have accrued by reason of the facts alleged was barred by the statute of limitations. The court sustained this ground of demurrer, and dismissed the plaintiff's action, and the bill of exceptions sets forth an assignment of error upon this judgment.

A. H. Cox and Anderson, Anderson & Thomas, for plaintiff in error. J. H. Martin, Hatcher & Carson, and Slaton & Phillips, for defendants in error.

EVANS, J. (after stating the facts). It is well settled law in this state that an accommodation indorser is to be considered as a mere surety. Civ. Code 1895, § 2969. The plaintiff's petition presents a case of the payment by one accommodation indorser of the principal debt to the creditor, and a claim for contribution from the other indorsers. It is insisted by the plaintiff in error that the cause of action set forth in the petition is predicated neither upon the subrogation of her testator to the rights of the payee of the note nor upon any implied contract on the part of the defendants to make contribution, but upon their statutory liability so to do arising under Civ. Code 1895, § 2992, which declares that: "Where several are sureties for the same principal, for the same sum of money, either by one or by distinct instruments, and one pays more than an equal share of the sum, he may compel contribution from his co-sureties. If one of the co-sureties be insolvent, the deficiency in his share must be borne equally by the solvent sureties." The payment of the joint indebtedness by one of several sureties entitles him to sue his co-sureties upon the written evidence of indebtedness (in which case the period of limitation would be that applicable to instruments of its class) or to sue upon the implied contract raised by law in favor of one surety against his co-sureties for contribution (in which instance the period of limitation would be that of an implied assumpsit). Hull v. Myers, 90 Ga. 674, 16 S. E. 653. Admittedly the plaintiff is barred by lapse of time from pursuing either of these remedies. But it is contended that the right of a surety to compel contribution from his co-sureties is a statutory right, and therefore, under Civ. Code 1895, § 3766, the cause of action is not barred. That section provides that "all suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues." The evident purpose of this section is to fix a period of limitation for special cases not provided for by the general statute of limitations or otherwise, where rights accruing to "individuals" are sought to be enforced. A statutory liability is one that depends for its existence upon the enactment of a statute, and not upon the contract of the parties. Pare v. Mahone, 32 Ga. 253. The right of one surety to compel contribution from a co-surety, recognized and declared in Civ. Code 1895, § 2992, is not of statutory origin. The section of the Code just cited is a mere codification of the common law. As was pointed out in Lumpkin v. Mills, 4 Ga. 343, under the common law, as understood and applied prior to the time of the Revolution, where a surety paid off a debt, he was subrogated to all the rights of the creditor upon the evidence of indebtedness, and was entitled to an assignment of the security to enable him to obtain satisfaction for what he had paid beyond his own just proportion. See, also, Irby v. Livingston, 81 Ga. 283, 6 S. E. 591.

But, conceding that a new right was created in favor of the surety by the adoption of the Code section last mentioned, still the enforcement of that right must be within the period of limitations applicable to causes of action which arise by implication of law from the contractual relations existing between parties to an obligation which they have voluntarily assumed. The provisions of section 3766 were not intended to apply to a case such as that now under consideration. To construe it as referring to every right conferred by statute or accruing "by operation of law," and to stick to its letter

as thus interpreted, would be to nullify other sections of the Code fixing the period within which an aggrieved party shall bring an action in assumpsit or one for damages arising out of the violation of or failure to perform a legal duty imposed upon another under the common law or by statute. In Harris v. Smith, 68 Ga. 461, the provisions of this section were held not to apply to an action in assumpsit brought by a defendant in fi. fa. against a sheriff for the balance of funds in his hands after paying off the fi. fa. under which he had sold property belonging to the defendant in execution; and Mr. Justice Crawford said (page 463): That the act of which this section is a codification "does not apply to the case before us, we think very clear. If, indeed, it were made so to apply, we are at a loss to see where it would stop, for every right to recover arises in some way by operation of law; and, if we stick to the letter of this act, there would be but few cases barred by the statute of four years." As he also pointed out, "the Legislature was dealing with rights accruing to individuals under statutes and acts of incorporation, the latter of which, especially about the date of the passage of the act, had given rise to great litigation in the state. In some of the cases, growing out of both statutory and charter liabilities of parties, it was held that obligations arose which were 'quasi ex contractu, and imposed by operation of mere law.' Banks v. Darden, 18 Ga. 341." So the conclusion announced by the court was that: "Looking at the act and the judicial decisions of the times, it would seem that these words ["by operation of law"] were intended to apply to such rights as arise in connection with, though not strictly under, the very words of the statutes or acts of incorporation." In other words, the General Assembly had in contemplation rights conferred by law upon particular individuals, and not upon the general public, because they sustained a peculiar relation to the incorporators of certain chartered institutions, or were by special enactment given privileges in return for services to be performed by them for the benefit of the public, or were for some other reason entitled to enforce rights which they did not share in common with their fellow citizens. The rights referred to were such as could be asserted by certain persons, not in their capacity as members of the public, who came within the protection of a general law, but as particular "individuals," who were by special enactment expressly designated by name, or who belonged to a designated class to the members of which, but to none others, such rights might accrue "under statutes, acts of incorporation, or by operation of law." With these strictly personal rights the public at large has no concern. To rights which are conferred by law upon members of the public at large, as such, section 3766 has no application. That this is true was recognized in the case of Savannah Canal Co. v. Shuman, 98 Ga. 171, 25 S. E. 415, wherein Chief Justice Simmons said (page 173 of 98 Ga., page 416 of 25 S. E.): "In order to bring the case within this section, the liability would have to be one expressly created in favor of an individual or a class to which he belongs, as distinguished from one arising under the general law in favor of all persons who might be injured by a breach of the corporate duty" imposed upon the canal company. In that case the plaintiff made complaint that the defendant did not keep its canal in such condition as to enable him to transport his lumber and wood over it in boats, and he sued for damages sustained by reason of its breach of public duty. The trial court held that the provision of the Code section last cited applied to the cause of action, and it was not barred because suit was not brought within four years from the time the right of action accrued; but this court took the opposite view, holding that the 20-year period of limitation did not apply. In the present case the court below held that the right of a surety to contribution was not one of statutory origin; that the provisions of Civ. Code 1895, § 2992, were a mere codification of the common law; that the remedy of the plaintiff's intestate, on paying off the joint indebtedness, was either on the note or on the implied assumpsit; and that therefore the cause of action was barred. We concur in this interpretation of the law, and the judgment sustaining the demurrer is affirmed. All the Justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, J., disqualified.

(123 Ga. 765)

GOULD v. C. B. JOHNSTON & CO.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. NEW TRIAL—MOTION—NOTICE OF HEARING.
The provision of Civ. Code 1895, § 4824, that 10 days' notice of the time and place of the hearing of a motion for a new trial shall be given to parties at interest, applies only in a case where the trial judge, upon the application of one of them, in vacation fixes a time and place for the hearing during vacation.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 314.]

2. SAME—RULE NISI—SERVICE.
No specific time is prescribed by statute within which the respondent shall be served with a copy of the rule nisi issued upon an application for a new trial, made in term under the provisions of Civ. Code 1895, § 5484; and where service has been perfected in ample time to enable counsel for the respondent to prepare for the hearing of the motion on the day fixed by the order of the court, and it does not limit the time within which service shall be made, the motion is not subject to dismissal on the ground that respondent was not served with a copy of the rule nisi within 10 days after it was granted.

3. SAME—BRIEF OF EVIDENCE.
Under an order passed in term, fixing a day in vacation for the hearing of a motion for a new trial, and granting leave to the movant "to amend his motion and until the said day

and on said day to amend and to perfect his brief of evidence in the case," it is the right of the movant on the day set for the hearing to present for approval a brief of the evidence, and to file the same after it has been perfected and approved by the court.

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by C. B. Johnston & Co. against one Gould. Judgment for plaintiffs, and defendant brings error. Reversed.

J. W. Preston, Sr., for plaintiff in error. Arthur L. Dasher, for defendants in error.

EVANS, J. This case was tried at the September term, 1904, of the city court of Macon, and resulted in a verdict in favor of the plaintiff. The defendant, Gould, made a motion for a new trial, which, by an order passed by the court at that term, was set for a hearing in vacation. On the day appointed counsel for the movant announced to the court that he had prepared a brief of the evidence, which he desired to submit for approval. Counsel for the plaintiff stated to the court that he wished to interpose a motion to dismiss the motion for a new trial. Argument on this motion to dismiss was had, and the court passed an order sustaining the same. To this judgment exception is taken.

1. One of the grounds of the motion to dismiss was that no notice of the hearing, as contemplated by Civ. Code 1895, § 4324, had been given to the respondent. The 10-days notice in writing provided for in that section applies only to cases where no order is passed in term fixing the time in vacation for the hearing of a motion for a new trial.

2. Another ground of the motion to dismiss was that no copy of the rule nisi had ever been served upon the respondent. No evidence in support of this ground of the motion was offered. Indorsed upon the motion for a new trial is an acknowledgment of service purporting to have been signed by "Arthur L. Dasher, Atty. for Plaintiff." It follows the rule nisi, and appears to have been written originally in these words: "Due and legal service of the within motion and amended motion for a new trial is hereby acknowledged, and copy and further service waived. November 23rd, 1904." Through the introductory words, "Due and legal," and also through the word "waived," a line is drawn, presumably with a view to striking these words. The result is to offend good English, but enough was preserved to show an acknowledgment of service of both the original motion for a new trial and the amendment thereto. Nothing to the contrary appearing, it is presumed that the service which the plaintiff's attorney acknowledged had been made upon him was such as the law directs; and it is but fair to take him at his word that service of the motion for a new trial had been perfected. Civ. Code 1895, § 5475, provides that "in all applications for a new trial the opposite party shall be served with a copy of the rule nisi, unless such copy is waived." The plaintiff's attorney evidently intended to waive nothing, but he was not entitled to a copy of either the original or the amended motion for a new trial, and if (as he acknowledged in writing was true) service thereof was made upon him no further service was essential, and there was no occasion for waiving anything. What he evidently wished to make apparent was that whereas the rule nisi was granted on October 5, 1904, service was not perfected until the date of his acknowledgment of service, November 23, 1904, and he did not wish to commit himself to the proposition that the service was timely, and therefore "due and legal," or be understood as waiving his right to insist that service came too late. Counsel was mistaken in thinking that under Civ. Code 1895, § 4324, his client was entitled to at least 10 days' notice in writing of the time and place of the hearing; for, as has already been stated, that section provides simply for cases where no order is passed in term for hearing a motion for a new trial in vacation, and where the trial judge, upon application of one of the parties, in vacation fixes a time and place for the hearing during vacation. Section 5487, providing for 20 days' notice to the respondent when an application for a new trial is made after the adjournment of the court, relates only to what are known as "extraordinary" motions for a new trial. Section 5475, which refers to ordinary motions filed in accordance with the requirements of section 5484, and which provides for service of the rule nisi upon the respondent, does not fix any specified time within which such service shall be perfected. Service within a reasonable time is contemplated, and, if made in ample time before the hearing to afford the respondent a reasonable opportunity to get ready to meet the motion, the demands of the statute will be satisfied. It is good practice, however, for the judge to provide in his order within what time the movant shall perfect service upon the respondent, to the end that both parties may be ready on the day fixed for the hearing. When this is not done, and service is not made prior to the hearing, the motion for a new trial is subject to dismissal. Smedley v. Williams, 112 Ga. 114, 37 S. E. 111. In the present case the attorney for the respondent acknowledged service three days before the hearing, which had been set for November 26th. This apparently gave him ample time within which to prepare to resist the granting of the motion; and the record contains no suggestion to the contrary, nor did he insist upon the hearing that the time was too short. The case is therefore controlled by the decision of this court in Martin v. Monroe, 107 Ga. 330, 33 S. E. 62, in which case the respondent moved to dismiss the motion for a new trial "because the acknowledgment of

service was over ten days after the granting of the rule nisi and after the adjournment of the term." Dealing with this point, the court held that there was no merit in the complaint that the trial judge overruled the motion to dismiss, "the service having been actually made in ample time before the hearing, and there being no order limiting the time within which service should be made." The order passed in the present case made no provision whatever for service upon the respondent.

3. In this order November 26, 1904, was fixed as the date of the hearing, and leave was therein given the movant "to amend his motion and until the said day and on said day to amend and to perfect his brief of evidence in the case." The respondent, in its motion to dismiss the motion for a new trial, presented the objection that no brief of the evidence had been filed, nor any attempt to do so made as contemplated by Civ. Code 1895, § 5484. Unless the order of the court relieved the movant of the necessity of filing a brief of the evidence in accordance with the terms of that section, the motion for a new trial was ripe for dismissal. West v. Smith, 90 Ga. 284, 15 S. E. 912; Cotton v. Slaughter, 69 Ga. 735; Brantley v. Hass, Id. 748; Brunswick Light Co. v. Gale, 91 Ga. 813, 18 S. E. 11; Central R. Co. v. Pool, 95 Ga. 410, 22 S. E. 631; Williams v. Central R., 77 Ga. 612, 3 S. E. 88; Baker v. Johnson, 99 Ga. 374, 27 S. E. 706; Hyatt v. Cowan, 115 Ga. 608, 41 S. E. 985. Leave to prepare and file a brief of the evidence on or before the hearing must be unequivocally granted, else the movant cannot justify an omission to follow the practice prescribed in the section of the Code last cited; and where the order relied on by him as authorizing a departure from this practice is ambiguous, and was not intended by the trial judge to be understood as extending the time for filing a brief of the evidence, the movant is not in a position to excuse his failure to comply strictly with the terms of the statute. Cohen v. Lester, 103 Ga. 565, 29 S. E. 823; Barnes v. Railroad Co., 105 Ga. 495, 30 S. E. 883; Brown v. Richards, 114 Ga. 318, 40 S. E. 224. But an order of court which prescribes other terms respecting the preparation and presentation for approval of a brief of evidence is to be given a reasonable construction, and be understood as not contemplating that the movant should file a brief of evidence during the term at which the trial was had. R. & D. R. Co. v. Buice, 88 Ga. 181, 14 S. E. 205; Hightower v. Brazeal, 101 Ga. 371, 29 S. E. 18; Maisby v. Young, 104 Ga. 205, 30 S. E. 854; Johnson v. Grantham, 110 Ga. 281, 34 S. E. 851; Cross v. Coffin-Fletcher Packing Co., 123 Ga. 817, 51 S. E. 704. Thus, in Hightower v. George, 102 Ga. 549, 26 S. E. 729, it was held that: "Where in term time an order is passed directing that a motion for a new trial then pending be heard and determined at a day named in vacation, and time is given by the presiding judge until that date within which to perfect the brief of evidence and have the same approved, and where, upon the day thus named, a brief of evidence is presented to and approved by the judge, and he thereupon orders the same filed, a motion made at the hearing to dismiss the motion for a new trial upon the ground that no brief of evidence has been filed as required by law is properly overruled." This decision disposes of the objection made in the present case that a brief of the evidence had not been filed within the time prescribed by statute. The order was broad enough to include the privilege of filing the brief on the day set for the hearing. A brief of the evidence had been prepared, and a copy of it had been delivered to counsel for respondent, and counsel for the movant stated to the court that he "expected then and there to have the motion as amended approved, and also the brief of the evidence." The court erred in not permitting the movant to perfect his motion by filing an approved brief of the evidence, as it was his right to do under the terms of the order fixing the time and place of the hearing.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 697)

GEORGIA RY. & ELECTRIC CO. v. REEVES.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. PLEADING—AMENDMENT — NEW CAUSE OF ACTION.

Where an action was based on the allegation that a passenger on a car of an electric railway, at the direction of the conductor, was required to change cars, and while passing from one car to another she was injured by the negligent conduct of the defendant's agents and servants in connection with such change, an amendment which alleged an additional act of negligence forming part of the same transaction did not set up a new and distinct cause of action.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 694.]

2. SAME.

Such an amendment, which alleged that "said jerk of said car was caused by the defendant's servants and agents in charge of said car," was not subject to objection on the ground that it did not connect the alleged negligence with the defendant.

3. CARRIERS—INJURY TO PASSENGER—PLEADING.

If a car is at rest temporarily, and a passenger is lawfully leaving it, or passing from it to another car, under the direction of the conductor, and while this is in progress a sudden and violent jerk or movement of the car is caused by the company's agents, resulting in injury to the passenger, it is not necessary to allege in detail by what particular means they caused the jerk to occur.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1275½.]

4. PLEADING—AMENDMENT — NEW CAUSE OF ACTION.

While an independent act of negligence not connected with, contributing to, or causing the injury to a passenger is immaterial, and an

amendment alleging such an act is demurrable, yet where the amendment, taken in connection with the declaration, sufficiently shows that the act alleged in it formed a part of the conduct of the defendant's agents from which the injury was alleged to have resulted, there was no error in overruling a demurrer thereto.

5. SAME.

Where the evidence for the plaintiff in an action for damages tended to show that the injury occurred on the same line of railroad, but at a point some 350 or 400 yards distant from the place where it was alleged in the declaration to have happened, an amendment for the purpose of correcting the allegation so as to make it conform to the evidence, but still referring to the same transaction, and not to a different occurrence, did not add a new and distinct cause of action, and was not objectionable on that ground.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 608, 695.]

6. APPEAL—HARMLESS ERROR—AMENDMENT.

If any objection could properly have been made to the allowance of such an amendment, it furnishes no cause for a reversal, where, upon further evidence being introduced, which tended to show that the injury in fact occurred at the point originally alleged, the amendment was withdrawn.

7. SAME—REFUSAL OF NONSUIT.

If a motion for a nonsuit should have been granted at the time when it was refused, yet, if the evidence afterwards introduced supplied the deficiency, no reversal will result from such refusal.

8. CARRIERS — INJURY TO PASSENGER — INSTRUCTIONS.

Where the presiding judge, at one part of the charge on the subject of the presumption arising from proof of injury from the running of the cars of a railroad company, or the acts of persons in its employment, did not limit such presumption to the specific acts of negligence alleged, but in his general charge did clearly and specifically confine the jury to the consideration of such specifications of negligence, this furnishes no ground for a new trial.

9. SAME—PRESUMPTION OF NEGLIGENCE.

If a car containing passengers is stopped while in transit, and the passengers are directed by the conductor to change to another car, which is on a track parallel to the first, and if, while they are so doing, the employés of the company put out the lights of the first car, and cause it to jerk suddenly, resulting in injury to a passenger who is in the act of making the change, this would be an injury resulting from the running of the cars of the company, within the meaning of the statute, and would also be a damage done by a person in the employment and service of the company, so as to raise the statutory presumption of negligence against it.

10. APPEAL—REFUSAL OF NEW TRIAL.

None of the other grounds of the motion for a new trial in this case require a reversal.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Malinda Reeves against the Georgia Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. Malinda Reeves brought suit against the Georgia Railway & Electric Company to recover damages for a personal injury, alleging, in brief, as follows: She was a passenger on one of defendant's cars on November 20, 1902, between the hours of 5 and 6 p. m. When the car reached a certain point on the line, it stopped, and the conductor directed the passengers to transfer from it to another car of the defendant, which stood on a parallel track, and which was to carry the passengers to the end of the journey. The conductor and motorman directed the passengers to step from the car on which they had been riding to the other car. They negligently failed to exercise any care or diligence in assisting passengers, particularly female passengers, like the plaintiff, who was an elderly lady, from one car to the other, and negligently failed to provide any safe means of getting from one car to the other. They negligently failed to stop the car at any proper place where there was a platform or a raised place for passengers to alight, and negligently directed the passengers to step from one car to the other. A number of passengers were in front of the plaintiff and a number behind, and they were crowding and pressing in the cars from one to the other. Passengers made a step from one car to the other. The conductor and motorman stood by, seeing and directing and permitting this to be done, and permitting the passengers to crowd behind the plaintiff with force and speed. The car on which the plaintiff had been riding had been lighted by electricity, and just as the plaintiff was in the act of undertaking to step from one car to the other the conductor negligently pulled down the trolley pole, and by this method, and by other means unknown to the plaintiff, caused the car to become suddenly darkened, and no sufficient light was thrown out between the cars to enable persons to safely make the step from one car to the other, or to safely judge of the distance; and because the plaintiff was unable to see or discern the landing place or step on the car, and because the passengers behind were crowding and pressing her, with the knowledge of the conductor and motorman, and because no safe landing or passageway from one car to the other had been provided, and because the plaintiff was in no way assisted or guarded or protected, and failed to get a firm footing upon the step of the car in passing from one car to the other, she fell to the ground, and was permanently injured. The nature of the injury was specifically alleged. The defendant admitted that the plaintiff was a passenger on its car; that the car was stopped, and the conductor directed passengers to transfer from it to another car which stood on a parallel track, for the purpose of carrying the passengers into the city of Atlanta. The other substantial allegations were denied. The plaintiff amended her declaration by alleging that when she was in the act of stepping from one car to the other there was a sudden jerk or movement of the car from which she was stepping; that such jerk or movement of the car was negligence on the part of the defendant, and that it was caused by the defendant's servants and agents in charge of the car. This amend-

ment was allowed over objection, and exceptions pendente lite were filed. While the plaintiff was on the stand, she testified that the injury occurred, not at Hurt street, as alleged in the declaration, but at a point known as "Moreland's Station," which other evidence indicated was about 350 or 400 yards distant from Hurt street. Thereupon an amendment was offered and allowed over objection, alleging that the injury really occurred at Moreland's Station. The plaintiff's evidence was not very clear as to the location, as she stated that she was not familiar with the line. When the defendant's evidence was introduced, it showed positively that the occurrence really took place at Hurt street. The plaintiff then withdrew the amendment previously made, changing the allegation as to the place of the occurrence, and returned to the original allegation on that subject. This also was objected to. The evidence on behalf of the plaintiff as to what transpired at the time and place of the alleged injury was, in brief, as follows: The plaintiff was returning to Atlanta from Decatur, six miles distant, on one of the defendant's cars, operated by electricity, between 6 and 7 o'clock in the evening. When the car arrived at a place about the outskirts of the city of Atlanta, it stopped alongside of another one of defendant's cars, which was on a parallel track. The conductor stated that they had lost their schedule, and instructed the passengers to change to the other car immediately. They were rushed out, and the plaintiff went to step from one car to the other (or, as she expressed it, "went to make my step"), when the conductor turned the trolley, the lights went out, and there was a sudden jar of the car, caused by the defendant's agents, which threw the plaintiff to the ground, causing the injury. The evidence for the defendant tended to show the following among other facts: There was an arc light at the junction of Hurt and Decatur streets, used for lighting the city streets. When the two cars were parallel to each other, both were still. Owing to a loss of time by the one coming into Atlanta, the schedule was disarranged, and it became necessary for the passengers to transfer to the other car, in order that the first might turn back and resume its regular schedule. Both cars remained still while the passengers went from one to the other, and both were lighted. No change was made in the lights at the place, except that the headlight on the first car was made ready to be transferred to the other end of it. To do this a key or stop was taken out, which disconnected the electric current from it. The trolley was not moved until after the passengers were transferred. The effect of taking the trolley off the wire would not be to cause the car to move, but to disconnect the current from it, and render it impossible for it to move. Both cars were standing still during the transfer. The car was in good running order. One witness of the defendant testified: "The two cars were standing side by side, and the other passengers were stepping from one car to the other, and she went to step across, and it looked like that she stepped on her skirt, and she dropped down there." Neither the changing of the headlight nor the change of the trolley pole could have caused a jerk of the car. The jury found in favor of the plaintiff $500. The defendant moved for a new trial, which was refused, and it excepted. Error was also assigned on the allowance of the first amendment to the declaration.

Rosser & Brandon, Walter C. Colquitt, and Ben. J. Conyers, for plaintiff in error. Arnold & Arnold and Harvey Hill, for defendant in error.

LUMPKIN, J. (after stating the facts). 1. It was contended that the amendment alleging that while the plaintiff was stepping from one car to the other the defendant negligently caused the car to jerk suddenly added a new cause of action. This ground of exception is not well taken. The action being based on the allegation that while a passenger, at the direction of the conductor, was passing from one car to another, she was injured by the negligent conduct of the defendant's agents and servants in connection therewith, an amendment which alleged an additional act of negligence in the same transaction did not set out a new and distinct cause of action. City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318; Harris v. Central Railroad Co., 78 Ga. 525, 3 S. E. 355; Ellison v. Georgia Railroad Co., 87 Ga. 699, 13 S. E. 809; Civ. Code 1895, § 5098.

2. The bill of exceptions pendente lite assigns error in allowing this amendment on the ground that it "does not connect the alleged negligence with the defendant." It distinctly alleges "that said jerk of said car was caused by the defendant's servants and agents in charge of said car."

3. It was further objected that the amendment did not show in what way the defendant caused said alleged negligence. It was not necessary that the plaintiff should ascertain and allege the particular methods by which the defendant's employés produced a sudden jerk while she was leaving the car. Where a car is at rest, and a passenger is lawfully leaving it or passing from it to another car under the order or at the request of its conductor, if a sudden and negligent jerk or movement is caused by the agents, resulting in injury to the passenger, it is not incumbent on the passenger to allege the specific manner in which it was produced. It would be an unreasonable burden to place upon her to require that she should know and allege and prove whether the motorman turned on the current, or turned off the brake, or by what method of handling the complex machinery connected with a car propelled by electricity the jerk was produ-

ced. The allegation of the amendment on this subject was sufficient.

4. Objection was further made on the ground that the amendment does not show in what manner the alleged negligence contributed to or caused any injury to the plaintiff. If this amendment stated a new count which should be complete in itself, or if it alleged some act of negligence disconnected from the transaction set forth in the declaration, and by reason of which negligence injury to the plaintiff was alleged, the point would be well taken. But we think that under the allegations of the declaration, which show that she was a passenger on defendant's car, that under order of the conductor she was leaving that car, and undertaking to step across to another, and that by reason of negligence on the part of the defendant's agents in connection with such transfer she fell and received an injury, the addition of another act of negligence in the same connection might fairly be construed with the whole declaration as being one of the causes which produced the injury. Taking the amendment, therefore, in connection with the original declaration, while it might have been more explicit, we do not think that it was amenable to this objection.

5, 6. Complaint is made that, after the plaintiff closed her evidence, wherein the scene of the injury was located at a point 350 or 400 yards distant from that alleged in the declaration, a motion for a nonsuit was made, and thereupon an amendment was allowed making the declaration conform to the evidence of the plaintiff. It is urged that this set forth a new cause of action. This objection was not well founded. The mere correction of an allegation as to the exact location of an occurrence on the line of a railroad, so as to allege that it in fact occurred a few hundred yards distant from the point alleged in the original declaration, does not add a new and distinct cause of action. It is the same cause of action. Nor does it become a new and distinct cause by merely shifting the scene of the occurrence a short distance along the line of the railroad. By doing so there was no difference in the law applicable or in the evidence necessary to support the substantial grounds of the plaintiff's contention. Even if there had been error in the allowance of this amendment, it could furnish no ground for reversal, because at a later stage of the trial the amendment was withdrawn, and the original allegation restored, the defendant's evidence showing that the occurrence took place at the point alleged in the original declaration.

7. Error is assigned because the court overruled the motion for a nonsuit. If the motion rested on the variance between the allegata and probata with reference to the place at which the injury occurred, the making of an amendment which caused the former to conform to the latter destroyed the right to a nonsuit, if it existed. If, however, we should consider the case as if the amendment which was afterwards withdrawn had not been made, and that there was an error at the time when the motion was made in not granting the nonsuit, yet, if the evidence afterwards introduced supplied the deficiency, no reversal will be granted on that ground. Here the evidence of the defendant clearly showed that the occurrence transpired at Hurt street, the place alleged in the declaration.

8. The motion for a new trial assigns error in the following charge: "Now, in this investigation, gentlemen, if the plaintiff makes it appear to you from the evidence in the case that she was injured in the manner that she sets forth in her declaration, the law would presume then that the defendant was negligent, and the burden would be cast upon the defendant to show to you either that it was not negligent, or else the injury to the plaintiff, if she was injured, was due to accident, and not caused by the defendant's negligence; or else that the plaintiff, by ordinary care on her part, could have avoided the consequences to herself of the defendant's negligence, if that is shown. If the defendant makes either of these propositions appear, that would be a reply to the presumption, and make a complete defense to the action." The grounds of complaint in respect to this charge are that it was without basis in the evidence; that the charge as to the presumption of negligence was not adapted to the evidence; that there was no evidence to show that the plaintiff was injured by the running of the locomotive or cars or other machinery of the defendant, or by any person in its employment; that the case was not one to which the statutory presumption against railroads was applicable; and that the charge raised a general presumption of negligence against the defendant, whereas, if any presumption arose at all, the court should have limited it to the specifications of negligence submitted to the jury. The evidence furnished ample basis for this charge. The judge excluded from the consideration of the jury all the specifications of negligence except two—causing the light to go out and causing the sudden jerk. And while he did not, in immediate connection with the charge complained of, inform the jury that the presumption of negligence arising against the defendant would be limited to the specifications of negligence submitted to them, the general charge contained in the record shows that he did do this several times. At one point in the charge he instructed the jury: "Your investigation of the case on the question of whether the defendants were negligent or not negligent will be confined to these two specifications, and you would not be authorized to go outside, and inquire whether the defendant was or was not negligent in some or any other way than that set forth in these two specifications of negligence which will be submitted

to you." At another time he said: "Your method of inquiry, confining yourselves to these two specifications to which I have called your attention," etc. And in several other portions of the charge he emphasized the fact that the consideration of the jury was confined to these specifications. Under the entire charge the jury could not have understood that the judge referred to a presumption of negligence in respect to other matters which he had expressly excluded from their consideration.

9. It is urged that, if the injury occurred as alleged and proved by the plaintiff, this was not a case in which the statutory presumption of negligence arises. Civ. Code 1895, § 2321, declares: "A railroad company shall be liable for any damage done to persons, stock, or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." The argument is that, inasmuch as the car was standing still when the passengers were directed to leave it and go to another car, the injury was not done by the running of the car, or by any person in the employment and service of the company. This argument would be sound if made in regard to an injury which was entirely disconnected from the running of a car, or which was not produced by some direct act of a person in the employment of the company. And such was the ruling in Ga. R. Co. v. Nelms, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. Rep. 308; Savannah Ry. Co. v. Flaherty, 110 Ga. 335, 35 S. E. 677. But it would be too narrow and restricted a view to hold that if, while passengers are in transit upon a car, it was stopped for one or more of them to alight, or to be transferred to another car, and the injury resulted to one of them by reason of turning out the lights in the car or causing it to jerk while the passenger was alighting, this was not done by the running of the car, or by a person in the service of the company, if such person put out the light or caused the jerk. Such an occurrence would be a part of the actual transit. The running of the car, as used in the section of the Code above quoted, is not confined to a mere collision with a person on the track. An unnecessary jerk, causing an injury to a passenger while alighting, is a part of the running within the reason and spirit of the statute. Moreover, if, while the passenger is in the act of alighting, an employé of the company turns out the lights, or causes the car to jerk, and as a result the passenger is injured, this would be damage done by a person in the employment and service of the company within the meaning of the statute.

10. There were numerous other grounds of the motion for a new trial, alleging errors on the part of the court in stating the contentions of the defendant, and in various charges and refusals to charge and omissions to charge. A careful consideration of all of them in connection with the evidence and the charge given convinces us that none of them are well taken. The verdict is supported by the evidence.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(72 S. C. 25)

CREECH v. LONG.

(Supreme Court of South Carolina. June 24, 1905.)

1. INJUNCTION—RESTRAINING ORDER—BOND.
Code Civ. Proc. 1902, § 244, authorizes the judge, if he deems it proper that defendant should be heard before granting an injunction, to issue an order requiring cause to be shown, and restrain defendant in the meantime. *Held* not to make it the duty of the judge to require an undertaking before hearing the return to a rule to show cause when a restraining order was granted.

2. ACTION—JOINDER OF CAUSES.
A complaint alleged a sale of fertilizers under a promise to execute a chattel mortgage and an agricultural lien to secure the same, and sought a sale of the crops and chattels; the proceeds to apply to the debt. *Held* to state only one cause of action.

3. EQUITABLE MORTGAGE.
An equitable mortgage to secure a debt may be created, by parol agreement, on crops to be raised, and attaches as soon as they are in esse.

4. SAME.
An agreement to execute an agricultural lien is not an equitable mortgage.

Appeal from Common Pleas Circuit Court of Barnwell County; Townsend, Judge.

Action by Frank H. Creech against B. R. Long. From an order granting a temporary injunction, defendant appeals. Affirmed.

The following is the complaint:

"The complaint of the above-named plaintiff respectfully shows to the court:

"First. That the defendant above named, a farmer, being engaged in the cultivation of the soil for his means of support and livelihood, as well as for that of his family, applied to the plaintiff above named on or about the 23d day of February, A. D. 1904, for advances in fertilizers to assist him in the making of said crops in his business as a farmer, in said state and county, and agreed then and there that said crops so grown by him during the current year, and whereon he proposed to, and did, use the fertilizers hereinafter set forth and described, should be a security or pledge for said advances in favor of said plaintiff, and to this end defendant agreed to execute to the plaintiff such security upon said crops, together with the chattel mortgage on certain and sundry live stock hereinafter set forth and described.

"Second. That the plaintiff, relying upon said agreement on said defendant's part to

execute and deliver security as aforesaid upon said crops to be grown as aforesaid, agreed to advance to the defendant standard fertilizers and acids to the extent of one hundred ninety and $^{65}/_{100}$ dollars, to be used by the defendant as aforesaid in the production of his crops for the then current year, grown and to be grown upon all that tract of land upon which the defendant resides in said county, known as the 'Holman Place,' near the town of Barnwell, which was secured to be paid to the plaintiff on or before the 15th day of October, A. D. 1904, by an agricultural or other lien or security upon said crops to be planted upon said place as aforesaid, together with a chattel mortgage or bill of sale of the defendant's stock, described as follows: one white horse mule, named Jack, about twelve years old; one white mare mule, named Beck, about ten years old; and one sorrel mare, named Julia, about seven years old.

"Third. That, when the time came to haul away the fertilizers to the said place, defendant received the fertilizers and hauled the same away to the extent of one hundred and sixty-one and $^{00}/_{100}$ dollars, upon the further promise that, as soon as he had finished hauling, that he would forthwith execute the said security upon the said crops and upon the said live stock aforesaid; but plaintiff alleges that the defendant, in derogation of his said promise and agreement, and with intent to defraud this plaintiff, thereafter failed and refused, and still fails and refuses, to execute the said security upon said crops and said live stock as aforesaid, in spite of the fact that defendant used the said fertilizers in the cultivation and making of said crops as aforesaid, enjoying the benefit of said fertilizers and the credit extended as aforesaid by the plaintiff, to plaintiff's damage as aforesaid in the sum of $161, the balance of said amount agreed to be advanced not having been taken up by the said defendant.

"Fourth. That the defendant has disposed of most of his crops, and has failed and refused to pay the plaintiff any part of said advance made upon the strength of his promise and agreement as aforesaid; but defendant has still a large part of his crops in his possession, to wit, a good portion of his cotton crop, which is in merchantable bales of cotton, as well as corn fodder and other provisions, which plaintiff is informed and believes defendant intends to dispose of for the purpose of defeating the rights of this plaintiff as above stated, unless plaintiff's rights are safeguarded by the orders of this honorable court.

"Fifth. That defendant is totally insolvent, and plaintiff remediless at law, and, unless the courts of equity will interfere to protect plaintiff's rights, plaintiff is without remedy, and said advances will be a total loss to this plaintiff. Wherefore plaintiff prays that the contract above stated be declared by this court to be an equitable lien by way of mortgage upon said crops and live stock aforesaid; that the defendant be restrained and enjoined from disposing of said crops by sale or otherwise until the rights of the plaintiff may be ascertained in this suit; that the said property be seized by the court and sold by the master, and the proceeds applied to the costs of this suit and the payment of this indebtedness, and for such other and further relief as to the court may seem meet and proper."

W. A. Holman, for appellant. Bates & Simms, for respondent.

GARY, A. J. This is an appeal from an order granting a temporary injunction refusing the defendant's motion to strike out certain allegations of the complaint as irrelevant, and also refusing to require the plaintiff to elect upon which cause of action he would proceed to trial.

The questions presented by the exceptions render it necessary to refer to the complaint, which will be set out in the report of the case. Briefly stated, it alleges that the plaintiff, in pursuance of an agreement with the defendant, made to him advances of fertilizers during the year 1904 for the purpose of enabling him to make his crops; that the defendant "agreed then and there that said crops so grown by him during the current year, and whereon he proposed to, and did, use the fertilizers hereinafter set forth and described, should be a security or pledge for said advances in favor of said plaintiff, and to this end defendant agreed to execute to the plaintiff such security upon said crops, together with the chattel mortgage on certain and sundry live stock hereinafter set forth and described"; that the amount due for the advances of fertilizers "was secured to be paid to the plaintiff on or before the 15th of October, 1904, by an agricultural or other lien or security upon said crops to be planted upon said place as aforesaid, together with the chattel mortgage or bill of sale of the defendant's stock" described in the complaint; that the plaintiff complied with his part of the contract, but that the defendant refused to perform his obligation thereunder. The plaintiff seeks the equitable remedy of foreclosure. On the 13th of February, 1905, his honor the circuit judge granted an order requiring the defendant to show cause on the 16th of March, 1905, why he should not be enjoined from disposing of the property described in the complaint, and in the meantime restraining him from disposing of the same. The defendant anticipated the hearing upon the rule to show cause by giving notice of a motion for the following relief:

"First. For an order to vacate and set aside the injunction or restraining order herein granted on the 13th day of February, 1905, whereby the defendant was restrained and enjoined from selling and disposing of the property mentioned and described in said complaint, on the ground that no bond or undertaking was exacted of the plaintiff

as required by the laws of the state of South Carolina in such cases made and provided.

"Second. That inasmuch as the complaint attempts to state two causes of action—one for legal relief to recover the value of certain commercial fertilizers as therein stated, and the other for equitable relief to adjudge an alleged agreement of the defendant with the plaintiff to be an equitable lien on the property mentioned and described in the said complaint—the defendant will therefore ask his honor for an order to require the said plaintiff to so amend his complaint as to state each of the said causes of action separately, or that he be required to elect upon which cause of action he will proceed to trial.

"Third. That the plaintiff be required to strike out of paragraphs 1, 2, 3, and 4 of the said complaint, as irrelevant, each and every allegation or reference made to the crops raised or grown by the plaintiff on the said plantation known as the 'Holman Place,' in that this court cannot decree the specific performance of a lien on such crops, or declare a promise as alleged to be an equitable or other lien thereon, as such order or decree would be in contravention of the statute laws of the state of South Carolina.

"Fourth. That the plaintiff be required, when said causes of action are separated, to make his complaint more definite and certain, by stating whether the agreement alleged to have been made between the plaintiff and defendant was in writing or verbal, whereby it is claimed that the defendant agreed to give to the plaintiff a mortgage or bill of sale over the live stock described in the complaint."

On the 8th of March, 1905, the circuit judge refused the motion, and further ordered that the temporary restraining order theretofore granted should be continued in force until the further order of the court, provided the plaintiff entered into an injunction bond in the manner therein prescribed. The plaintiff complied with this requirement.

The first exception assigns error in refusing the relief sought by the defendant, on the first ground mentioned in his motion. Section 244, Code Civ. Proc. 1902, provides that "if the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained." This section recognizes the distinction between an order granting an injunction proper, and an order simply restraining the defendant until the court can determine whether the plaintiff is entitled to an injunction. The Code does not make it the duty of the judge to require an undertaking on the part of the plaintiff before hearing the return to the rule to show cause, although a restraining order was granted in the meantime. This exception is overruled.

The second exception raises the question whether there was error in not granting the relief for which the defendant asked, in the second ground of his motion. Our construction of his complaint is that it states but a single cause of action. The circuit court, in the exercise of its chancery powers, has the right to ascertain the value of the fertilizers. Ex parte Landrum, 69 S. C. 136, 48 S. E. 47; Pratt v. Timmerman, 69 S. C. 186, 48 S. E. 255. This exception cannot be sustained.

The third and fifth exceptions assign error in not granting relief upon the third ground set forth in the motion. The motion failed to specify the particular allegations which the defendant desired should be struck out as irrelevant. We will therefore discuss their general effect upon the cause of action. It is true that an agreement to execute an agricultural lien cannot be construed as an equitable mortgage, nor can it be made the basis of an equitable right. Cureton v. Gilmore, 3 S. C. 46; Moore v. Byrum, 10 S. C. 452, 30 Am. Rep. 58; Sternberger v. McSween, 14 S. C. 35; Kennedy v. Reames, 15 S. C. 548; Carpenter v. Strickland, 20 S. C. 1. But under our construction of the complaint, especially in view of the facts set out in the first paragraph, the allegations which the defendant made a motion to strike out are relevant, to the extent of showing that the plaintiff had an equitable mortgage on the crop. An agreement that specific property shall stand as security for the payment of the debt creates a mortgage, and a promise to give a mortgage on certain chattels has the effect of impressing such property with an equitable lien, although it is merely verbal. Moore v. Byrum, 10 S. C. 452, 30 Am. Rep. 58; Davis v. Childers, 45 S. C. 133, 22 S. E. 784, 55 Am, St. Rep. 757; Avery v. Wilson, 47 S. C. 78, 25 S. E. 286; Read v. Gaillard, 2 Desaus. 552, 2 Am. Dec. 696; Dow v. Ker, Speers, Eq. 413; Massey v. McIlwain, 2 Hill, Eq. 421; 3 Pom. Eq. Jur. § 1235. Property not in esse may be the subject of an equitable mortgage, and is impressed with a lien as soon as it comes into existence. Moore v. Byrum, supra; Parker v. Jacobs, 14 S. C. 112, 37 Am. Rep. 724; 3 Pom. Eq. Jur. § 1236; 5 Enc. of Law, 982. These exceptions must be overruled.

The fourth exception alleges error in not giving the relief sought on the fourth ground mentioned in the motion. It sufficiently appears upon the face of the complaint that the agreement was only verbal. This exception is also overruled.

It is the judgment of this court that the order of the circuit court be affirmed.

(123 Ga. 356)

CLARK et al. v. CLINE et al.

(Supreme Court of Georgia. Aug. 5, 1905.)

1. SCHOOLS — APPORTIONMENT OF FUND — SCHOOL POPULATION.

Where a county contains a town or city having a school system sustained by local taxation for a period of five months or more, to which direct apportionments are authorized to be made, the part of the entire county fund to be so paid is determined by the proportion which the school population of the town or city bears to the school population of the county as shown by the last school census. The statute declares that the division is to be made according to school population, not according to the number actually attending the schools.

2. SAME.

The school population includes all children between the ages of 6 and 18 years.

3. SAME—CHILDREN OF SCHOOL AGE.

Children of school age resident in the county attending the public schools of such town or city are to be counted in the school population of such town or city, and are entitled to have their share of such county fund paid over to the proper officer of the municipal school board.

4. SAME.

The local system of the city of West Point (created by the act of 1877 [Laws 1877, p. 192]) falls within this rule.

5. APPEAL—REVIEW.

The question raised as to the constitutionality of the act of 1904 (Laws 1904, p. 332), providing for the payment of the whole school fund of the county to the county commissioner of Troup county, and a payment by him to the local school system of West Point of its share, was not decided by the presiding judge, and will not be determined by this court.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1037.]

6. INJUNCTION—MISAPPROPRIATION OF SCHOOL FUND—SUIT BY TAXPAYERS.

If the county school fund of Troup county, in which West Point is located, has been customarily paid to the county school commissioner, and a division made, and the share of the city system of schools paid by him to it, and if the amount so paid is larger than the city system is entitled to under the law, and the county board of education and county school commissioner intend to continue such payment, citizens and taxpayers of the county outside of the city, who are also patrons of a school outside the city, have such an interest as will authorize them to proceed by application for injunction to prevent such payments.

7. SCHOOLS — CONSTRUCTION OF SCHOOL—JURISDICTION OF COUNTY BOARD OF EDUCATION.

The county board of education constitutes a tribunal for hearing and determining any matters of local controversy in reference to the construction or administration of the school law. But this does not oust a court of equity of its power to enjoin the board of education and school commissioner from making unlawful payments of part of the county school fund to a municipal school system operating independently of the county system.

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by C. E. Cline and others against E. B. Clark and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Cline and others filed their equitable petition alleging that the county school commissioner of Troup county had received the county school fund; that it was in the hands or under the control of the county board of education, and that the commissioner and the board of education were about to pay over to the officials of an independent local system in the city of West Point an amount in excess of that which was allowed by law, and would do so unless enjoined. By amendment the board of education of West Point was made a party. It was alleged that the amount to be paid the local school system should be determined according to the school population, and not according to school attendance, but that the payment which it was proposed to make would be according to attendance. The defendants answered, and contended that the payment which would be made would be according to law, and that the contention of the plaintiffs would work an unjust and unequal mode of distribution. They also demurred to the petition. On the hearing the presiding judge granted the injunction, and the defendants excepted.

Longley & Longley and Hatton & Lovejoy, for plaintiffs in error. H. A. Hall and D. J. Gaffney, for defendants in error.

LUMPKIN, J. (after stating the facts). 1–5. On February 7, 1877 (Acts 1877, p. 192), an act of the Legislature was passed, the caption of which was, "An act to authorize the city of West Point in Troup county, to organize a public school system independent of the public school system of the state of Georgia, and for other purposes." The first section provides: "That the city of West Point, in the county of Troup, be, and is hereby, authorized to organize a public school system independent of the public school system of this state; that said organization shall draw its pro rata share of all educational funds raised by this state, and that the chief executive officer of such organization shall make the same regular reports to the state school commissioner as are required from the county school commissioner of the public school system of this state." Under this act an independent public school system was created for the city of West Point. Its chief executive officer was required to make reports to the state school commissioner similar to those required from county school commissioners; and this independent organization was to draw its pro rata share of all educational funds raised by the state. The act itself did not declare how the pro rata share was to be ascertained, but that was left for determination according to the general law. The Legislature had power to declare how the pro rata share of independent school systems should be determined, and on what basis calculated, and the West Point system under this act was entitled to its pro rata share calculated on the basis which the Legislature might fix at any time. In 1887 an act was passed revising, amending, and consolidating the school laws of the state. Acts 1887, p. 68. In 1894 an

act was passed to systematize the finances and increase the efficiency of the common schools. Acts 1894, p. 60. The laws relating to the public school system will be found codified in the Political Code of 1895, §§ 1338 to 1408. Several amendments to the school laws have been made since that Code, but none of them are material to this controversy, and none are relied on by counsel, except a local act passed in 1904, which will be referred to hereafter. Section 1406 of the Political Code of 1895, which was codified from the act of 1894, reads as follows: "In those counties having local laws, where schools are sustained by local taxation for a period of five months or more, the state school commissioner shall, on the first day of January, April, July, and October of each year, or as soon thereafter as practicable, notify the Governor of the amount of funds standing to the credit of each of such counties on the books of the treasurer on said dates, arising from the quarterly apportionments aforesaid, and thereupon the Governor shall issue his warrant for said sums, and the treasurer shall draw his checks for said sums without requiring the itemized statements as provided; and the state school commissioner shall immediately transmit said checks to the officer under the local system authorized to receive its funds, and the state school commissioner shall, in like manner, pay over to the proper officer under the school board of any town or city having a school system sustained by local taxation for a period of five months or more, and to which he is now authorized by law to make direct apportionments, such proportion of the entire county fund as shown on the books of the treasurer as the school population of the town or city bears to the population of the county, as shown by the last school census: provided, that all children of school age resident in said county, and attending the public schools of such town or city, shall be counted in the school population of such town or city and be entitled to have their share of such county fund paid over to the proper officer of the school board of such town or city." This distinctly declares that the state school commissioner shall pay over to the proper officer under the school board, in a town or city having a separate school system, "such proportion of the entire county fund as shown on the books of the treasurer as the school population of the town or city bears to the population of the county" (omitting the proviso as to children resident in the county and attending the public schools in the town or city). This language is plain and clear. It declares how the proportion or pro rata part of the entire county fund which shall be paid to the proper officer of the local school board is to be determined. The rule laid down for making the calculation is this: As the school population of the town or city is to the school population of the county, so is the proportion or share of the county fund which shall be paid to the officer of the local board to the entire county fund. Thus, if the entire school population of the county were 5,000, and the school population of the town or city were 1,000, the local system would be entitled to one-fifth of the entire county fund. In estimating the school population of the town or city, the proviso at the end of this section declares that all children of school age resident in the county, and attending the public schools of such town or city, shall be counted in the school population of such town or city, and be entitled to have their share of the school fund paid over to the proper officer of such town or city. In the illustration given the 1,000 therefore is to be considered as including the school population as thus calculated in accordance with the terms of the act.

It is contended that the act of 1894 and the section of the Code derived from it do not apply to the school system of West Point, because the act authorizes the state school commissioner to pay over to the proper officer "under the school board of any town or city having a school system sustained by local taxation for a period of five months or more, and to which he is now authorized by law to make direct apportionments." It is not denied that West Point is a city having a school system sustained by taxation for a period of five months or more; but it is contended that the act by its terms is applicable only where the state school commissioner "is now authorized by law to make direct apportionments," and that the West Point school system does not fall within this description. As has already been noted, under the act of 1877 the city of West Point was authorized to organize an independent public school system, having a chief executive officer, who was required to make reports to the state school commissioner similar to those required by county school commissioners, and "said organization shall draw its pro rata share of all educational funds raised by this state." In the second section of the act, after providing for the election of a board of commissioners for the school system, it is expressly declared that "said board shall receive all monies drawn from the educational funds raised by this state, and all funds raised by taxation in said city," etc. There is nothing in the act which intimates that the county school commissioner of Troup county is to receive the pro rata share of the educational fund from the state and pay it over to the local board. While it did not in terms declare that the state school commissioner should make a direct apportionment to the local board, yet it seems to us the very plain meaning of the act is to authorize him to do so. What reason was there for requiring the chief executive officer to make regular reports to the state school commissioner similar to those made by county school commissioners, and declaring that the board

should receive all moneys drawn from the educational funds raised by the state, if the Legislature meant that the county school commissioner should receive these funds and pay them over to the board? This act nowhere even mentions the county school commissioner, but places the local board in direct communication with the state school commissioner. It is said in the brief of counsel that it has been the practice under that act for the county school commissioner to receive the funds from the state school commissioner, and pay over to the local board its proportion. We do not know how this may be, but we entertain no doubt that under the act of 1877 the state school commissioner was authorized to make a direct apportionment to the local board, and that it therefore came within the terms of the act of 1894. Even if this were not clear, there has been a practical adjudication on this point in the case of Bridges v. State, 103 Ga. 21, 35, 29 S. E. 859. In the opinion Chief Justice Simmons said: "By an act approved August 11, 1881 (Acts 1880–81, p. 421), a public school system was established for the city of Rome, independent of the county school system. Under its provisions that portion of the school fund which belonged to the city of Rome was paid by the state authorities to the county school commissioner, who was in turn required and authorized to pay it to the city authorities. The general act approved October 27, 1887 (Acts 1887, p. 68), contains no provisions which would authorize the payment by the state authorities directly to the city of Rome of her proportion of the school fund, but the act approved December 13, 1894, codified as section 1402 et seq. of the Political Code, does provide expressly for such payment. As to this matter, the terms of the act (Pol. Code 1895, § 1406) apply to the schools of the county of Floyd and the city of Rome, and the school funds belonging to the latter pass directly into the hands of the proper city authorities." Indeed, it was held in that case that the county school commissioner was not authorized in his official capacity to receive or disburse that portion of the school fund.

It is contended that, if the state school commissioner was authorized at any time to pay the pro rata share of the West Point school system directly to the local board, this was changed by the act of August 13, 1904 (Acts 1904, p. 332). This act amended the act of 1877 by adding at the end of the first section the following words: "Said officer shall file a copy of said reports with the county school commissioner of Troup county, and said public school system of West Point shall draw its pro rata share of the public school money apportioned each year to said county, and the county school commissioner shall pay the same over to the person authorized to receive it." Plaintiffs reply by saying that this act is unconstitutional, as being a special law in a case provided for by the general laws above referred to. The presiding judge did not decide this constitutional question, and therefore we deem it unnecessary to do so. Whether that act is constitutional or not makes no difference as to the mode of calculating the pro rata share of the local school system of West Point. It merely affects the question whether such share shall be paid directly to the local board, or whether it shall be paid to the county school commissioner, and by him to the local board. If, then, the rule is that the pro rata share of the local system is to be determined according to the ratio between the school population of the city and the school population of the county, the only remaining question, in ascertaining the exact amount, is to determine what constitutes the school population. This is answered by sections 1389, 1390, and 1391 of the Political Code of 1895, which provide for taking a census of the school population, and declare that there shall be an enumeration of the number of children between the ages of 6 and 18 years. With these rules stated, there can be no difficulty in determining what is the pro rata share of the entire county school fund which shall be paid to the local board of West Point. It is urged that the fund going to the county outside of West Point—or at least in the school which is patronized by the complainants—is disbursed according to school attendance, and that it is unfair and inequitable to make this disbursement on such a basis, while in the city of West Point the attendance is much higher, so that the amount per scholar according to attendance in West Point is much less than the amount per scholar according to attendance outside of West Point. Whether the argument is based on sound considerations of equity or not is immaterial; and on that point we express no opinion. The statute determines the mode by which the pro rata share to be paid to the local school board shall be ascertained. If it is not a just rule, the Legislature can change the law. The courts cannot do so. The pro rata shares of the counties are determined on the same basis of school population. Pol. Code 1895, § 1403. After the share of the local school system has been paid over to its board, the balance remains for use by the county authorities. The county board has power to employ teachers and make contracts with them. Id. § 1360. "It shall be the duty of said board to make arrangements for the instruction of the children of the white and colored races in separate schools." Id. § 1363. "The county board of education shall have power, if they deem best, to employ teachers at a salary." Id. § 1370. It will thus be seen that considerable discretion is conferred upon the county board of education in reference to the disbursement of the county fund and the payment of teachers. There is nothing in the law which requires them to pay the teachers according

to the number of scholars attending. Indeed, if the public school system of West Point has received all that it is entitled to, we do not perceive how it is concerned with the mode in which the county board of education shall disburse that part of the fund over which they have control. Whether the number of children attending the school is made the basis for paying the teacher, or whether the teacher is employed at a salary, or like matters, do not affect the local school system. There is no claim that the county board of education is making any unlawful use of the remaining fund.

On August 26, 1903, the Honorable John C. Hart, Attorney General, furnished to the state school commissioner an opinion in which he construed the law in regard to determining the pro rata share of the local systems. See opinions of Attorneys General from January 1, 1891, to January 1, 1904, p. 387. In it he says: "The county is treated as a unit, and the local system should be treated as but another unit in a unit. * * * I therefore advise, irrespective of any directions to the contrary in the act creating the local systems, that you adopt the rule of apportionment between the local system and the county, using as a basis 'the proportion which the school population of the local system bears to the school population in the county.'" In this case it appears that there are local systems in Hogansville and La Grange, and in making his calculation as to the amount which shall be paid by the county school commissioner to the local system at West Point the presiding judge excluded the school population in those two places. The acts creating those local systems are not before us, nor is any contention made in regard to them. We are led to infer that they receive their pro rata share directly, and not through the county school commissioner, and therefore that, inasmuch as the county school commissioner has been receiving the share of the West Point system along with that of the rest of the county, the calculation is made accordingly. No contention is made before this court that the exclusion of the school population of Hogansville and La Grange in making the calculation is improper. The judge in granting the injunction also states that this judgment does not prohibit said county school commissioner from paying the West Point schools, in addition to such proportion, such sum as is provided by law for children outside of the city attending the schools of West Point.

6, 7. It is urged that, even if the method of division which is attacked by this proceeding is illegal, nevertheless the plaintiffs are not entitled to injunction, both because they are not injured and because the county school board constitutes a school court, and that it, and not the superior court, has jurisdiction of the subject-matter of this controversy. One who neither is nor will be hurt by an illegal proceeding has no right to enjoin it. Thus in Mayor, etc., of Gainesville v. Simmons, 96 Ga. 477, 23 S. E. 508, complaint was made by citizens and taxpayers of Gainesville that the county school commissioner of Hall county was making payments to be used in the support and maintenance of the public schools of that city, which were illegal. It was held that the complainants were not entitled to an injunction, because "no person can possibly be heard to complain in equity of that with which he is in no way concerned, and which not only cannot injure him, but may operate to his benefit." See, also, Reid v. Eatonton, 80 Ga. 755, 6 S. E. 602. The facts of this case, however, do not bring it within the decisions cited. The plaintiffs are citizens and taxpayers of the county outside of the city of West Point, and patrons of the rural schools. They therefore have a direct interest in having the school fund applicable to the county system properly preserved and lawfully applied, and to enjoin its misuse or disposition contrary to law. A taxpayer, though his contribution to the public fund may be small in proportion to the aggregate, nevertheless has such a pecuniary interest in the sum made up from taxes, of which his forms a part, as to authorize him to see that there is no illegal diversion of such sum. Such a fund is in the nature of a trust fund, which equity will preserve from misapplication. Accordingly it has been held that citizens and taxpayers of a town could enjoin the unlawful establishment of a dispensary by the corporate authorities, because it would or might require an improper expenditure of the public funds. Mayor, etc., of Leesburg v. Putnam, 103 Ga. 110, 29 S. E. 602. In Mayor, etc., of Macon v. Hughes, 110 Ga. 795, 36 S. E. 247, it was held proper to enjoin municipal authorities from holding an election to determine whether a given territory should be annexed to a city, when the ordinance calling the election was plainly ultra vires. This was done at the instance of residents and taxpayers. In Mitchell v. Lasseter, 114 Ga. 275, 281, 40 S. E. 287, it was said: "A court of equity will, at the instance of citizens and taxpayers of a county, enjoin the authorities in charge of the affairs of such county from carrying into effect an unauthorized order or judgment providing for the location of a county site, in the execution of which order it will be necessary either to expend the money of the taxpayers in the treasury of the county or to incur illegal indebtedness by the county." In Mayor of Americus v. Perry, 114 Ga. 871, 884, 885, 40 S. E. 1004, 57 L. R. A. 230, it was held proper, at the instance of taxpayers and citizens of a municipal corporation, to enjoin the authorities from carrying into effect various ordinances which were ultra vires, providing for the election of certain public officers, for the reason that, if such officers were elected,

they would have an apparent demand against the municipality for compensation, which would have to be resisted at the expense of the taxpayers, or illegally paid out of the funds of the corporation. See, also, 2 High on Injunctions (3d Ed.) §§ 1236, 1241, 1243; Rice v. Smith, 9 Iowa, 570.

As to the contention that the board of education of Troup county is a school court, it may be said that for certain purposes and within certain limits this is true. But it is a court of limited jurisdiction. Cheney v. Newton, 67 Ga. 477. It is a tribunal for hearing and determining any matters of local controversy in reference to the construction and administration of the school law. Pol. Code 1895, § 1364. Thus the board has power as to the establishment and location of schools, the employment of teachers, and, until recently, in the selection of text-books; also in the preservation of order, enforcement of discipline, and the carrying out of the rules that may be established. Controversies occurring out of these and other similar matters are properly for the consideration of the county board of education. Pierce v. Beck, 61 Ga. 413. But they have no power to unlawfully give to a separate local school system money which does not properly belong to it, nor to misapply public funds arising from taxation. Whether their jurisdiction to determine matters of local controversy in reference to the construction or administration of the school law would confer upon them authority to pass upon the constitutionality of an act of the Legislature, or to render a judgment on that subject which would be binding as an adjudication, may well be doubted. Certainly they have no authority to grant an injunction to prevent the unlawful payment of money from being made. In the opinion filed by the presiding judge it was said: "It is admitted that by this system the sum of money paid over to the West Point schools, being based on attendance on said schools, is greater than these schools would receive if based on school population. It is admitted that more is paid to West Point schools than her proportion based on school population, and the board of education and county school commissioner propose to continue such payment." Under such circumstances the remedy by injunction was proper. The remark made in the opinion in Mayor of Gainesville v. Simmons, supra, that "it is the business of the state school commissioner, and not of the taxpayers of Gainesville, to determine whether or not the school commissioner of Hall county makes illegal or unauthorized payments to the Gainesville school fund," was not an adjudication that taxpayers outside of Gainesville would not have had the right to invoke the aid of a court of equity to protect their interests. This statement is to be taken in connection with the fact above referred to that the schools of Gainesville were already receiving more than they were entitled to, and the taxpayers of that municipality were not in a situation to set themselves up as regulators to enjoin a distribution of which they were receiving the benefit.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 613)

ATLANTIC COAST LINE R. CO. v. WAYCROSS ELECTRIC LIGHT & POWER CO.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. RAILROADS—KILLING STOCK — DILIGENCE OF EMPLOYÉS.

On the trial of an action against a railroad company for damages on account of the killing of stock it was error for the court, after charging that a presumption of negligence arose against the company upon proof that the stock was killed by the running and operation of its train, to add: "But that presumption is subject to be rebutted by evidence introduced by the railroad company showing that everything was done by its agents and servants which could have been done under the circumstances to avoid the killing or the injury." The effect of this charge was to place upon the railroad company the burden of proving that its employés exercised the highest degree of care known to the law, whereas only ordinary care and diligence was required of them. Western & Atlantic R. Co. v. King, 70 Ga. 261; East Tennessee R. Co. v. Daniel, 18 S. E. 22, 91 Ga. 768; Savannah R. Co. v. Wideman, 25 S. E. 400, 99 Ga. 245.

2. SAME—SIGNALS—INSTRUCTIONS.

In such a case, where the stock were not killed at a public crossing, it was not error to charge: "If you shall find that the agents and servants of defendant failed to blow the whistle and ring the bell of the locomotive, and shall further find that in such failure ordinary and reasonable care and diligence was not used, and that such failure proximately caused the death of the [stock], then, in either of these events, you should find for the plaintiff."

3. CORPORATIONS — ACTIONS — PLEADING — AMENDMENT.

While it is permissible for a plaintiff corporation to amend its petition by alleging that since the institution of its suit its corporate name has been changed, and praying that the suit may proceed in its new name, it is incumbent upon it, in order to recover under the name as changed, to prove the allegations of its amendment upon the trial of the case.

(Syllabus by the Court.)

Error from City Court of Waycross; J. C. Reynolds, Judge.

Action by the Waycross Electric Light & Power Company against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Kay, Bennet & Conyers and Simon W. Hitch, for plaintiff in error. J. L. Sweat, for defendant in error.

CANDLER, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 550)

SWAN OIL CO. v. LINDER.

(Supreme Court of Georgia. Aug. 1, 1905.)

SPECIFIC PERFORMANCE—PAROL PROMISE—EXPENDITURES.

Specific performance "will not be decreed of a voluntary agreement or merely gratuitous promise," except in a case where possession of land has been surrendered, upon a meritorious consideration, and valuable improvements have been made thereon upon the faith of the promise. Civ. Code 1895, § 4039. It follows that a naked promise, resting in parol, will not be enforced against the promisor, notwithstanding he may have encouraged the person to whom he made the promise to expend money on the faith thereof, the expenditures made being for his own benefit, and not for or in behalf of the promisor, who received no benefit therefrom. Under the facts alleged in the present case the plaintiff was not entitled to the relief sought, and the action was properly dismissed on demurrer.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 140.]

(Syllabus by the Court.)

Error from Superior Court, Hart County; H. M. Holden, Judge.

Action by the Swan Oil Company against T. J. Linder. Judgment for defendant, and plaintiff brings error. Affirmed.

The assignment of error made in the bill of exceptions is that the court on demurrer dismissed the plaintiff's action. The facts relied on by the plaintiff company and set forth in its petition were substantially as follows: It was incorporated under the name of the Swan Oil Company, May 26, 1902, for the purpose of engaging in the business commonly carried on by the proprietors of oil mills, the promoters of the enterprise being James Swan, A. J. Little, and others. Before applying for a charter they authorized Little to buy up certain property in the town of Hartwell on which to locate the company's plant, and furnished him with the purchase money, he agreeing to convey the property to the company when incorporated. He accordingly bought the property from W. T. Johnson and J. C. Massey, taking deeds thereto in his own name, but afterwards conveying the property to the company. Prior to making this purchase, Little went to T. J. Linder, who was operating the Hartwell railroad under a lease from the Hartwell Railway Company, and stated to him the object and purpose of the intended purchase of the property from Johnson and Massey, at the same time saying the purchase would not be made unless a practicable and convenient right of way could be obtained from him, as lessee of that company, from the main track of the railroad to the property of Johnson and Massey, running across certain streets and over two vacant lots belonging to the railway company. Linder promised Little that as soon as the plaintiff company was incorporated he would deed to it the desired right of way. Thereupon Linder carried Little to a point on the railroad near where the main line crossed Jackson street, and pointed out the proposed right of way for a spur track from that point to the property on which the promoters of the plaintiff company desired to build its oil mill. The route thus agreed on is the only practicable way to enter the property purchased from the main line of the railway. In pursuance of this agreement on the part of Linder to lease this right of way, Little purchased the property from Johnson and Massey at a cost of $2,100. Under the contract of lease held by Linder from the Hartwell Railway Company, Linder had the right to lease to plaintiff the proposed right of way. After plaintiff was incorporated, Little, acting as its agent, presented to Linder a writing to be signed by him, leasing to the plaintiff the desired right of way, and at the same time also requested of Linder a grant of a building privilege on one of the vacant lots belonging to the railway company. Linder replied that he would sign the lease for the right of way, and would also grant the building privilege requested, but proposed that plaintiff wait till he could confer with the officers of the railway company about granting the building privilege, saying that, if it was agreeable to them, he would grant both the right to build on the vacant lot and the proposed right of way. Plaintiff had previously, acting on the faith of Linder's agreement to give it a right of way, begun valuable improvements on the property purchased by it, and Linder on this occasion requested plaintiff to go on with these improvements, as he would sign the lease granting the right of way in any event. "The principal reason and consideration that induced said Linder to give petitioner a right of way over said land" of the railway company, and to allow petitioner to connect a spur track from its oil mill with the main line of that company, was that "petitioner should and would be obliged to patronize the said Hartwell Railroad, running from Hartwell to Bowersville, which said Linder was operating under said lease from the Hartwell Railway Company, with all shipments of freights to and from said oil mill, and that the building of said oil mill in Hartwell on the proposed location, as aforesaid, would greatly benefit said Linder and said Hartwell Railway Company by increasing the earnings of said railway company over and from its road." Without this right of way and spur track, plaintiff cannot build its oil mill and operate its business on the site purchased without such expense in hauling its products and raw material as to destroy all profits, and to prevent carrying on the business save at a loss. Plaintiff has several times requested Linder to sign a lease covering the desired right of way, but he has refused so to do, notwithstanding he had that right under his lease from the railway company. At the suggestion of Linder that its main line might at an early day be changed to a standard gauge road, plaintiff went

ahead, and purchased $101.76 worth of standard gauge cross-ties with which to build the proposed spur track, shipping these ties over the railroad under the control of Linder to the town of Hartwell, at which point they were by his direction unloaded at the place near Jackson street where he had agreed to allow the spur track to be connected with the main line. Besides paying to Linder the freight on these cross-ties, plaintiff also paid him freight on a quantity of building material to be used in the erection of its oil mill, also expending large sums in improving its building site, the aggregate amount expended being some $1,580.13 in addition to the $2,100 paid for the land purchased on the faith of Linder's agreement, which land will be practically worthless unless it can be reached by a spur track. The plaintiff alleged that the refusal of Linder to comply with his agreement was "unfair, unjust, and injurious and damaging to petitioner, rendering petitioner unable to build and compete with other mills"; that he has, "by his fraudulent conduct, by his deceitful means and willful promises, led your petitioner into considerable expense in procuring" a charter, employing lawyers, etc., in the sum of $500, or other large amount; and the plaintiff prayed that Linder be required to execute to it a lease to the right of way described in its petition, or if, for any reason, this relief could not be afforded, that plaintiff have judgment against Linder for the damages it had sustained by reason of his refusal to execute such lease. The demurrer was based on both general and special grounds, one of these grounds being that the parol agreement to lease was within the statute of frauds, and another being that the facts alleged were not such as to entitle the plaintiff to equitable relief of the nature sought.

James H. Skelton and J. N. Worley, for plaintiff in error. W. L. Hodges and A. G. & Julian McCurry, for defendant in error.

EVANS, J. (after stating the facts). It is now well settled in this state that specific performance of a parol contract as to land will be decreed "if it be so far executed by the party seeking relief, and at the instance or by the inducements of the other party, that if the contract be abandoned, he cannot be restored to his former position." Civ. Code 1895, § 4037. Relief will likewise be afforded where "there has been such part performance of the contract as would render it a fraud of the party refusing to comply, if the court did not compel a performance." Civ. Code 1895, § 2694 (3). But it does not follow that a promise made without consideration is enforceable in a court of equity merely because the person to whom it is made has, relying upon its fulfillment, acted to his prejudice. Where there is a contract which would be binding on both parties if it did not rest wholly in parol, the interposition of a court of equity after the contract has been partly performed on one side is justified to prevent positive fraud being perpetrated by the party who then repudiates the contract and refuses to himself perform. And we have cases in which a gift has been enforced, where the donee has actually entered on land in reliance on a parol promise to deed it to him, and has, at the donor's instance, made valuable improvements thereon; for in such a case the donor would profit by his fraudulent conduct, to the extent of the value of the improvements made, were he permitted to break his promise. Porter v. Allen, 54 Ga. 624; Jones v. Clark, 59 Ga. 136; Hughes v. Hughes, 72 Ga. 173; Howell v. Ellsberry, 79 Ga. 475, 5 S. E. 96. What was the character of the alleged agreement by Linder in the present case? According to the most favorable view of the plaintiff's allegations, it was a promise to give the plaintiff a valuable right of way. There is no pretense that there was any consideration for this promise. What induced Linder to make it was such incidental benefits as he believed might flow to him by the plaintiff being placed in a position where its interests would dictate that it should make shipments over the road which he controlled. It is to be observed that the plaintiff was not bound to apply for a charter, or to erect an oil mill, or, in the event it should be incorporated, and should elect to build its plant and lay a spur track to the main line, to ship any freight, save at its option, over the line of railway which Linder had leased and was operating. Imagine the absurdity of his predicating a suit for damages upon the failure of the plaintiff to erect its plant and to furnish shipments to his read, had the plaintiff, after it was incorporated, abandoned its project, or, after erecting its mill, elected not to build a spur track or to furnish any shipments of freight to him. The so-called "agreement" between the parties was entirely unilateral. Morrow v. Southern Express Co., 101 Ga. 810, 28 S. E. 998; Huggins v. Cement Co., 121 Ga. 311, 48 S. E. 933; Swindell v. National Bank, 121 Ga. 714, 49 S. E. 673. Were Linder compelled to perform his promise by executing to the plaintiff a lease to the coveted right of way, how would the parties then stand? At its option the plaintiff company could go on and build its plant or abandon the enterprise: and after it erected the mill the company would be under no obligation to furnish shipments to Linder, or have shipments to it made over his line, inasmuch as the company has never undertaken to bind itself to pay or to do anything whatever in consideration of his executing a lease to a right of way for its spur track. The courts cannot, of course, make a contract for the parties; and the question is, can the agreement of Linder be enforced against him because he has encouraged the plaintiff to ex-

pend money upon the faith of his complying with his naked promise to make to it a valuable gift necessary to the complete enjoyment of its property. He has not profited by the expenditure of any of this money. He will not profit therefrom, or from the carrying out of the plaintiff's commercial enterprise, save at its pleasure, and in a measure it shall determine for itself. He cannot force it to perform. Harrison v. Lumber Co., 119 Ga. 6, 45 S. E. 730.

The case is not one like that of McCaw Manufacturing Co. v. Felder, 115 Ga. 408, 41 S. E. 664, where one party makes a continuous proposal to do something for another or to sell or furnish him something if he, in return, will do or bind himself to do something for the former. In such a case, if the proposal be accepted before it has been withdrawn, mutuality is not lacking, and both parties become bound to perform their respective obligations. If the one who makes the proposal does not withdraw it before the other, with his express or implied assent and approbation, enters upon a performance of the obligations which it was proposed he should undertake and expends money in so doing, the want of mutuality in the first instance because he did not bind himself to perform will not excuse the other from living up to the terms of his proposal. Fontaine v. Baxley, 90 Ga. 416, 17 S. E. 1015. 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To break a promise wholly without consideration does not constitute legal fraud, and the mere fact that the person to whom the promise is made is thereby induced to act as he would not otherwise have done will not of itself alone afford ground for equitable interference or redress. Where the aggrieved party's complaint is that he expected to get something for nothing, and so expecting expended money for his own benefit, not that of the promisor, which he otherwise would not have done, his loss of expectations and money is to be attributed to his own folly, rather than to fraud on the part of the promisor, who never legally bound himself to perform, as his disappointed promisee was bound to know. Especially where, as in the present case, the alleged promise was not only gratuitous, but was in parol, the statute of frauds should not be emasculated. Our Civ. 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But after it had been so far carried into effect the plaintiff had a right to enjoin the company from cutting off his water supply until such time as the benefits flowing to him from a continuance of the arrangement entered into would, in value, approximate the outlay he had incurred in putting down the supply pipe he had obligated himself to lay for their joint use and benefit. The present case is quite dissimilar. If the plaintiff had been permitted to lay the proposed spur track, and had completed its plant, then or thereafter obligating itself to make all shipments of freight it might have in the conduct of its business over the defendant's railroad, doubtless a court exercising equity jurisdiction would well be justified in enjoining the defendant from interfering with the plaintiff's use of

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Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 707)

COOLEY v. MOSS.

(Supreme Court of Georgia. Aug. 8, 1905.)

1. VENDOR AND PURCHASER—BREACH OF CONTRACT—TENDER.

If an owner of land enters into a contract which is legally binding, whereby he agrees to sell a certain described lot to another for a named price, but that he shall not make the deed until he shall have sold a certain other lot or lots, if, before selling such other lots, he sells and disposes of the lot covered by the contract, and thus puts it beyond his power to make a deed to the other party, this constitutes a breach of the contract which will authorize an immediate suit against him, without waiting for him to sell the other lots, and without requiring a tender of the purchase money to him by the other party to the contract.

2. SAME—UNILATERAL CONTRACT.

Where one agrees to sell land to another at a given price, and that he will make a deed when he shall have sold certain other lots, and where the other person does not agree to buy or to pay the consideration named, and there are no mutual obligations, and no other consideration appears, the contract is unilateral, and does not bind the owner of the land, and he may withdraw from it or repudiate it.

3. SAME—CONSIDERATION.

Where mutual promises are relied on as a consideration to support a contract, the obligations of the contract must be mutually binding upon the respective parties. If one assumes under such an agreement to do a special act beneficial to another, and that other, under the terms of the contract, is under no obligation to perform any act of advantage to the former, the agreement is without such consideration as will support the promise of the party assuming to perform.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. L. Cooley against A. J. Moss. From the judgment, plaintiff brings error, and defendant brings cross-error. Reversed.

Cooley brought an action against Moss, laying his damages in the sum of $500, and alleging that on April 28, 1903, the defendant entered into the following agreement with the plaintiff: "This agreement made this day between A. J. Moss and J. L. Cooley. A. J. Moss agrees to sell the said Cooley the N. W. corner of Glenwood ave., and Broyles street, fronting 40 ft. on Glenwood and back 140 ft. on Broyles st.; the said Moss is to make deed to said Cooley upon his paying $300 for said lot, but it is understood that said Moss is not to make deed until he has sold the lot adjoining or the two western lots of the block. Whenever he makes sales as above specified, he then will close the trade with said Cooley"—signed by each party. The defendant fails and refuses to comply with this agreement, and has sold the lot described in it, and disposed of it to some other person than the plaintiff, and has put it beyond his power to make a deed to the plaintiff and to comply with the contract. Plaintiff has been ready, able, and willing to take and pay for the land, and is now ready, able, and willing to do so, but has not done so on account of the failure of the defendant. The defendant demurred on the following grounds: First, because the petition sets forth no cause of action; second, because it shows no consideration for the contract alleged to have been entered into between the parties; third, because it does not show that the defendant has sold the lot adjoining, or the two western lots of the block referred to in the agreement, and until the selling of the adjoining lot or the two western lots no right of action exists, or can exist, in the plaintiff. The court overruled the first and second grounds of the demurrer, but sustained the third ground, and dismissed the action. The plaintiff filed a bill of exceptions and the defendant a cross-bill.

C. D. Maddox, for plaintiff in error. Du Bignon & Alston, for defendant in error.

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(Supreme Court of Georgia. Aug. 8, 1905.)

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(123 Ga. 707)

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(Supreme Court of Georgia. Aug. 3, 1905.)

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C. D. Maddox, for plaintiff in error. Du Bignon & Alston, for defendant in error.

LUMPKIN, J. (after stating the facts). 1. The main bill of exceptions makes a single question: If the contract be treated as valid and binding on Moss, does not the declaration allege a breach, giving an immediate right of action? It has been said that "a breach of contract may arise in any one of three ways, namely, by renunciation of liability under the contract, by failure to perform the engagement, or by doing something which renders performance impossible." 7 Am. & Eng. Enc. L. (2d Ed.) 149, 150. If an agreement is made that one shall convey land to another, and if the former conveys it to a third person, and thus puts it out of his power to comply with his contract, the latter may sue him without waiting for the contract time to elapse, and without demanding a conveyance. Bishop on Contracts, § 1430. In Newcomb v. Brackett, 16 Mass. 161, it was said: "A., for a valuable consideration, promises to convey land to B. as soon as B. should pay to A. a certain sum of money. A. conveys the land to a stranger; and it was held that B. was presently entitled to his action, without payment or tender of the money." In Heard v.

Bowers, 23 Pick. 455, this doctrine was pursued even to the extent of holding that: "Where a party stipulates to convey an estate to another at a future day, and in the meantime conveys it to a third person, he is guilty of a breach of his stipulation; and although he should repurchase the estate before the day named he could not compel the other party to take the land and perform the contract on his part; but this rule does not apply to the case of an involuntary disability of a party to perform his stipulations, which he may remove previous to the time appointed for their performance." See, also, Hopkins v. Young, 11 Mass. 302; Lovell v. St. Louis Ins. Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423; Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962; 1 Addison on Contracts (3d Am. Ed.) 40; Shaffner v. Killian, 7 Ill. App. 620; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Gray v. Green, 9 Hun, 334; Smith v. Ga. Loan Co., 113 Ga. 975, 39 S. E. 410. One or two of the cases cited, including the last, arose on a renunciation by one party of a continuing contract consisting of mutual stipulations. Voluntarily to place it beyond one's power to comply with a contract constitutes a breach quite like the other breach arising from renunciation. As to what is sometimes called an "anticipatory breach" arising from the renunciation of a contract of the character referred to, and the right to bring an action at once upon the occurrence of such a breach, or to treat the contract as still binding, and wait until the time for performance arrives, the authorities have not always been in perfect harmony; but this court has followed the line of authority resting upon the leading cases of Hochster v. De la Tour, 2 El. & Bl. 678, and Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. The trial judge erred, therefore, in sustaining the third ground of the demurrer.

In the brief for defendant in error it is said that the declaration does not set out the time when this sale occurred, nor the time when Cooley took advantage of it, so as to show whether he acted promptly, but no such point was made in the demurrer.

2, 3. The cross-bill of exceptions assigns error in overruling the other two grounds of the demurrer. An examination of the contract sued on will show that Moss agreed to sell to Cooley a certain lot, and to make him a deed upon his paying $300, "but it is understood that said Moss is not to make deed until he has sold the lot adjoining or the two western lots of the block. Whenever he makes sales as above specified, he then will close the trade with said Cooley." Cooley made no agreement or promise to do anything, nor was any consideration stated in the contract. Inasmuch as a valuable consideration is one of the essentials of a valid contract, it follows that in an action upon it the burden of proof is upon the plaintiff to show a consideration; and where the instrument sued on is a simple contract, and is not itself sufficient to show a consideration, it is incumbent on the plaintiff to allege and prove that there was one. 6 Am. & Eng. Enc. L. (2d Ed.) 763; 4 Enc. & Pr. 928. Certain instruments import a consideration, and the production of such an instrument alone furnishes prima facie evidence of a consideration, and casts upon the defendant the burden of proving want or failure of it. Such bills and notes as under the law merchant import a consideration would be an illustration of this class of instruments. Sealed instruments import a consideration. At common law the presumption of a consideration for specialties was conclusive. In some of the United States all contracts made in writing and signed by the party to be charged thereby are declared by statute to import a consideration. 6 Am. & Eng. Enc. L. (2d Ed.) 762, 763; Rowland v. Harris, 55 Ga. 141. Except in instances of this character, however, the rule above announced applies. In Morrow v. Southern Express Co., 101 Ga. 810, 28 S. E. 998, it was said: "Where mutual promises are relied upon as a consideration to support a contract, the obligations of the contract must be mutually binding upon the respective parties; and if one assume under such an agreement to do a special act beneficial to another, and that other under the terms of the contract is under no obligation to perform any act of corresponding advantage to the former, the agreement is without such consideration as will support the promise of the party assuming to perform." See, also, McCaw Manufacturing Co. v. Felder, 115 Ga. 408, 41 S. E. 664; Harrison v. Wilson Lumber Co., 119 Ga. 6, 45 S. E. 730; Huggins v. Southeastern Lime Co., 121 Ga. 311, 48 S. E. 933; Swindell v. First National Bank, 121 Ga. 714, 49 S. E. 673; Swan Oil Co. v. Linder, 123 Ga. —, 51 S. E. 622, 7 Am. & Eng. Enc. L. (2d Ed.) 114. A decision in regard to an option to purchase real estate will be found in Frank v. Stratford-Hancock Co. (Wyo.) 77 Pac. 134, 67 L. R. A. 571. It is true that the instrument sued on begins with the words, "This agreement made this day between A. J. Moss and J. L. Cooley," and is signed by both parties. But Cooley nowhere agrees or promises to do any act or binds himself in any way. He does not agree to take the lot or to pay the purchase price. Suppose that Cooley had announced that he was unwilling to take the lot, there is no promise or agreement on his part contained in the paper on which Moss could have brought an action; nor does any agreement on his part at any time appear. It was in the nature of an agreement between the two by which Cooley was to have an option or right to buy the lot and Moss was to sell it to him at a certain price. Moss agreed that when he had sold certain other lots "he then will close the trade with said

Cooley." But there is no agreement that Cooley will then close the trade with Moss. Nor is there any other promise or agreement on Cooley's part which would furnish a consideration for the agreement of Moss. Mutual agreements or promises may furnish a consideration one for the other, but where one party does all the promising and agreeing the mere fact that the other signs his name to the paper is not sufficient to constitute an agreement on his part. The instrument construed in Harrison v. Wilson Lumber Co., supra, was very similar in these respects to the one now under consideration. It began with the words, "This agreement, made in triplicate, and entered into this February 13th, 1902, between Harrison & Garrett, of Forsyth County, Ga., parties of the first part, and the Wilson Lumber Co., Ltd., of Toronto, Ontario, parties of the second part." It then stated that Harrison & Garrett agreed to furnish a sawmill, and cut to the order of the Wilson Lumber Company, and to edge and trim in a good workmanlike manner, as called for by the lumber market, such logs to be furnished to the mill desirable to the Wilson Lumber Company at different places in Dawson and Pickens counties, for which Harrison & Garrett were to receive for such services $2.50 per thousand feet board measure for all lumber so sawed and accepted by the Wilson Lumber Company. Lumber badly and improperly manufactured should fall upon Harrison & Garrett, who were to run out all lumber on trucks at no expense to the Wilson Lumber Company, when the amount of such cut was 30,000 feet or more; and the contract was to remain in force until such timber "as will have been bought by the parties of the second part is cut, unless mutually agreed upon by both parties hereto." Each of the parties signed this instrument. But it was held to be unilateral.

The fact of bringing this suit for damages cannot be considered as an acceptance and agreement on the part of the plaintiff, if for no other reason, because it shows on its face that the defendant had abandoned the contract or violated it, and rendered compliance impossible before the declaration was filed. It could not amount to the closing of a contract alleged to have already been rendered impossible of performance by the defendant. This does not conflict with the ruling in Black v. Maddox, 104 Ga. 157, 30 S. E. 723, or that in Sivell v. Hogan, 119 Ga. 167, 46 S. E. 67. We are of the opinion, therefore, that the trial judge erred in not sustaining the demurrer on the first and second grounds. He correctly dismissed the case, though we cannot agree with him as to the reason for so doing. In Wellmaker v. Wheatley, 123 Ga. 201, 51 S. E. 436, there were mutual promises to furnish a consideration.

Judgment reversed on both bills of exceptions. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 569)

STEED v. STATE.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. CRIMINAL LAW—APPEAL—ASSIGNMENT OF ERROR.

An assignment of error in a motion for a new trial that "the court erred in charging the law of conspiracy in said case, there being no evidence to sustain the same," is too general and indefinite to raise any question for decision.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2366.]

2. SAME—INSTRUCTIONS.

A party cannot complain of the court's failure to charge upon a particular theory, when his counsel, in response to a question addressed to him by the court, stated that he did not desire an instruction on such theory. A party cannot complain of an error which his own conduct has induced. Quattlebaum v. State, 46 S. E. 677, 119 Ga. 433 (2); Harris v. State, 47 S. E. 520, 120 Ga. 169; Robinson v. State, 47 S. E. 968, 120 Ga. 312 (2); Nixon v. State, 48 S. E. 966, 121 Ga. 144 (3). Horton v. State, 47 S. E. 969, 120 Ga. 307, differs from the present case and from those cited in that the counsel merely contended to the jury that manslaughter was not involved, and did not make directly to the judge any statement which brought about the failure to charge upon the law of that offense.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3008.]

3. SAME.

Failure to give an instruction on the subject of impeachment of witnesses, in the absence of a pertinent and proper request, is not cause for a new trial. Baker v. State, 48 S. E. 967, 121 Ga. 189, and cit.; Phillips v. State, 49 S. E. 290, 121 Ga. 358, and cit.; Horton v. State, 47 S. E. 969, 120 Ga. 309.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1999; vol. 15, Cent. Dig. Criminal Law, §§ 2210, 2216.]

4. SAME — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence was impeaching in its nature, as well as cumulative; and, there being some evidence to warrant the verdict, the discretion of the trial judge in overruling the motion for a new trial will not be controlled.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3068, 3069.]

(Syllabus by the Court.)

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Orville alias Buster Steed was convicted of murder, and brings error. Affirmed.

Hamrick & Smith, for plaintiff in error. J. R. Terrell, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 570)

GROVES v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

1. GAMING — MAINTAINING HOUSE—INSTRUCTIONS.

On the trial of an indictment for keeping a gaming house it is not error, where such a charge was warranted either by the evidence or the statement of the accused, to instruct the jury that if the accused loaned money to an-

other person for the purpose of maintaining a gaming house, and after the loan was made the accused visited the gaming house, and "did anything towards keeping and maintaining such house and room so kept and maintained * * * for the purpose of gaming, he [the accused] would be equally guilty with [the person to whom the money was loaned], inasmuch as keeping and maintaining a gaming house in Georgia is a misdemeanor, and all persons concerned in such keeping and maintaining are principals."

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 207.]

2. SAME—INSTRUCTIONS.

Where the indictment contained a count charging the accused with gaming, it was not error to charge that "it is not essential to the state's case for the state to prove that he both played and bet for money. If he played or bet for money contrary to the laws of the state as contained in the bill of indictment, the state would be authorized to demand at your hands a verdict of guilty." Stripped of all confusion, this was equivalent to charging that one may be guilty of gaming if he bet on the result of a game, though he be not a player; and this is a sound principle of law. Parmer v. State, 16 S. E. 937, 91 Ga. 152.

3. SAME—EVIDENCE.

Evidence that the accused played games of chance for money in a gaming room, that on stated occasions he "presided over a crap table" in the room, and that when visitors applied for admission to the room they were admitted sometimes by the accused and sometimes by another person, who seemed to be equal with him in authority over the room, coupled with an admission by the accused that he had loaned a sum of money to this other person for the purpose of operating a gambling room, and that he frequently visited the room in order to "look after his money," was sufficient to authorize a general verdict of guilty on an indictment containing three counts, viz., keeping a gaming house, keeping a gaming table, and gaming.

4. SAME—INSTRUCTIONS.

The exceptions to specified portions of the charge of the court on the ground that they were not warranted by the evidence are without merit.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

W. C. Groves was convicted of keeping a gaming house, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 673)

CREDILLE et al. v. CREDILLE et al.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. WILLS—CONTEST—DEVISAVIT VEL NON.

Upon the trial before a jury of an issue of devisavit vel non, when in the paper propounded as the will the alleged testator has not left his property to strangers, but to one of his sons and such son's wife and children, the principle laid down in the latter clause of section 3258 of the Civil Code of 1895 is not applicable, and it is erroneous to give it in charge.

2. SAME—BURDEN OF PROOF.

Upon the trial of such an issue the burden in the first instance is upon the propounder of the alleged will to make out a prima facie case by showing the factum of the will, and that at the time of its execution the testator apparently had sufficient mental capacity to make it, and, in making it, acted freely and voluntarily. When this is done, the burden of proof shifts to the caveators.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 101.]

3. SAME—DECLARATIONS OF TESTATOR.

Declarations of the testator, made within a few months after the date when the alleged will purports to have been executed, to the effect that he had not made a will, and that, if he had signed a paper purporting to be one, he did not know what he was doing, are admissible in evidence, not as evidence of the truth of the facts so stated, nor as evidence that any fraud was practiced upon him or any undue influence exerted over him in the matter, nor as evidence that he had revoked the will, but simply for the purpose of showing the state of his mind when the paper purporting to be his will was executed, and whether or not he then had sufficient mental capacity to make a will, or was then in such a mental condition as to be easily and unduly influenced by another.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 133.]

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by A. A. Credille and others against W. F. Credille, executor, and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Saml. H. Sibley and Jas. B. & Noel P. Park, for plaintiffs in error. James Davison, for defendants in error.

FISH, P. J. Reuben A. Credille died September 8, 1902, aged 76 years, leaving as his next of kin four sons and two daughters, all of age. On the 10th of October thereafter a paper purporting to be his last will and testament was probated in common form by his son W. Florence Credille, the date of its execution being February 27, 1902. In it the testator gave the bulk of his property, consisting of his old homestead of 650 acres of land, to this son, his wife and children. He gave nothing to his other children, except to one other son, to whom he bequeathed a feather bed and pillows. W. Florence Credille was named as sole executor in this instrument. Some months after the probate the other three sons and one of the daughters of the testator brought a petition in the court of ordinary to set aside and cancel this will against W. Florence Credille, as executor and as an individual, and his wife, Mrs. Annie Credille, and their seven minor children, naming them. In the petition it was charged that at the time the alleged will purported to have been executed Reuben A. Credille was paralyzed, and was totally lacking in capacity, both mentally and physically, to make and execute a will; that at the date of the paper purporting to be his will he was sick and in bed at the home of W. Florence Credille, and entirely under his influence; that if he signed such paper at all he was moved thereto by undue influence exerted over him by said W. Florence

Credille; that if he signed said will it was not his will, because fraud was practiced upon him, by which he was made to believe that he was signing an entirely different instrument, and that the instrument probated was a paper of which the deceased knew nothing; and that this imposition was practiced upon him by W. Florence Credille. W. Florence Credille was appointed guardian ad litem for his children, and the defendants answered, denying the charges of the petition, and alleging that at the date of the will the testator was of sound mind and disposing memory and fully capacitated to make a will, and did make the will in question uninfluenced by any of the defendants, or by any other person, and of his own free will and mind. The case thus made was appealed by consent from the court of ordinary to the superior court, where it was tried, the trial resulting in a verdict and judgment in favor of the caveators and setting aside the will. The defendants moved for a new trial, which was refused, and they excepted.

1. Upon the trial the court gave section 3258 of the Civil Code of 1895 in charge to the jury. That section reads as follows: "A testator, by his will, may make any disposition of his property not inconsistent with the laws or contrary to the policy of the state; he may bequeath his entire estate to strangers, to the exclusion of his wife and children, but in such case the will should be closely scrutinized, and, upon the slightest evidence of aberration of intellect, or collusion or fraud, or any undue influence or unfair dealing, probate should be refused." One ground of the motion for a new trial alleges that the court erred in giving this instruction, the assignment of error being that the facts of the case did not authorize it, and that it tended to prejudice the case of the propounders in the minds of the jury. We think a new trial should have been granted upon this ground of the motion. The testator did not leave his property to strangers, but to his son Florence and his wife and children; and the strict rule that upon the slighest evidence of aberration of intellect, or collusion or fraud, or any undue influence or unfair dealing, probate of the will should be refused, which is applicable to cases in which a testator leaves his property to strangers to the exclusion of his wife and children, should not have been given in charge. The contention that, if there were error, it was harmless, as the evidence showed that the testator did not leave his property to strangers, and therefore the jury would understand that this rule or principle was not applicable to the case before them, is in conflict with the decision of this court in Wetter v. Habersham, 60 Ga. 193. There a testatrix, who left no children or descendants of children, bequeathed the bulk of her property to strangers, and so bequeathed all of it, "if the word 'strangers' be taken to mean any persons not bearing the relationship of husband and wife or children." It was held that as the heirs at law of the testatrix, who were contesting the will, were her remote or collateral kindred, it was erroneous to give in charge to the jury the latter clause of this section of the Code. If it is erroneous to give it in charge in a case in which both the legatees and the kindred excluded by the will stand, relatively to the testatrix, upon the footing of strangers, then it must follow that it is equally erroneous to give it in charge in a case where both the legatees and the kindred excluded stand upon the footing of children. The evidence upon which the will in the present case was set aside by no means demanded such a verdict, and the giving of this erroneous instruction requires the grant of a new trial.

2. Another ground of the motion was that the court erred in charging as follows: "The burden of proof in the case rests upon the propounders of the will in the first instance. In the opening of the case the burden of proof is upon Florence Credille to propound the will, and he is here to-day asking that the will be sustained as a valid will. The burden rests upon him to show that the paper was executed, and to show the capacity of the testator." There was no error in this charge. It was in accordance with the decisions of this court in Evans v. Arnold, 52 Ga. 169, and Wetter v. Habersham, supra. All that the propounders of a will have to do in a case like this is to make out a prima facie case; that is, to show the factum of the will, and that at the time of its execution the testator apparently had sufficient mental capacity to make it, and in making it acted freely and voluntarily. But they must do this much before the onus is shifted to the caveators. In Thompson v. Davitte, 59 Ga. 472, 475, Bleckley, J., said: "The truth is that what the propounders have to carry on the score of sanity and freedom is more in the nature of ballast than of cargo. It is just burden enough to sail with; no more." In Freeman v. Hamilton, 74 Ga. 317, where the paper propounded as a will was attacked upon grounds similar to those involved in the present case, it was held that while a charge that, "when a paper is presented to the court purporting to be a will it must be satisfactorily shown to the jury that the person making it had legal capacity to make it, that it was freely and voluntarily made, that it is a fair and legal expression of the intention; the burden of proof is on the person offering it"—was correct as far as it went, the court should have gone further, and added "that when the propounder showed the testamentary capacity of the testator, and that the will was made freely and voluntarily, then the onus was charged, and the burden of proof was on the caveators to make their grounds of objection good." In the case under consideration it appears from the charge of the court, contained in the record, that the instruction complained of was carefully

qualified in accordance with the decision just above cited.

3. The motion for a new trial also complained of the admission in evidence of various declarations made by the testator after the date when the paper purporting to be his will appears to have been executed. One of these declarations was to the effect that he had not made a will. Two others were that he never made a will in his life, and the other was that he understood there was what was supposed to be a will he had made in Greensboro, and he wanted the person to whom the declaration was made to bear witness, if he (the testator) had signed such a paper, he didn't know anything about what he was doing. These declarations were admissible, not as evidence of the facts which they purported to declare, nor as evidence that any fraud was practiced upon the testator, or any undue influence exercised over him, nor as evidence of a revocation of any will that he might have made, but as tending to show the state of his mind when the paper purporting to be his will was executed, and whether he then had sufficient capacity to make a will, or was then in such a mental condition as to be easily and unduly influenced by another. Dennis v. Weekes, 51 Ga. 24; Mallery v. Young, 94 Ga. 804, 22 S. E. 142. The court very carefully and fully instructed the jury as to the purpose for which these declarations were admissible and the purposes for which they were not admissible, and plainly told them that such declarations could not be considered as evidence to show that the paper was not executed, or that fraud and undue influence were practiced upon the testator, or for the purpose of revoking the will, and that these declarations were no proof of the facts stated therein. There was no error in admitting them for the purpose to which the court limited their consideration by the jury.

The other grounds of the motion are the general ones and grounds of the same nature, complaining that the verdict was contrary to various quoted extracts from the charge of the court.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 542)

EDWARDS v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

1. STATUTES — INTOXICATING LIQUORS — SPECIAL LEGISLATION.

Under the decision in Papworth v. State, 31 S. E. 402, 103 Ga. 36, and later cases, the act of September 12, 1881 (Acts 1880–81, p. 608), prohibiting the sale of spirituous, malt, or intoxicating liquors within the limits of Jefferson county, was unconstitutional.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 79–81.]

2. SAME—SALE WITHOUT LICENSE.

While the offense of retailing spirituous liquors without a license cannot be properly charged against one who sells such liquors in a county where prohibition exists under a valid statute, such offense can be committed in a county where prohibition does not exist, for the reason that a special act attempting to provide for prohibition therein was itself unconstitutional.

3. EVIDENCE—JUDICIAL NOTICE.

This court will take judicial notice of the dates fixed by legislative enactment for the beginning of the sessions of the superior courts of the state.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 56.]

4. INDICTMENT—DATE OF OFFENSE.

Where a special presentment was returned at the November term, 1903, of the superior court of Jefferson county, which begins its session on November 12th, and charged that an offense was committed on November 8, 1903, this was sufficient to show that the alleged date of the offense was prior to the return of the presentment.

5. INTOXICATING LIQUORS—ILLEGAL SALE.

The verdict was supported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; H. M. Holden, Judge.

Fannie Edwards was convicted of selling liquor without a license, and brings error. Affirmed.

A special presentment was returned against Fannie Edwards for selling liquor without a license in Jefferson county. The offense was charged to have been committed on November 8, 1903. The presentment was returned at the November term, 1903, of Jefferson superior court. The case was tried in the county court. A demurrer was filed to the presentment on two grounds: First. Because it was based on the general law of the state as embodied in section 431 of the Penal Code of 1895, which makes it criminal to retail without a license, and without taking the oath required by law; the objection urged being that there was at the time in force in Jefferson county a local law which made the sale of intoxicating liquors within that county penal, and no license could have been obtained. Second. Because it does not affirmatively appear from the presentment that the crime alleged to have been committed was prior to the finding of such presentment. The demurrer was overruled. The evidence was clear that the defendant sold a half pint of whisky to certain persons for 50 cents. The defendant was convicted, and carried the case to the superior court by writ of certiorari. On the hearing the certiorari was overruled, and the defendant excepted.

Phillips & Phillips, for plaintiff in error. Alfred Herrington, Sol. Gen., for the State.

LUMPKIN, J. (after stating the facts). 1, 2. It is contended on behalf of the plaintiff in error that by the act of September 12, 1881 (Acts 1880–81, p. 608), the sale or furnishing of spirituous, malt, or intoxicating liquors within the limits of Jefferson county was prohibited, and therefore there could be no indictment and conviction for selling liq-

uor without a license in that county. Where, by a valid subsisting law, the sale of liquor is entirely prohibited in a county, the provisions of the general law requiring retailers of liquor to obtain a license and making it penal to sell without a license have no application. An indictment and conviction for retailing liquors without a license in such a county cannot be had. Patton v. State, 80 Ga. 714, 6 S. E. 273; Batty v. State, 114 Ga. 79, 39 S. E. 918; Collins v. State, 114 Ga. 70, 39 S. E. 916. But if there is no valid act prohibiting the sale of liquor in the county, then the general law making it penal to retail without a license applies. The act of 1881, prohibiting the sale of spirituous, malt, or intoxicating liquors in Jefferson county was unconstitutional, under the ruling in Papworth v. State, 103 Ga. 36, 31 S. E. 402, being violative of that clause of the Constitution prohibiting special legislation in any case for which provision has been made by an existing general law. If the question decided in the Papworth Case were now for determination for the first time, it might involve serious consideration as to whether some of the members of this court, as now constituted, would follow the reasoning of the majority in that case, or that set forth in the dissenting opinion of Mr. Justice Little. It is due to Mr. Presiding Justice Fish and Mr. Justice Cobb to say that they are still of the opinion that the views of the majority of the court in the Papworth Case were correct. That decision, however, has been followed a number of times. See O'Brien v. State, 109 Ga. 51, 35 S. E. 112; Embry v. State, 109 Ga. 61, 35 S. E. 116; Tinsley v. State, 109 Ga. 822, 35 S. E. 303; Smith v. State, 112 Ga. 291, 37 S. E. 441; Griffin v. Eaves, 114 Ga. 65, 39 S. E. 913; Harris v. State, 114 Ga. 436, 40 S. E. 315; Hancock v. State, 114 Ga. 439, 40 S. E. 317. It is true that in no case has the decision in Papworth v. State been affirmed by the entire bench of six justices, and sometimes decisions of a less number of justices are spoken of lightly, as if they scarcely ranked as decisions at all. This is a mistake. Decisions of less than six justices are nevertheless decisions of the Supreme Court. Where all six justices concur in a decision, it cannot be overruled or materially modified except upon review, and then only with the concurrence of all the justices. Decisions rendered by a less number of justices do not require formal review or the concurrence of six justices to overrule or modify them. Still they are decisions of this court, rendered after due deliberation, and should have weight as such. Civ. Code 1895, § 5588; Acts 1896, p. 44, § 5. While all courts may sometimes find it necessary to modify or reverse their rulings, it is desirable that their decisions should be as uniform and as stable as practicable. They become rules of law, on which the public rely and act, and confusion may arise from too great readiness to overturn former rulings. A number of local acts prohibiting the sale of liquors, without excepting domestic wines, have been held unconstitutional. Prosecutions have taken place and convictions have been had under the general law prohibiting the retailing of liquors without a license. In some of these counties elections have been held under the local option law. Relying upon the decisions of this court as having established a fixed rule, the citizens of various localities have adjusted themselves to the law as thus declared. To overrule this long line of decisions would breed much confusion and trouble. We do not think it our duty to do so. The act of 1881 prohibiting the sale of liquors in Jefferson county being unconstitutional, the general law of the state applied to that county, and retailing liquors without a license within its limits was a misdemeanor under Pen. Code 1895, § 431.

It was suggested in the brief of counsel for plaintiff in error that by the act of August 9, 1881 (Acts 1880–81, p. 420), the sale of spirituous, malt, or intoxicating liquors in any quantity within the limits of the town of Louisville was prohibited, and that the sale involved in this case was within the limits of that town. It does not appear that any such point was raised or decided in the court below. If it were so, the ruling in the Papworth Case would seem to apply equally to this act.

It is further contended in the brief of counsel for plaintiff in error that under the act of February 5, 1866 (Acts 1865–66, p. 282), the right to issue licenses for the sale of liquors in the town of Louisville was vested exclusively in the corporate authorities thereof; that by the act of 1900 (Acts 1900, p. 313) they were forbidden to issue licenses for the sale of liquors; that thus there was no authority in any person to issue such licenses, and hence there can be no conviction for retailing liquors without a license within the municipal limits. Want of authority in the municipal officers to issue a license would not authorize retailing without a license, or prevent such conduct from being criminal. Section 431 of the Penal Code of 1895 declared it to be a misdemeanor to "sell by retail, any wine, brandy, rum, gin, or whiskey, or other spirituous liquors, or any mixture of such liquors, in any house or other place, without license from the proper authority in said county, or without license from the corporate authorities of any town or city, where by law authority to grant license is vested in such corporate authorities." That the corporate authorities may be without power to grant a license to retail lawfully will not operate as a license to retail unlawfully.

3, 4. This court will take judicial notice of the fact that the superior court of Jefferson county, by act of the Legislature, begins its fall session on the second Monday in November. In the year 1903 that day fell on the

12th day of the month. The special presentment was returned at that term. The point that the presentment fails to show that the date of the alleged offense (November 8, 1903) was prior to the return of the presentment is accordingly without foundation.

5. The evidence amply supported the verdict.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(123 Ga. 546)

BENNING v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

INTOXICATING LIQUORS—ILLEGAL SALE.

This case is controlled by the case of Edwards v. State, 51 S. E. 630, this day decided.

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; H. M. Holden, Judge.

One Benning was convicted of the illegal sale of intoxicating liquors, and brings error. Affirmed.

Phillips & Phillips, for plaintiff in error. Alfred Herrington, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 626)

LANIER et al. v. HEBARD et al.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. POWER OF ATTORNEY — INDEFINITENESS—ADMISSION IN EVIDENCE.

A power of attorney authorizing a designated person, as attorney in fact, to sell and convey all the lands situated in the state of Georgia belonging to the donors of the power, or in which they have any interest, or any part of such lands, is not inadmissible in evidence because it fails to describe the lands "by county, number, or district."

2. TRIAL—RECEPTION OF EVIDENCE.

Upon the interlocutory hearing of an application for injunction, brought under Civ. Code 1895, § 4927, it is not erroneous to admit in evidence a paper offered by the plaintiff as a link in his chain of title, and objected to as being irrelevant, although at the time such paper is offered in evidence it does not appear to be admissible as such, if its admissibility depends upon facts which it is competent to establish by subsequent evidence. But such paper should only be admitted subject to the objection made, and, if evidence showing its relevancy to the issue on trial is not afterwards introduced, it should be either expressly ruled out, or treated by the judge as of no probative value.

3. EVIDENCE — ANCIENT DEEDS — RECITALS—WEIGHT.

Recitals in an ancient deed, wherein the party executing it purports to convey the property for himself, and, as attorney in fact, for others, as the heirs at law of a former owner, that such former owner is dead, and the grantors are such heirs, unsupported by other evidence showing the relationship of the party making such recitals to the person whose heirs at law the grantors are, in the writing, claimed to be, or by proof of uninterrupted possession, under such deed, for such length of time as to raise a presumption that such recitals are true, are not sufficient to prove the facts so recited.

4. INJUNCTION—TRESPASS—TITLE OF PLAINTIFFS.

As the plaintiffs not only failed to prove the perfect paper title contemplated by Civ. Code 1895, § 4927, but also failed to prove any title at all to the premises in controversy, they were not entitled to an injunction, even if they showed that the threatened damage would be irreparable, or that the grant of the writ would prevent a multiplicity of suits.

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action by Charles S. Hebard and others against I. G. Lanier and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Charles S. Hebard and others filed an equitable petition against I. G. Lanier, C. T. Hamilton, and Daniel J. Guy, partners under the name of Lanier, Hamilton & Co., to enjoin the defendants from working for turpentine purposes trees on lots of land Nos. 328 and 329 in the Twelfth district of Ware county. The plaintiffs sought to bring their case within the scope of section 4927 of the Civil Code of 1895, which relieves an applicant for injunction, in a case of this character, of the necessity of averring and proving insolvency of the defendant, or that the threatened damages would be irreparable, or other circumstances rendering the issuance of the writ of injunction necessary and proper, by attaching to their petition an abstract of title, claimed to be a "perfect title" to the land and the timber in question. This abstract was as follows: (1) Grants from the state to Benjamin G. Barker, dated July 8, 1858, to lots 328 and 329 in the Twelfth district of Appling county (but now of Ware county). (2) "Power of attorney, dated December 8, 1871, from heirs at law of Benjamin G. Barker to William B. Van Benschoten, signed by John Van Benschoten, Edward Van Benschoten, Sarah Van Benschoten, Edwin Mills, and Elizabeth Mills." (3) "Deed dated December 22, 1871, from William B. Van Benschoten, under said power of attorney, for the heirs at law of said Benjamin G. Barker, to J. M. Stiger, conveying the lands in question and other lands." (4) "Deed dated April 27, 1901, from J. M. Stiger to R. R. Hopkins," conveying lands in question and other lands. (5) Deed dated July 17, 1902, from R. R. Hopkins to the plaintiffs, conveying the lots in controversy and other lands. The defendants were not alleged to be insolvent. There was an allegation to the effect that working the timber on the lands in question by defendants for turpentine purposes would cause irreparable damage to the plaintiffs, for the reason that plaintiffs had purchased such lands, together with a large body of land known as the "Okefinokee Swamp," for the purpose of manufacturing the timber thereon into lumber when they should see proper to do so; that such timber was very valuable, and constituted the

principal value of the land; that the working of the timber for turpentine purposes would cause it to be destroyed, and plaintiffs would be deprived of the profits they expected from its manufacture into lumber. It was further alleged that the acts of trespass complained of were continuing from day to day, and, unless defendants were enjoined, plaintiffs would be involved in a multiplicity of suits at law against defendants for the recovery of damages. It was also alleged that defendants had cut, felled, hacked, and boxed 10,000 of the trees on the two lots of land, to plaintiffs' damage in the sum of $3,000, for which recovery was prayed. The defendants demurred to the petition on the grounds that it set up "no reason in equity which [entitled] the plaintiffs to an injunction," and that the abstract of title attached to the petition did not authorize the granting of an injunction, in the absence of insolvency of defendants or irreparable damage to the plaintiffs. The defendants also answered, denying the material allegations of the petition.

On the interlocutory hearing the plaintiffs introduced the following evidence: Plats and grants from the state to Benjamin G. Barker, dated July 8, 1858. "A power of attorney, dated November 6, 1871, from E. B. Scattergood, Theodore Scattergood, I. Scattergood, Robert Smith, Helen C. Smith, and Sarah Barker to William B. Van Benschoten, containing the following powers: 'To enter into and take possession of all real estate belonging to us or in which we or either of us have any interest, situated in the state of Georgia, and to bargain, sell, grant, convey, and confirm the whole or any part thereof for such price or sum of money, and on such terms, as he may think best, and to sell or exchange the same for other property as he may think best.'" (3) The power of attorney from John Van Benschoten et al. to William B. Van Benschoten, dated December 8, 1871, being the same as set out in the abstract of title attached to the petition, the powers delegated being the same as those in the power of attorney from Scattergood et al. to William B. Van Benschoten. (4) "A [warranty] deed from William B. Van Benschoten and Julia A. Van Benschoten, his wife, to J. M. Stiger, to which the said William B. Van Benschoten purported to sign for himself and as attorney in fact for the heirs of Benjamin G. Barker, executed on the 22d day of December, 1871, and conveying, among a great many lots of land in various counties," the two lots of land in question, and reciting that the lands conveyed embraced "in all 21,560 acres, be the same more or less," and further reciting: "Said premises having formerly belonged to the estate of Benjamin G. Barker, deceased, and are herewith conveyed and intended to be conveyed by the said William B. Van Benschoten in his own right and by several powers of attorney, dated November the 6th, 1871, and 8th of December, 1871, so far as the rights of other heirs and representatives of said Benjamin G. Barker are or may be concerned." (5) A deed from J. M. Stiger to R. R. Hopkins, and a deed from R. R. Hopkins to the plaintiffs, to the lands in question and other lands. (6) Affidavit of J. M. Stiger that he had purchased from William B. Van Benschoten, as attorney in fact for the heirs at law of Benjamin G. Barker, certain real estate, including the two lots of land in controversy; that he had remained in the uninterrupted, quiet, peaceable, adverse, and notorious possession of said two lots of land until he conveyed them to R. R. Hopkins; that his "ownership and possession of above lots extended over a period of twenty years; during all of this time [he] paid taxes levied upon and assessed against these two lots of land, and that during the last twenty years of [his] ownership [he] had houses, fences, and buildings and improvements upon certain of the lands described in the deed from William B. Van Benschoten to [him], and that [his] acts of ownership and possession extended over and embraced all of said property described in this deed from William B. Van Benschoten to [him] during said period." (7) Affidavit of R. R. Hopkins to the effect that the trespass complained of would be of irreparable injury to the plaintiffs in the manner set out in the petition. (8) Affidavit of W. H. Mizell that defendant had cut 10,000 of the trees standing on the two lots in question, to the injury of the plaintiffs in the sum of $3,000.

Defendants submitted in evidence the affidavits of several witnesses to the effect that defendants had not cut the boxes in the trees on the two lots in question, but had merely worked them by hacking the boxes and dipping the gum therefrom, and that this did not increase the damage already done by boxing the trees; and that the damage thus done the defendants was not irreparable, but of easy computation; and that neither J. M. Stiger nor any one claiming under or through him has ever been in possession of the two lots in controversy, or any land contiguous thereto, "by inclosures, cultivation, residence, tenants, or otherwise, or by working the timber for any purposes." They further deposed that the lands conveyed by Van Benschoten and wife to Stiger "do not constitute one body and tract of land, and is not composed of entire adjacent or contiguous lots or tracts, and that there are no improvements or possession of any kind on said land." The court granted an order enjoining defendants as prayed for until the final hearing. To this order the defendants excepted.

R. G. Dickerson and S. L. Drawdy, for plaintiffs in error. Krauss & Sheppard and Toomer & Reynolds, for defendants in error.

FISH, P. J. (after stating the facts). 1. The defendants objected to each of the pow-

ers of attorney to William B. Van Benschoten when it was offered in evidence, because it "failed to describe the land described in plaintiffs' petition by county, number, or district," and upon the further ground that it did not in any way connect Benjamin G. Barker with the parties creating the power of attorney, and no evidence was offered by the plaintiffs connecting such parties with Benjamin G. Barker, and showing that they were his heirs at law. Another ground of objection made was abandoned in this court. There was no merit in the first ground, as the power given covered all the real estate belonging to the donors in this state, wherever situated.

2. The second ground of objection was meritorious, unless the plaintiffs by subsequent evidence removed it; as, at the time the objection was made, there was absolutely nothing in evidence which tended to show that the parties executing either of these papers had derived title in anyway from Benjamin G. Barker, the grantee of the state. The plaintiffs sought to show that the parties creating these powers of attorney were the heirs at law of Benjamin G. Barker, by certain recitals contained in the deed from William B. Van Benschoten and wife to J. M. Stiger, this deed being more than 30 years old. This was the next piece of evidence introduced, the probative value of which will be considered later. The judge was not bound to sustain the objection to the powers of attorney at the time when it was made, especially as the case was before him at chambers, but could properly admit them, subject to be ruled out, unless their relevancy was shown by subsequent evidence. We shall presently come to the real, substantial error which he committed, which renders the ruling just discussed of but little or no importance, and requires a reversal of the case upon its merits.

3. We think it is clear that the plaintiffs failed to prove a perfect title as contemplated by Civ. Code 1895, § 4927. To authorize the granting of an injunction under this section, "the plaintiff must show a perfect title upon the face of the papers presented by him and constituting his chain of title. If such papers do not show upon their face a perfect title, aliunde evidence will not be admitted to explain any defects in the title apparent upon the face of the papers." Camp v. Dixon, 111 Ga. 674, 676, 36 S. E. 878; Wiggins v. Middleton, 117 Ga. 162, 43 S. E. 432, and cit. Counsel for the plaintiffs contend that they did prove such perfect paper title by a chain of title from the state down to the plaintiffs, which they introduced in evidence. One link in this chain of title was the deed from William B. Van Benschoten and wife to J. M. Stiger, wherein said Van Benschoten purported to convey for himself and for others, as heirs at law of Benjamin G. Barker, the lands in question to such grantee. This link was fatally defective, in that it was not shown that the parties for whom Van Benschoten undertook to convey the lands to Stiger were the heirs at law of Benjamin G. Barker. As we have intimated, counsel for the plaintiffs rely upon certain recitals in this deed to establish this fact. They insist that, as the deed is an ancient one, the recitals therein are to be taken as true, and that these recitals, so considered, show that the persons in whose behalf the deed was made were the heirs at law of Benjamin G. Barker. The recitals relied on are as follows: "Said premises having formerly belonged to the estate of Benjamin G. Barker, deceased, and are herewith conveyed and intended to be conveyed by the said William B. Van Benschoten in his own right, and by several powers of attorney dated November 6, 1871, and 8th of December, 1871, so far as the right of other heirs and representatives of said Benjamin G. Barker are or may be concerned." It will be noted that it is only indirectly and inferentially declared here that William B. Van Benschoten is an heir at law of Benjamin G. Barker, and that who the "other heirs and representatives of said Benjamin G. Barker" for whom he was acting were is not stated. It will be observed also that there is no direct and explicit statement that the makers of the deed are all the heirs at law of Benjamin G. Barker. Admitting, however, for the sake of the argument, that these recitals, taken in connection with the two powers of attorney introduced in evidence, the dates of which, respectively, correspond with the dates of the powers of attorney here mentioned, can be considered as a declaration by William B. Van Benschoten that he and the parties signing such powers of attorney are the heirs at law of Benjamin G. Barker, is this declaration by him, when found in an ancient deed, which he executed, sufficient in and of itself to prove that he and the other persons for whom he acted in executing the deed were the heirs at law of Benjamin G. Barker? We think not. In Dixon v. Monroe, 112 Ga. 158, 37 S. E. 180, it was broadly held: "A recital in a deed that the parties making it are heirs at law of a former owner is no evidence of the fact, except as against parties to the deed and their privies." The same ruling was made in Hanks v. Phillips, 39 Ga. 550, and Yahoola Co. v. Irby, 40 Ga. 479. In none of these cases, however, was the deed containing the recital an ancient deed. In Yahoola Co. v. Irby, McKay, J., said: "We see no reason why the recital in a deed by John and Jacob Doe that they are the heirs at law of William Doe should be evidence of the fact. Any other two men might make a deed with the same recital in it, and there would be no reason why the recital in one of the deeds should be taken for true rather than in the other. To make out a title to land, all that would be necessary, if this were the law, would be to write a

deed to it, setting forth that the maker of the deed was the heir at law of the true owner." Carver v. Astor, 4 Pet. 83, 7 L. Ed. 761, was cited, wherein it was held that the general rule is "that a recital of one deed in another binds the parties and those who claim under them. Technically speaking, it operates as an estoppel, and binds parties and privies; privies in blood, privies in estate, and privies in law. But it does not bind mere strangers, or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed. * * * But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital of the lease in such release is not per se evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself, under such circumstances, materially fortify the presumption, from lapse of time and length of possession, of the original existence of the lease. Leases, like other deeds and grants, may be presumed from long possession, which cannot otherwise be explained; and under such circumstances a recital of the fact of such a lease in an old deed is certainly far stronger presumptive proof in favor of such possession under title than the naked presumption arising from a mere unexplained possession." It is somewhat significant that Judge McKay, though citing that case, did not except ancient deeds, but announced the broad and unqualified rule that "a recital in a deed that the parties making it are heirs at law of a former owner is no evidence of the fact recited, except as against parties to the deed and their privies." And the reasons, above quoted, which he gave to sustain the ruling, are as applicable to a recital in an ancient deed as to one in a recent deed. In a few courts a recital in an ancient deed of a pedigree of inheritance has been held admissible to show the state of the relationship; but the great weight of judicial authority is to the effect that before such a recital, even in an ancient deed, can be considered as evidence of relationship, possession of the premises under the deed, or other corroborative circumstances, must also appear. 2 Wigmore on Ev. § 1573 (3), and cases cited in note 7.

The rule, as we understand it to be established by the great weight of outside authority, is that, before the recitals in an ancient deed of the death of the former owner and of the relationship of the grantor to him can be taken as evidence of the facts recited, there must be evidence of the death of the person making the recital or declaration, and that he was de jure related by blood or marriage to such former owner, or proof of undisturbed possession, under the deed, of the premises conveyed for such a length of time as to raise a presumption that such recitals in the deed are true. While the rule seems generally recognized that in matters of pedigree the declarations of deceased persons who were de jure related by blood or marriage to the family in question may be given in evidence, yet before such a declaration can be received in evidence the relationship of the person making it with the family must be established by some proof independent of the declaration itself.

There is absolutely no evidence disclosed by the record in this case which shows that William B. Van Benschoten, who made the recitals in this deed which are relied on by the plaintiffs, was dead when the case was tried. Nor is there any evidence, other than his written declaration, that he was in any way related to Benjamin G. Barker. Therefore his written declaration that he and the other persons for whom he acted were the heirs at law of said Barker stands upon no higher footing than such a declaration made by one who is in no way related to Barker. This being true, it is unnecessary to inquire whether, if these facts had been shown, his declaration that the grantors were the heirs at law of Barker would have been admissible. In this connection we will, however, say that the declaration in question seems to be more the statement of a legal conclusion from facts undisclosed than a statement of the real relationship of the grantors to Barker. There was no proof, as we will later show, that possession of the lots, or either of them, was held for any length of time, under the deed to Stiger; and, even if there had been proof of such possession of the lots, or either of them, for such length of time as to raise a presumption that the recital that the grantors were the heirs at law of Benjamin G. Barker was true, such proof would necessarily have had to be made by aliunde evidence, which, under the ruling in Camp v. Dixon, supra, would not be admissible for the purpose of bringing the plaintiffs' case within the provisions of Civ. Code 1895, § 4927, as such evidence could not be received to explain defects in the title apparent upon the face of the papers. Our conclusion therefore is that the plaintiffs did not show the "perfect title" which will, under this section of the Code, relieve an applicant for injunction from the necessity of averring and proving insolvency of the defendant, or that the threatened damage will be irreparable, or other circumstances rendering the interposition of the writ necessary and proper.

4. The plaintiffs not only failed to prove a

perfect title, but proved no title at all, to the land or timber in question. While Stiger's affidavit was that he remained in the uninterrupted, quiet, peaceable, adverse, and notorious possession of lots 328 and 329 until he sold and conveyed the same to Hopkins, and his (Stiger's) ownership and possession of these lots extended over a period of 20 years, during all of which time he paid taxes on them, and that during the 20 years of his ownership he had houses, fences, buildings, and improvements placed upon certain of the lands described in the deed from William B. Van Benschoten to him, and that his acts of ownership and possession extended over and embraced all of the property described in this deed, it is very clear that he was only swearing to his own conclusion. The deed to him embraced some 21,560 acres of land, consisting of lots containing 490 acres each, and situated in as many as five different counties; and the payment of taxes on all of the lands embraced in the deed, and the actual possession of one or more of the lots other than 328 and 329 in Ware county or some one of the other lots which was contiguous to these, was not even constructive possession of such two lots. The undisputed evidence is that there was no actual possession of the two lots in question, or of any lots conveyed in the deed contiguous to these lots. It follows, therefore, that, even if the threatened injuries would be irreparable, or that plaintiffs would be saved the necessity of a multiplicity of suits, they were not entitled to an injunction, because they failed to prove title to the land or timber in question.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 706)

JOHNSON v. THROWER et al.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. APPEAL—REVIEW—RULINGS ON EVIDENCE.
As has been repeatedly held, this court will not consider grounds of a motion for a new trial complaining of the admission of evidence, oral or documentary, unless the evidence is set out in the motion, either literally or in substance, or attached thereto as an exhibit. Petty v. Brunswick R. Co., 35 S. E. 82, 109 Ga. 666, and cases cited; Fraser v. State, 37 S. E. 114, 112 Ga. 13; Freeman v. Mencken, 42 S. E. 369, 115 Ga. 1017.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2899–2904.]

2. NEW TRIAL—MOTION—PLEADING.
It is not the office of a motion for a new trial to call in question the sufficiency of an amendment to pleadings. Kelly v. Strouse, 43 S. E. 280, 116 Ga. 874 (6).

3. APPEAL—DIRECTING VERDICT.
This court will in no case reverse the judgment of the trial court on account of the refusal of the judge to direct a verdict.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4211.]

4. CONTINUANCE—DISCRETION OF COURT.
Motions to continue are addressed to the sound legal discretion of the trial judge, and in the present case it does not appear that that discretion was abused.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, §§ 17, 18.]

5. APPEAL—RECORD—GROUND FOR NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.
The alleged newly discovered evidence on account of which a new trial was asked was not clearly set out in the motion, nor does it appear by affidavits of the movant and her counsel, or either, that the existence of the evidence was not known at the time of the trial, and could not have been known by them in the exercise of ordinary diligence. Hence this ground of the motion is without merit.

6. INJUNCTION—DISPOSSESSORY WARRANT—DIRECTING VERDICT.
As between the parties to this suit, the title to the land in question was directly involved, both by reason of the averments and cross-prayers of the answer of the defendants and by reason of the fact that the plaintiff was not entitled to the full relief sought if the ownership of the land was in the defendants. There was ample evidence to support the finding of the jury that the title of one of the defendants was superior to that of the plaintiff, and it was not error of which the plaintiff can complain to direct a verdict in her favor on the questions as to the validity of the dispossessory warrant, the enforcement of which was asked to be enjoined, the validity of the rent contract introduced in evidence, and submit to the jury the question of the title to the realty in dispute.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by Mary Johnson against M. L. Thrower and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Robt. L. Rodgers, for plaintiff in error. C. L. Pettigrew and J. W. & J. D. Humphries, for defendants in error.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, J., disqualified.

(123 Ga. 566)

WYNNE v. STATE.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. CRIMINAL LAW—NEW TRIAL—GROUNDS.
For the admission of evidence to be a ground of a motion for a new trial, it must appear what objection was urged to it at the time. It is not enough to state what the objection was at the time when the new trial was asked.

2. WEAPONS—CARRYING AT PUBLIC GATHERING.
A barbecue on the 4th of July, at which people are assembled to the number of 400 or 500, is a "public gathering," within the meaning of Pen. Code 1895, § 342, which declares it to be a misdemeanor for one not an arresting officer in the discharge of his duties, or a member of his posse, to carry about his person a deadly weapon to any public gathering, except at militia muster grounds.

3. SAME—EVIDENCE.
If a person, knowing that a public gathering would occur at a certain time and place, shortly beforehand carried a deadly weapon to a place near by in order to have it accessible when the gathering occurred, and while it was in progress went to the place of deposit, obtained actual possession of the weapon, and

carried it about his person to the gathering and into the crowd assembled, he was guilty of the offense of carrying a deadly weapon to a public gathering, as prescribed by Pen. Code 1895, § 342.

4. SAME—EVIDENCE.

The evidence warranted the verdict.

(Syllabus by the Court.)

Error from Superior Court, Taliaferro County; H. M. Holden, Judge.

Dave Wynne was convicted of carrying a shotgun to a public gathering, and brings error. Affirmed.

Dave Wynne was indicted for carrying about his person a shotgun to a public gathering not at a militia muster ground. On the trial the evidence for the state was, in brief, as follows: On July 4, 1904, there was a public barbecue at Hillman, in Taliaferro county, at which negroes and some white people gathered, to the number of some 400 or 500. A difficulty occurred, and there was a good deal of rioting. Some of the crowd scattered. Several were seen with deadly weapons. Among others, the defendant had a shotgun. The evidence did not disclose just where he procured the gun, but he was seen coming with it from the direction of the house of one Terrell, some 50 or 60 yards away from where the barbecue occurred. He came down to where the crowd was and stopped. At the time of the rioting there were some 40 or 50 people present. During the day a number of women were in Terrell's yard, under the shade of the trees, and they passed from the gathering to the house, back and forth. The defendant's statement was substantially as follows: He carried his gun over to Terrell's on Saturday before July 4th. He generally hunted such things as young rabbits. He set his gun down at Terrell's house Saturday evening, forgot it, and left it there. On Monday evening, the day of the gathering, he came by there, and got his gun. At the time of the rioting he was not present. He had gone to the spring about a quarter of a mile distant. He came back by Terrell's house, and got his gun, expecting to shoot some young rabbits on his way home. He did not know anything about the difficulty until some of them were telling him about it. He had no "forethought" at all about it, was not interested in it, and had nothing to do with it. In rebuttal the state proved that at the time the defendant came up with his gun two or three others were also there with guns, though the general rioting had ceased a few minutes before. Two or three of these men, including the defendant, brought guns from Terrell's house. He was the second or third who did so. He was in position where he could see those bringing guns to the difficulty. The jury found the defendant guilty. He moved for a new trial, which was refused, and he excepted.

Hawes Cloud, for plaintiff in error. David H. Meadow, Sol. Gen., for the State.

LUMPKIN, J. (after stating the facts). 1. One ground of the motion for a new trial complains that the court allowed a witness to testify that he thought the defendant was in a position to see whether other people brought guns from Terrell's residence; that from the position where the defendant was he could have seen this; and that other people did bring guns to the scene of the difficulty. It does not appear what ground of objection was urged to this evidence when it was introduced. It is stated in the motion for a new trial that "said question and answer are irrelevant, and said answer is purely an opinion of the witness, without having any facts upon which such opinion is based." This was the opinion of the attorney when movant's motion for a new trial was made, but whether this ground of objection was urged at the time of the trial does not appear. It cannot, therefore, be considered.

2–4. The purpose of Pen. Code 1895, § 342, is to protect the public against the danger arising from allowing persons to carry deadly weapons to courts of justice, or election grounds or precincts, or places of public worship, or any other public gathering in this state. The exception of militia muster grounds is for the purpose of allowing parades and gatherings where troops necessarily carry deadly weapons. So, also, sheriffs, constables, marshals, policemen, or other arresting officers or their posses, acting in the discharge of their official duties and for the preservation of the public peace, are excepted from the operation of the law. The wholesome purpose of this statute would be much limited by putting a narrow construction upon the expression "any other public gathering." A barbecue on the 4th of July, at which the public is assembled in considerable numbers, constitutes a public gathering within the meaning of the statute. Reliance is placed by the defendant upon the decisions in Modesette v. State, 115 Ga. 582, 41 S. E. 992, and Culberson v. State, 119 Ga. 805, 47 S. E. 175. They hold that coming into possession of a deadly weapon while at a public gathering is not the same thing as carrying a pistol to such gathering, and will not authorize a conviction under Pen. Code 1895, § 342. Those decisions do not control the present case. The defendant carried his gun to a house 40 or 50 yards distant from the point where the barbecue was to occur, and deposited it there. During the gathering, and while the riotous conduct was prevalent, he left the gathering, and went to the house, obtained the gun, and returned to the crowd. It is true that he stated that he left the gun at the house by accident, and that he obtained it for the purpose of carrying it home and shooting some young rabbits; but, in view of the coincidence of his obtaining the gun and returning to the crowd about the same time others procured guns from the same house, the jury evidently did

not believe his statement. They were not bound to do so, and the evidence warranted their finding. That some of the crowd during the day went into Terrell's yard and sat in the shade did not bring this case within the decisions above cited. We think that neither the judge nor the jury erred.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 659)

ADAMS v. HAIGLER et al.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. BUILDING CONTRACTORS' BOND—PLEADING—PETITION—AMENDMENT.

The petition was not subject to any of the objections set forth in the demurrers. The amendment offered thereto was germane, and did not set out a new cause of action.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 676.]

2. SAME—DEFAULT OF CONTRACTORS—BREACH OF BOND—RELEASE OF SURETY.

H. & F. entered into a joint contract in writing with A. to build a house according to certain plans and specifications, and to complete the work by a named date. H. & F. also gave bond, with B. as surety, the condition of which was that the principals should well and truly comply with all the terms of the contract, or that the surety would do so for them. F. alone began the work, but abandoned it before its completion. H. then, with the consent of A., and with the knowledge and at the instance of B., undertook to complete the building, but failed to comply with a provision of the contract requiring the contractors to find all material, labor, etc. *Held*, that a stipulation in the contract authorizing A., in case of the default of H. & F., to employ a third person to complete the work, never became operative; that the act of H. in carrying on the work was, under the allegations of the petition, not a novation, but in pursuance of the original contract; that B.'s risk as surety was not increased by any act of A.; and that the condition of the bond was broken by H.'s failure to comply with the terms of the contract.

3. BUILDING CONTRACT—CONSTRUCTION—ACTION FOR BREACH.

A stipulation in a building contract that, if any damage shall arise by reason of delay in completing the work, and the parties are unable to agree, "the same shall be referred to arbitrators," will not prevent a suit in the first instance for damages so occasioned, unless it is clearly and unequivocally provided in the contract that arbitration shall be either a condition precedent to suit or be the only mode for the assessment of damages.

4. SAME—PLEA—DEFENSES.

A defense to a suit on a building contract that delay was due to alterations and additions, and that the contract provided the contractors should not be liable for delay so occasioned, should be made the subject of a plea; and, in the absence of an allegation in the petition that delay did result from such a cause, the petition is not subject to demurrer.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by D. D. Adams against J. N. Haigler and others. Judgment for defendants, and plaintiff brings error. Reversed.

Adams brought suit upon a bond against Haigler and Frey as principals and Bazemore as surety. The petition alleged: The plaintiff entered into a contract with Haigler and Frey on January 9, 1904, under which they were to build a house of a certain description and do other work stipulated in the contract. The plaintiff fully complied with all of his obligations, and has paid out upon the order of Haigler, for material and labor in the construction of the house and necessary for its completion, the sum of $3,514.73, of which a bill of particulars is attached to the petition, but of this amount the defendants are entitled to credits which will reduce it to $3,426.03. Frey utterly failed to comply with the contract, and it was absolutely necessary for the plaintiff to advance the sum above referred to to enable Haigler to perform the work, and the material was purchased and the labor employed under the direction of Haigler. Haigler and Frey utterly failed to find all materials, labor and services, tools, scaffolding, implements, and power of every kind necessary for the full completion of the building, as set forth in the specifications therefor, and as required by the third paragraph of the contract; and the plaintiff was thereby injured and damaged in the sum of $426.03, besides interest, that amount having been expended in excess of the contract price in the purchase of materials, etc., necessary to complete the work at the least expense. Haigler and Frey likewise utterly failed to comply with that portion of the contract which required them to complete the house on or before April 15, 1904, and have never yet completed the same; the house never having been sufficiently completed for the plaintiff to occupy the same until May 15th, whereby the plaintiff was injured and damaged in the sum of $40, the value of one month's rent. The house is not yet completed in accordance with the contract, the work necessary to be done to complete it being set out in detail in the petition. Haigler and Frey have therefore failed to well and truly comply with all the terms and conditions set forth in the contract, and have likewise failed to fully carry out and comply with their obligations in the particulars above set out; and Bazemore has likewise failed to do so for them. The bond has therefore been broken, to the injury and damage of the plaintiff. Attached to the petition were copies of the bond and the contract. The bond was in the sum of $500, payable to the plaintiff, and the condition was that Haigler and Frey should well and truly comply with all the terms and conditions in the contract (a copy of which was attached to the bond), and fully carry out and perform all their obligations therein, or that Bazemore should do so for them. The contract provided that the house should be erected according to the plans and specifications of a named architect, which were made a part of the contract, and that it should be completed on or before April 15, 1904; but that, if any additions and alterations were

made, further time should be allowed, if such additions and alterations should be the cause of the delay and the contractors had exercised reasonable diligence in reference to the same. Those portions of the contract which are material in the present controversy are as follows:

"(3) The contractor shall find all materials, labor and services, tools and scaffolding, implements, and power of every kind necessary for the full completion of said building, as set forth in these specifications.

"(4) The owner shall pay to the contractor, for the full, safe, and perfect completion of the work, the sum of $3,000.00; but if the owner, with the consent of the architect, shall direct in writing any additions to, or alterations of, or omissions from the plan or works, the value of such shall be added to or deducted from the said sum of $3,000.00, as the case may be, such value to be computed by the architect, whose decision shall be final and conclusive on both parties hereto."

"(7) If the contractor shall become bankrupt or insolvent, or make an assignment for the benefit of his creditors, or shall suspend or delay the performance of any part of this contract for five days after a notice shall be served upon him or left at his place of abode by the architect, requiring him to proceed with and perform the same, it shall be right for the owner, with the consent of the architect, to enter upon and take possession of the works, and to employ any other person or persons to carry on and complete said works, and to use the materials of the contractor there being, and the cost and expense incurred in carrying on and completing the said works shall be deducted by the owner from any money due or to become due the contractor; and if said work is not completed for the sum at which the contractor agreed to do it, then the said contractor shall make said overplus good to said owner; said overplus shall be a valid debt against the contractor. The expense incurred by the owner as herein provided, either for furnishing materials, or furnishing the work or both, and any damage incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties hereto.

"(8) In case the work and things hereby contracted to be done by the contractors shall not be done and completed the time hereinbefore mentioned, the contractor shall pay to the owner, on demand, such damages as can be shown by reason of such delay, for every day that may elapse from the appointed and actual time of the completion, as mentioned in clause 1st, allowance being made for delay (if any) occasioned in the execution and completion of the work by reason of additions to, alterations of, or omissions, as provided for in clause 1st, or for strikes, fire, or similar accidents; and if parties are unable to agree as to the amount which may be claimed, the same shall be referred to arbitrators, one selected by the contractor, and one by the owner, and these two shall have power to name an umpire, whose decisions shall be binding on all parties."

Each of the defendants filed a general demurrer, as well as a special demurrer upon specified grounds. Before the demurrer was heard the plaintiff offered an amendment, which is, in substance, as follows: Bazemore had full notice and knowledge of the failure of Frey to comply with the contract, of the failure of Haigler and Frey to find materials, labor, etc., and of the payments made by the plaintiff as set out in the petition. He also had full notice and knowledge at the time of the fact that the plaintiff was completing the building contracted for. "Said W. L. Bazemore himself procured the said Haigler to perform the work as set out in the petition," and Bazemore, with full notice and knowledge, utterly failed himself to carry out the obligations of the contract. The plaintiff acted in good faith for the purpose of reducing the damages arising by reason of the breach of the contract as much as possible, and the work was done and material purchased at the lowest possible sum necessary to construct the building according to the specifications. The court refused to allow the amendment, sustained the demurrers, and dismissed the petition. To these rulings the plaintiff excepted.

Hardeman & Jones and E. P. Johnston, for plaintiff in error. M. Felton Hatcher, for defendants in error.

COBB, J. 1. The amendment should have been allowed. It was germane to the petition, and did not set forth a new cause of action. See City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318. One of the distinct terms in the contract was that Haigler and Frey were to find all material, labor, etc., necessary for the full completion of the building as set forth in the specifications. The condition of the bond was that they should well and truly comply with all the terms and conditions of the contract. The petition alleged that they utterly failed to find material, labor, etc., which was necessary to complete the building, and that as a consequence the plaintiff was damaged in a stated amount, being the sum which he was required to pay out in excess of the contract price; and the amendment which was rejected alleges that this sum was necessarily expended for this purpose, and that the labor and materials were secured at the lowest possible cost, a bill of particulars to the petition setting forth each item that was thus procured. These allegations in the original petition and the amendment seem to set forth a complete cause of action upon the bond, and, if there were no other allegations in the petition, the plaintiff would be enti-

tled to recover upon proof of the averments.

2. But it is said that under the seventh paragraph of the contract the plaintiff had no right to take charge of the work except in the manner therein specified; that is, that it was necessary to give the contractors five days' notice to continue the work, and, upon their failure, to obtain the consent of the architect to take charge of the work. It is claimed that this provision in the contract was not complied with, that the risk of the surety was thereby increased, and that he is discharged from any liability on the bond. The contract of Haigler and Frey was to complete the work. The contract of Bazemore was to complete the work for them if they failed to do so; and, in the event both failed, the contract of the principals and surety on the bond was to indemnify the plaintiff against loss on account of such failure. The purpose of the seventh paragraph of the contract was the protection of the plaintiff against the failure of both Haigler and Frey, the plaintiff thereby being given the right under certain conditions to have the work completed by other persons. It would seem from the allegations of the petition that, while the contract was a joint one of Haigler and Frey, the work was first begun and carried on by Frey alone; and, if he had completed the work, this would have been a compliance with the contract, for performance by either of the joint obligors would have been a sufficient compliance with the contract. When Frey abandoned the contract, it seems that Haigler was willing to undertake to comply with the same; that his willingness to complete the contract was not only known to Bazemore, but that it was at Bazemore's instance and request that Haigler took up the unfinished work of his co-obligor, which he had a right to do. It was during the time that Haigler was undertaking to comply with the contract that he failed, certainly at one point, and possibly at others; that is, he failed to find the material necessary. The plaintiff did not take the work completely out of the hands of both Haigler and Frey, as he would probably have had a right to do, after service of the notice and the consent of the architect, but Haigler was allowed, with the knowledge of Bazemore, the surety, to continue the work which Frey had failed to complete. Both Haigler and Frey were under an obligation to complete the work, and it was immaterial to the plaintiff which one actually did the work. Bazemore, the surety, was surety for both, and he was alike responsible for the failure of either. Haigler's taking the place of Frey in the actual conduct of the work, at the instance of the plaintiff, with the knowledge of Bazemore, was in no sense a novation of the contract. Haigler was simply doing what he was under an obligation to do; and we do not see how the risk of Bazemore was in any sense increased by the work being shifted from one of the contractors to the other one, when he was bound under the bond for the faithful performance of the contract by each and by both. The condition of affairs contemplated by the seventh paragraph of the petition does not seem to have arisen; that is, where the plaintiff would be compelled to secure the services of some one not connected with the original contract to complete the work. If the allegations of the petition were that both Frey and Haigler had entirely abandoned the contract and failed to perform its conditions, and that the plaintiff had made a new and independent agreement with Haigler to complete the work, without reference to the old contract, an entirely different question would have been raised; and it is probable that the right of the plaintiff to recover would have been dependent upon his compliance, either literally or in substance, with the stipulations of paragraph 7. But, as we interpret the petition, this was not the case. Frey attempted to perform, and failed. Haigler took his place, and he likewise failed at the point where the contract required him to find the material. But each was attempting to carry out the original contract, and Bazemore was bound as surety for them on the original contract, and was liable for the failure of each to perform the contract, as he would have been liable if both of them had together failed to perform.

3. The contract provided that the house should be completed on a given day. It was distinctly alleged that the house was not completed on this day, and there were allegations showing the damage which resulted from this failure. The failure to complete the contract on the day named was a breach of the bond. But it is said that the plaintiff is not entitled to recover this damage, for the reason that paragraph 8 of the contract requires the damage to be determined by arbitration, and there could be no recovery of such damage until there had been an arbitration in the manner provided. It is unquestionably true that parties may stipulate in a contract that the amount of damage in case of a breach shall be fixed by arbitration. But such a stipulation would not bar a party damaged by the breach from recovering the damages by suit, even though there were no arbitration, unless the provision for arbitration amounted to a condition precedent to the right to resort to the courts, or arbitration was made the only mode by which the amount of damages should be ascertained. Liverpool Ins. Co. v. Creighton, 51 Ga. 110. See, also, Cole Mfg. Co. v. Collier, 91 Tenn. 525, 19 S. W. 672, 30 Am. St. Rep. 898. The language of paragraph 8 of the contract is that, if the parties are unable to agree as to the amount due for delay, etc., "the same shall be referred to arbitrators." The question is whether the mere use of the word "shall" makes the submission to arbitration a condition precedent to suit. We do not think so. In the case of Hamil-

ton v. Insurance Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, a stipulation in an insurance policy, where the word "shall" was used in the same connection as it was in this contract, was held not to make the stipulation one which would require arbitration as a condition precedent to an action at law. See, also, in this connection, Cole Mfg. Co. v. Collier, supra; Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216 (1). Parties have a right to appeal to the courts for the assessment of damages to which they may be entitled, growing out of a breach of a contract into which they have entered; and, while the law authorizes them to make a binding agreement that the damage shall be assessed in other ways and by other tribunals, either provided by law, or created by themselves for this purpose, before any one will be deprived of an appeal to the courts it must appear from clear and unequivocal language in the contract that such was the intention of the parties. There may be cases where a party would be liable to an action for damages for a failure to submit the controversy to arbitration upon an agreement to do so, when such an agreement could not be pleaded in bar of the action. Hamilton v. Ins. Co., 137 U. S. 385, 11 Sup. Ct. 133, 34 L. Ed. 708.

4. It is also said that the petition should have alleged that the delay was not due to alterations and additions being made as provided by the contract; but we think this is a matter of defense, and should be made the subject of a plea. The petition was sufficient to call for an answer from both of the principals and from the surety.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 677)

OGBURN et al. v. ELMORE, Ordinary.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. INTOXICATING LIQUORS — LOCAL OPTION LAW—CONTEST—JURISDICTION.

The general local option liquor law (Pol. Code 1895, § 1546) confers upon the superior court as a court jurisdiction to hear and determine a contest of an election held under the provisions of that law. The question whether the General Assembly could constitutionally confer such authority upon the superior court is not made in the present case, though it is settled that such authority may be conferred upon individuals holding judicial office.

2. SAME—SPECIAL PROCEEDING.

The proceeding for contest under the general local option liquor law is not an action at law or a suit in equity. It is a special statutory proceeding conferring power which must be exercised within the limits and by the method prescribed by the statute.

3. SAME.

Such a proceeding cannot be annexed to a suit at law or a case in equity; nor can a suit in equity be converted by amendment into a proceeding for contest under the statute.

4. SAME—PETITION—EQUITABLE RELIEF.

The petition in the present case, properly construed, sets forth a suit in equity, and not a proceeding to contest an election held under the provisions of the general local option liquor law.

5. SAME—AMENDMENT.

It has heretofore been determined that there was no equity in the original petition. While the amendment by which certain allegations in that petition were sought to be stricken ought to have been allowed, as there would have been no equity in the petition with these allegations stricken, a judgment refusing the amendment and dismissing the petition will not be reversed.

(Syllabus by the Court.)

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Action by Ogburn and others against Elmore, ordinary of Macon county. Judgment for defendant, and plaintiffs bring error. Affirmed.

Ogburn and 293 others, in a petition addressed to the superior court of Macon county, made the following allegations: On July 9, 1904, a petition was filed with the ordinary of that county for the purpose of bringing on an election to determine whether such spirituous liquors as are mentioned in Pol. Code, § 1548, should be sold within the limits of Macon county. Elmore, the ordinary, upon the filing of the petition passed an order submitting the question to the qualified voters of the county, as required by law, and further ordered that notice of the election should be published in a named public gazette the requisite number of days. Although the order was passed on July 9th, the notice was not published until July 15th, and appeared only in the issues of a gazette dated July 15th, 22d, and 29th, and only 15 days elapsed from the first to the last insertion; the first notice being published only 24 days before the time fixed for the election. On the day named in the order the polls were opened at the different precincts in the county, and a pretended election was held. On August 9th—the day following the pretended election—the managers at the different precincts returned to the ordinary all the papers required to be returned at a lawful election, and the ordinary made an attempt to consolidate the returns, and, after such consolidation, did declare that a majority of the votes had been cast against the sale, and on the same day did publish for the first time the result of the election as declared by him, and is proceeding to publish the same once a week for four weeks. Unless the ordinary is enjoined from perfecting the result of said illegal election, the effect of the publication will be to make illegal the sale of liquors, at least until the order is reversed or set aside. Petitioners are citizens and taxpayers and interested in the revenue arising from the sale of liquors, and six of them (named) are engaged in the sale of spirituous liquors, and will be deprived by the illegal order of their property, being compelled to close their places of business. Petitioners are without a remedy except in a court of equity and by the state's writ of injunction. The result as declared

by the ordinary is not the true result of the election. A majority of the votes cast at the election was for the sale. At one of the precincts there were 39 votes for the sale and 12 against the sale, and the ordinary willfully and fraudulently rejected this precinct from the consolidation. At another precinct there were 197 votes for the sale and 203 votes against the sale. Notwithstanding the election at this precinct was not held at the proper place, the ordinary, in the consolidation, counted these votes. A large number of registered voters, to wit, 467, were deprived of their right to cast a legal ballot at this precinct on account of the failure to establish and open a legal voting place in the district. At another precinct 51 votes were cast for the sale and 66 votes against the sale. These votes were counted in the consolidation, notwithstanding one of the managers at the precinct was neither a freeholder nor officer authorized by law to hold an election. This was also true of one of the managers at the second precinct above referred to. The petitioners constitute more than one-tenth in number of those who voted at the election, and the petition is filed within 20 days from the day the ordinary declared the result. The prayer was that the judge direct three justices of the peace to recount the ballots at the three precincts above referred to, and report the result of the recount at the next term of the superior court to which the petition was made returnable; that the writ of injunction be directed to the ordinary enjoining and restraining him from any further publication of the result of the election, and from in any manner attempting to enforce or carry into effect any order made by him in reference to declaring the result of the election; and that process issue requiring the ordinary to be and appear at the next term of the superior court to be held for the county to answer the complaint. The petition was verified by the oath of one of the petitioners. Upon being presented to the judge, the same was sanctioned, and ordered filed, and a rule nisi was issued requiring the ordinary to show cause on a named day why the injunction prayed for should not be granted. It was further ordered that three named justices of the peace recount the votes at the three precincts referred to in the petition. Attached to the petition as an exhibit was a copy of the notice of the ordinary of the result of the election as declared by him, from which it appeared that upon a consolidation there were cast 547 votes for the sale and 570 against the sale, and the result of the election was declared as being against the sale. Process was duly issued, and the ordinary acknowledged service of the petition in the usual form of acknowledgments of service upon petitions in equity, following this acknowledgment with the statement that he also acknowledged service "of the filing of said petition for contest" and the order of the judge requiring a recount of the votes at the three precincts, waiving "all further notice of the filing [of] said petition for contest." At the time fixed for a hearing of the injunction the defendant appeared and filed a demurrer and an answer; and, after hearing evidence and considering the pleadings, the court refused to grant the injunction prayed for. This judgment was affirmed by the Supreme Court. Ogburn v. Elmore, 121 Ga. 72, 48 S. E. 702. When the case was called at the term of the court to which the petition was returnable, the plaintiffs offered to amend the petition by striking out the allegations that they were citizens and taxpayers, and interested as such in the revenue arising from the sale of liquors, that some of them were directly interested in the sale, and all references to and the prayer for injunction. The court refused to allow this amendment, and the plaintiffs excepted. The plaintiffs then offered a further amendment, in which it was alleged that the judge on a given day had passed an order requiring three justices of the peace to recount the ballots in the election, and that such recount had been had, and a return made to the next term of the superior court after the institution of the contest, and wherein it was sought to amend the prayer by asking for a recount of the ballots and a return of the result to the court. This amendment was also disallowed, and the plaintiffs excepted. The court then heard the demurrers and dismissed the petition, and to this ruling the plaintiffs also excepted.

Jos. H. Hall, Malcolm D. Jones, and E. L. Heath, for plaintiffs in error. Hall & Wimberly and Greer & Felton, for defendant in error.

COBB, J. The general local option liquor law provides that within 20 days from the day on which the ordinary declares the result of the election one-tenth of those who voted at the election may institute contest proceedings in the superior court in the manner provided in the act; that upon the institution of such a contest the judge shall direct three justices of the peace of the county to recount the ballots on a given day, and report the result to the next term of the superior court, or to the term to which the petition is made returnable, at which term the contest must be heard, if such term is held, and, if not, then at the next regular term of the court; that a continuance or postponement of the contest shall not be had for any other reason than the failure to hold the term to which the contest is returnable; and it is provided that, if any of the parties die, it shall not be necessary to make the legal representatives of the deceased parties to the case. Provision is made for the summoning of witnesses and the hearing of evidence. The finding of the superior court on the contest is referred to as "the judgment of the superior court," and

is declared to be final, unless the case is carried to the Supreme Court for review. Pol. Code 1895, § 1546. Express authority is thus conferred upon the superior court as a court to hear the contest. The authority is not conferred upon judge, but upon the court; and the act expressly declares that the action of the superior court denominated as the judgment may be reviewed by the Supreme Court. What is the status of such a proceeding when instituted in the superior court?

The superior court is a constitutional court, and jurisdiction is vested therein by the Constitution for the hearing and determining of civil and criminal cases. It has original jurisdiction in regard to certain classes of civil cases and appellate jurisdiction in regard to other classes. It has exclusive jurisdiction of certain classes of civil cases as well as of certain criminal cases, and it has concurrent jurisdiction with other courts of civil and criminal cases of given classes. The superior court as created by the Constitution is a court for the determination of civil and criminal cases. The manner in which these cases shall be heard and determined, so far as it is not prescribed in the Constitution, is left to the determination of the General Assembly. The Constitution confers upon the superior court and upon the judge authority to exercise, in certain instances, powers which would ordinarily be exercised by the executive or legislative department of the state, as where the judge is authorized to appoint a notary public who is ex officio a justice of the peace, or where the superior court is authorized to grant charters to corporations of a given character. There is nothing in the Constitution which confers upon the superior court as such the right to hear and determine contests of elections. The question whether there is in the Constitution anything which would prohibit the superior court, as a court, from entertaining jurisdiction of such contests, is not made by the present record, and need not be inquired into. Whatever doubts may have heretofore existed as to the power of the General Assembly to confer upon persons holding judicial offices the authority to hear contests of elections, it seems to be now settled that this power can be conferred upon these individuals, notwithstanding their relation to the judicial department of the government. See Johnson v. Jackson, 99 Ga. 389, 27 S. E. 734; Skrine v. Jackson, 73 Ga. 382. See, also, in this connection, Mayor v. Perry, 114 Ga. 881, 40 S. E. 1004, 57 L. R. A. 230. And when such authority is conferred upon a person holding a judicial position, and there is no provision of law for a review of his decision, it is final. Carter v. Janes, 96 Ga. 280, 23 S. E. 201. Whether in a case where a matter of this character is referred to the decision of the superior court the right of the Supreme Court to review its decision would arise under the Constitution, in the absence of an express provision in the act, need not be decided, for the reason that the act under consideration in express terms provides for such review, and no question was raised as to the validity of this provision. There may be grave doubts as to the expediency of conferring upon persons holding judicial office and upon the courts as such the right to determine those questions which are of political nature, and which could with more propriety be determined by the political department of the government. But if the General Assembly has the authority to confer this power upon such officers or upon the courts, the question of expediency is addressed to their sound discretion and judgment. Treating the act as authorizing the superior court as such to hear the contest, and that provision authorizing a review by the Supreme Court as being a valid exercise of power by the General Assembly, the question which now confronts us is, does this legislation make the proceeding in the superior court partake of the nature of the ordinary case instituted in that court under its well-defined and undoubted constitutional jurisdiction? Civil cases of which the superior courts have original jurisdiction are either cases at law or cases in equity; that is, cases in which the court is called upon to render a judgment according to the principles of the common law, or enter a decree according to the established principles of the court of chancery. It is impossible to classify the proceeding to contest the election either as a case at law or as a case in equity. The proceeding is one in its nature and effect unknown to the jurisdiction of either a common-law or equity court. It is a proceeding peculiar in its nature, of which the superior court would have no jurisdiction in the absence of a statute expressly conferring it. It stands alone and isolated, and in the determination of the questions therein raised the court is called upon to exercise neither its common-law nor its chancery powers, but to exercise simply the power conferred by the statute within the narrow limits therein prescribed. Such being the case, it must be instituted in the manner thus prescribed, and must not be joined or united with any other matter of controversy, even between the same parties, of which the superior court may have jurisdiction either as a court of law or as a court of equity. It cannot be annexed to a law case, nor can it be made a part of an equity case. Equitable relief cannot be sought in the proceeding, and legal relief can only be sought to the extent that the statute authorizes it, and no further.

It now becomes necessary for us to determine what was the character of the proceeding which was instituted by the plaintiffs in the present case. Was it an appeal to the superior court as a court of equity for the exercise by that court of some of its equity powers? Or was it a contest insti-

tuted under the provisions of the general local option liquor law (Pol. Code 1895, § 1546)? The petition has in it some allegations which would be appropriate to a petition for a contest; but in the prayer for a recount the plaintiffs do not ask for that which the law says shall be required in a contest—that is, for a recount of the entire vote cast in the election—the prayer being simply for a recount of the vote cast at three precincts. It is addressed to the superior court. This would be appropriate both in a petition for contest as well as in a petition for equitable relief. The allegations in reference to the conduct of the ordinary, so far as the notice of the election and the consolidation of the returns are concerned, would be appropriate in either proceeding. The statement as to the ratio which the number of the plaintiffs bore to the number of voters at the election would indicate that it was the intention of the plaintiffs to contest the election. That the petitioners are citizens and taxpayers, and that some of them are interested as sellers of liquor, and therefore interested as such in the action of the ordinary, are averments wholly foreign to a contest, but are appropriate to a petition for equitable relief. This is also true in reference to those allegations as to the injunction and the prayer for the granting of the same. The petition prays for process, which is a prayer wholly unnecessary and improper in a petition for a contest. The ordinary, in his acknowledgment of service, seems to have treated the petition as of dual nature, but the construction placed by him upon the petition is, of course, immaterial. The petition was presented to the judge as a petition for equitable relief, and was sanctioned as such. A hearing was had that would be had upon such a petition, and the case was brought to this court and heard upon a fast writ of error in the same manner that an ordinary injunction case would be disposed of. Considering the petition as a whole, as well as the manner in which the same has been dealt with by counsel and by the judge of the superior court, no other conclusion can properly be reached than that it was intended, when filed, as a petition for equitable relief. So construing it, those allegations which would be appropriate only to a petition for a contest were merely surplusage, and, even if not stricken, could be ignored. The judge therefore properly refused to allow the amendment which sought to convert the petition into a proceeding for contest by making allegations in reference to a recount of the ballots which were not made in the original petition. But we think the judge erred in refusing to allow the amendment striking out those portions of the petition relating to the prayer for injunction. In all cases, both at law and in equity, the plaintiff has a right, which is not subject to any limitation, to strike out any averment that he sees proper, and the court must allow the amendment. If this amendment had been allowed, however, the petition would have been left with nothing in it with which the superior court as a court of equity could deal, and therefore could have been stricken from the files either on motion of counsel or by the court on its own motion. The amendment should have been allowed, and then the case dismissed for want of equity in the petition. There was no equity in the petition as originally filed. Ogburn v. Elmore, supra. There would certainly have been no equity in the petition if the amendment had been allowed, and the erroneous disallowance of the amendment will not work a reversal of the judgment.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 533)

CAMPBELL v. STATE.

(Supreme Court of Georgia. Aug. 1, 1905.)

1. EVIDENCE—CONTENTS OF LOST LETTERS.

Where letters have been lost or destroyed, their contents, if material, may be proved by a witness who testifies that he read them, and knows the substance of them, although he cannot state what they contained "word for word."

2. HOMICIDE—EVIDENCE—MALICE.

Where a wife has been indicted for the murder of her husband, on the trial it is competent to prove declarations or acts on her part near the time of the alleged homicide, tending to show ill will or malice on her part toward him, or to prove a line of conduct or gross ill treatment and cruelty on her part toward him, continuing until shortly before the alleged offense. Such evidence is admissible for the purpose of showing motive or malice on the part of the accused, and to rebut the presumed improbability of a wife's murdering her husband.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 293–296.]

3. CRIMINAL LAW—NEW TRIAL.

Immaterial errors which could not have injured the defendant furnish no ground for a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2163.]

4. SAME—EVIDENCE — LETTERS — IDENTIFICATION.

On the trial of a criminal case, although a witness for the state on direct examination testified that he received and saw certain letters written by the defendant, yet where, on cross-examination, he stated that he did not know that the defendant wrote the letters, or that she authorized any one to write them, or that she was advised of their contents, they should have been excluded from evidence on motion. Nor were they rendered admissible because on redirect examination the witness stated that the name of the defendant appeared to be signed to the letters, and that they referred to her husband, and some of them were directed to him and some to the witness, and that they came by mail from a city where she told him that she intended to go, although he did not know that she was in such city, except from the fact that the letters came from that place.

5. SAME.

The refusal to allow counsel to ask a question of a witness to the effect that, if another witness had testified that a bullet entered the skull of the deceased "on the left, about where my finger is," and penetrated to the skull back near the ear, whether the other witness was

mistaken, furnished no ground for a new trial. If the form of question was admissible at all, its materiality is not apparent in the absence of any information in the record as to where counsel in fact placed his finger as an indication of locality.

6. SAME—CIRCUMSTANTIAL EVIDENCE.

To warrant a conviction on circumstantial evidence alone, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused. It is erroneous to charge that the jury would be authorized to find the defendant guilty unless there is some other hypothesis as reasonable as that the defendant committed the act.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1259–1262.]

7. SAME—INSTRUCTIONS.

In the absence of a request to charge on the subject of weighing the testimony of witnesses in cases of conflict, the omission of the judge to do so will furnish no ground for a new trial.

8. SAME—RECEPTION OF VERDICT—NEW TRIAL.

Where the jury returned into court a verdict of guilty, and while it was being received the foreman asked the presiding judge if the jury could find that the defendant be punished for a less term of years than her lifetime, to which he replied that they could not do so under a verdict of guilty, and the verdict was regularly received and recorded without objection or request that the jury be polled, or that they be required to return to their room for further deliberation, this furnished no ground for a new trial on behalf of the defendant, there being nothing to show that the verdict was not regularly agreed upon by the jury.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Nancy Campbell was indicted for murder, and brings error. Reversed.

Nancy Campbell was indicted for the murder of her husband, Alex. Campbell, charged to have been committed on the 14th day of January, 1905. The evidence introduced on the trial was entirely circumstantial. She was convicted, moved for a new trial, and, after refusal of the motion, excepted.

Hendricks, Smith & Christian, for plaintiff in error. W. E. Thomas, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

LUMPKIN, J. (after stating the foregoing facts). 1. A witness was allowed to testify in regard to the contents of certain letters. He stated that they were lost or destroyed, and what was the substance of them, but said he did not know what they contained "word for word." Objection was made to this evidence on the ground that the witness was allowed to testify to a part of the contents of the letters when he could not recollect all of them. There is plainly no merit in this objection.

2. Objection was made to permitting witness to testify that he heard a conversation "along in the fall" between the defendant and the deceased, tending to show that she was mad with him, and was complaining of his conduct. Where a wife was on trial, accused of the murder of her husband, it was competent to show ill will or bad feeling on her part toward him near the time of the alleged homicide, or a course of conduct or series of statements on her part, continuing until shortly before the alleged homicide, for the purpose of showing motive or malice on her part, and to rebut the presumed improbability of a wife's murdering her husband. If the evidence showed only a single instance of complaint of the conduct of the deceased, or a mere appearance of being mad several months before the death of her husband, without more, its admissibility would be very doubtful, and, if admitted, it would be of small importance. But if it is sought to show a line of conduct or course of ill treatment on the part of a wife toward her husband near the time of the homicide, such evidence would be admissible. Roberts v. State, 123 Ga. 146, 51 S. E. 374.

3. The house in which the deceased and his wife lived was burned immediately after the deceased was shot. A trunk was saved from the fire. A witness for the state was asked whether all the bedclothes in the house were burned, and answered: "I don't know. I had a good many gone that I never have seen." Objection was made to this on the ground that it sought to prove the character of the defendant, but the objection was overruled. If erroneous, this ruling was wholly immaterial. As the witness testified: "She was washing for us, and sometimes she kept things there for several days. She done our washing and ironing. I didn't consider that she stole any of it. It is not unusual for washerwomen to keep things over from one week to another." It was equally immaterial that defendant's counsel was not allowed to ask a witness for the state this question: "That was getting along, for negroes, pretty well, for six months, wasn't it?"

4. A witness for the state testified that he had received and seen certain letters written by the defendant, asking that her clothing be sent to her, she having been away from home for several weeks. On the direct examination he spoke of these letters as being from the defendant. But on the cross-examination he said that he did not know that the defendant wrote them, or that she authorized any one to write them, or that she was advised of their contents. On redirect examination he stated that the name of the defendant was signed to the letters; that they referred to her husband, and some of them were directed to him and some to the witness; that they came by mail from Macon, but the witness did not know that the defendant was in Macon, except from the letters; that she told the witness she was going to Macon. Defendant's counsel moved to rule out this evidence, but the motion was overruled. This was error. There was no proof that the defendant wrote the letters, or that they were in her handwriting, or were authorized by her; nor was the mere fact that they contained a request that cloth-

ing be sent to her such an identification as to make them admissible in evidence.

5. A physician was introduced by the state, who testified in regard to the wounds found upon the body of the deceased. On cross-examination he was asked the following question: "Now, doctor, if a man has sworn that the bullet entered on the left, about where my finger is, and penetrated to the skull back toward the ear, he is mistaken, is he not?" It was stated that an affirmative answer was expected. Counsel for the state objected to the evidence, and the court said: "No, I don't think that is competent. You can show where the wound is from the witness, and then it is a question for the jury." It does not appear where counsel who asked the question placed his finger, or what was the location indicated by the language, or whether it corresponded with the place on the skull which had been referred to by the other witness or not. It is therefore impossible for this court to determine whether or not the question was a proper one, or whether any error hurtful to the defendant was committed.

6. The court charged, in effect, that if the jury believed that there was some other hypothesis equally as reasonable as that of guilt—such as that some other person than the defendant committed the offense, or that the deceased took his own life—the jury would not be authorized to find the defendant guilty. At another time he charged as follows: "If it is as reasonable that the deceased committed suicide, under the evidence in this case, as that the defendant shot him, then you would not be authorized to find her guilty; or as reasonable that some other person might have inflicted the wound, under those circumstances, you would not be authority to find her guilty. But if there are none as reasonable as that the defendant committed the act, you would be authorized to find her guilty as charged in the indictment." These charges were erroneous. In criminal cases depending entirely upon circumstantial evidence, in order to convict it is not sufficient that the hypothesis of guilt is the more reasonable; nor is it necessary, to authorize an acquittal, that there must be some other hypothesis equally as reasonable as that of guilt. This would seem to make the question of conviction or acquittal depend on the mere preponderance of reasonableness or probability among several hypotheses, and to require a conviction unless there were some other hypothesis just as reasonable as that of guilt. Such a rule, in a trial for murder, would be to make an issue of life or death turn upon whether different hypotheses were exactly balanced, or whether one preponderated slightly over the other. The true rule is that, "to warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused." Pen. Code 1895, § 984.

7. In the absence of a proper request, there was no error in failing to charge the law in regard to weighing the testimony of witnesses in case of conflict.

8. The jury having returned their verdict into court, while it was being received the foreman arose and asked the presiding judge if the jury could find that the defendant should be punished for a less term of years than her lifetime; to which the judge replied that they could not do so under a verdict of guilty. It was urged that this was error, and that the court should have remanded the jury to their room, with instructions to make up and agree upon a verdict satisfactory to them. It does not appear that any request was made to poll the jury, or to have them returned to their room for further consideration, or that any member of the jury failed to agree to the verdict as rendered. It seems to have been the unanimous verdict of the jury, properly returned, received, and recorded, and the mere inquiry on the part of the foreman as to the extent of the sentence did not furnish any ground for a new trial.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(128 Ga. 589)

SHEFTALL v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. LIBEL — PRIVILEGE — PROTECTION OF RIGHTS.

One may publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights or those of another, provided the publication be not unnecessarily made to others than to those whom the publisher honestly believes are concerned in the subject-matter of the publication.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 141.]

2. SAME.

The statement must be no broader and the publication no wider than the interest to be subserved demands. Care must be taken not only to keep the statement within proper limits as to its subject-matter, but also that it be not made to those who are wholly without interest in the matter.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 141.]

3. SAME—PUBLICATION.

"Where the expressions employed are allowable in all respects, the manner of the publication may take them out of the privilege."

4. SAME.

Mere publication to a stranger will not always destroy the privilege, if it appears that the communication, prima facie privileged, was made in the hearing of third persons not legally interested, and whose presence was merely casual, and not sought by the publisher.

5. SAME—DEFENSE OF PRIVILEGE.

To make the defense of privilege complete in an action of slander or libel, good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons must all appear.

The absence of any one or more of these constituent elements will, as a general rule, prevent the party from relying on the privilege.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 141.]

6. SAME—DISCHARGE OF EMPLOYÉ.

When a railway company discharges a conductor, and it comes to its knowledge that there are still in his possession tickets of the company which were delivered to him while in its employment, which he at that time had a right to sell, and which he refuses or fails to surrender, the company has a right, in order to protect its own interest, to take such precautions as are reasonably necessary to prevent the use of the tickets by persons not entitled to use them.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 142.]

7. SAME.

A publication by a railway company, under such circumstances, to persons whose knowledge is necessary to its protection, is authorized.

8. SAME—PUBLICATION.

The publication, however, if couched in terms which would be per se libelous, or libelous if published under circumstances which would make it of such character, would not be privileged, if it was communicated to persons not concerned with the matter of the outstanding tickets, whether such persons be strangers or other employés of the company.

9. SAME—INSTRUCTIONS.

The charge of the judge did not distinctly submit to the jury the controlling issue in the case—as to whether the publication was unnecessarily made to others than those concerned in the matter of preventing the use of the unsurrendered tickets.

10. SAME—QUESTION FOR JURY.

Whether the writing was a libel under the circumstances under which it was published was to be determined by the jury, after taking into consideration the terms of the writing, the circumstances of the publication, their knowledge of the meaning of the words employed, and the impression the use of such words under such circumstances would make upon the mind of a person of average intelligence; and it was not incumbent upon the plaintiff to prove by witnesses what they understood the writing to mean.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 357.]

11. SAME—EVIDENCE.

The rulings upon evidence were free from error.

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by W. C. Sheftall against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Sheftall brought his action against the railway company for libel. The petition alleged, in substance, as follows: On November 9, 1902, the plaintiff was discharged from the service of the defendant as a passenger conductor because of a mistake as to an order. His application for reinstatement was pending until June 3, 1903, when it was finally refused. When the plaintiff was discharged he had in his possession certain mileage and exchange tickets and sleeping car and parlor car tickets, which were unused, and were good for passage over the defendant's line of railway, and which had been given the plaintiff as a part of a conductor's equipment. The plaintiff was ready at any time to turn over all of these tickets to the defendant, and defendant knew that fact, but failed to call upon him for them. On the contrary, during all of the period from his discharge until his application for reinstatement was refused plaintiff was led to believe that he would be reinstated. Notwithstanding this, the defendant maliciously, and with the intent to injure the plaintiff's good name, credit, peace, and happiness, and to expose him to public hatred, contempt, and ridicule, did compose and publish, by and through certain named officials, a false, scandalous, malicious, and defamatory circular, of which the following is a copy:

"Central of Georgia Railway Company. Passenger Department. Circular No. 3737. Savannah, December 31st, 1902. All Passenger Conductors: File No. —— X. 6111. Bulletin. Tickets lost and scalped: Mileage exchange tickets Form M. E. T. Nos. A-4630 to 4649 inclusive, also Parlor and sleeping-car tickets, Form S. C. Nos. T-6110 to 6199 inclusive. Mr. W. C. Sheftall, formerly employed by this company as conductor on the second division, upon leaving the service of the company, failed to surrender: [here follows a description of the tickets described above]. If any of the tickets described above are presented for transportation, you must decline to honor them; if possible lift tickets and send them to General Passenger Agent, with full particulars. Conductors of trains upon which sleeping-cars are operated will please instruct porters fully in regard to the outstanding sleeping-car tickets. W. A. Winburn, V. P. & T. M., J. C. Haile, G. P. A., F. J. Robinson, A. G. P. A." Copies of this bulletin were sent to many of the passenger conductors of the defendant, about 45 in number, and to some of its division superintendents in the county of Bibb, and to 5 or more conductors within that county. The circular was also posted by the defendant on what are known as its "bulletin boards" in its offices in the city of Macon, Atlanta, Savannah, and at other places where the defendant does business, and was allowed to remain in a public and conspicuous place for a period of 10 or more days. All employés of the defendant were required to examine this bulletin, and the office in which it was placed was open to and frequented by the public. In this manner the libelous matter was published where it was read by divers other persons besides the officers and employés of the defendant. Plaintiff is the Sheftall referred to in the bulletin, and the defendant intended thereby to charge him with having unlawfully disposed of the tickets referred to and appropriated the proceeds to his own use, and with being a dishonest person, defrauding the defendant by unlawfully selling its property which had been intrusted to his care;

and the language of the bulletin was, in effect, a statement and intimation that the tickets had been unlawfully and fraudulently disposed of by the plaintiff, and was, in effect, a charge that he had been guilty of the crime of embezzlement or larceny after trust. The defendant filed an answer, in which it admitted that the circular was prepared by its officers and agents, but denied that it was published maliciously, or with any purpose to injure or defame the plaintiff, and also denied that it was published to the general public; and specially pleaded that the preparation of the bulletin and placing it in the hands of its passenger conductors was a communication which is privileged under the law, it being made by parties interested in a business, and pertaining to a matter connected with their interest, and being made with the bona fide intent to protect the company's interest, to persons interested in the same business, and without any malice either in its preparation or the manner of its publication. The jury returned a verdict for the defendant, and the plaintiff complains of the overruling of his motion for a new trial.

Marion W. Harris, Jno. R. Cooper, Jos. H. Hall, and Claude Estes, for plaintiff in error. Hall & Wimberly, for defendant in error.

COBB, J. 1-5. Statements made with the bona fide intent, on the part of the person making them, to protect his own interest in a matter where it is concerned, are under the law privileged communications. Civ. Code 1895, § 3840. The privilege thus given by the law must not be used as a cloak for venting malice; and if the statement is not made in good faith, in promotion of the object for which the privilege is granted, the party defamed has a right of action. Civ. Code 1895, § 3841. The statement must be no broader than the interest to be subserved demands. The persons to whom the statement is published must be limited to those to whom the interest to be promoted requires that the information should be given. If it be published to strangers, wholly without interest in the matter, the communication loses its privilege. Care must be taken that the words reach only those who are concerned to hear them. If one deliberately adopts a method of communication which gives unnecessary publicity, this is a circumstance to be considered by the jury in determining whether the statement was really made in good faith. Care must also be taken not to embrace within the statement matter wholly unnecessary for the protection of the interest intended to be subserved by the communication. Exaggerated expressions must be avoided, for the privilege may be lost by the use of intemperate and violent language, when the circumstances are such that utterances of such character are clearly uncalled for. Odgers on Libel and Slander (text-book series), t. p. 184. Mr. Townshend says: "We venture, with much hesitation, to suggest the rule as to privilege to be: One may publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights, or to the rights of another, provided the publication be not unnecessarily made to others than to those persons whom the publisher honestly believes can assist him in the protection of his own rights." Townshend on Libel and Slander (4th Ed.) t. p. 301. "Where the expressions employed are allowable in all respects, the manner of the publication may take them out of the privilege." Newell on Slander and Libel (2d Ed.) § 66, p. 477. But mere publication to a stranger will not always destroy the privilege, if it appears that the communication, prima facie privileged, was made in the hearing of third persons not legally interested, when the presence of such persons was merely casual, and not sought by the defendant. Or if it appears that the presence of the third persons at the time of the publication was due to the act or conduct of the party complaining, the privilege would not be lost. Townshend on Libel and Slander (4th Ed.) § 344 et seq.; Odgers on Libel and Slander (text-book series) 184 et seq. But it would be otherwise if the defendant purposely sought an opportunity of making a communication prima facie privileged in the presence of the very persons who were most likely to act upon it to the prejudice of the plaintiff. Newell on Slander and Libel (2d Ed.) § 66, p. 477. To make the defense of privilege complete in an action of libel, good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion and publication in a proper manner and to proper parties only, must appear. The absence of any one or more of these constituent elements will, as a general rule, prevent the party from relying upon the privilege. All of these questions are, however, questions of fact for the jury to determine according to the circumstances of each case under appropriate instructions from the court.

6-8. The defendant company having discharged the plaintiff from its service, when it came to its knowledge that there were in his possession tickets which had been delivered to him, which, while in its employment, he would have had a right to sell, and which he had either failed or refused to surrender, the company had a right, in order to protect its own interest, to take such precautions as were necessary to prevent the use of the tickets by persons not entitled to do so. As the conductors upon the trains were the employés to whom these tickets would be presented in the event they fell into the hands of persons not entitled to them, the company had a right to communicate to these employés the fact that the tickets were outstanding, accompanying this statement with instructions as to what should be done by them whenever the same were presented. The communication, therefore, to the con-

ductors through the medium of the division superintendents, and to any other employés who were apt to be misled by these tickets being presented by persons not entitled to them, such as porters upon sleeping cars, was a communication made by the railroad company for the protection of its interest; and, if couched in language no broader and no stronger in its terms and in its effect than was necessary for this purpose, would be a privileged communication within the meaning of the law, provided, of course, it was made for the sole purpose of protecting the interest of the company, and not for the purpose of injuring the plaintiff. This much was strongly intimated by Mr. Justice Lamar when the case was here upon a former occasion. Central of Georgia Ry. Co. v. Sheftall, 118 Ga. 867, 45 S. E. 687 (2). While the controversy now before us grows out of the same transaction referred to in the case just cited, the present case is not the same case that was here before; for it appears that the present petition was filed after the decision of this court, and embraces not only what was alleged in the petition in the former case, but also what was sought to be inserted therein by amendment and other allegations in reference to publication to persons other than employés at different points along the line of railway. It appears from the petition, as well as from the evidence, that the publication of this bulletin was not limited to those employés whose duties were connected with tickets, but that the bulletin was posted in various places in the offices of the company, where it was not only the right of all employés, but the duty of a large number of employés other than conductors and employés connected with tickets, to read the same; and, in addition to this, there is evidence that at some of the places, while the public was not expected to come to the offices where the bulletin was posted, still members of the public were allowed there, and some persons not connected with the company in any way did actually read the bulletin. If the presence in those places of persons not connected with the company was merely casual, and from all the circumstances as to the manner and the place in which the bulletin was posted it was apparent that the company did not intend the publication for the public, the fact that one or more persons casually passing through the office had seen the bulletin would not alone be sufficient to destroy the privilege. It would be a question for the jury whether the business of the company at the place the bulletin was posted was carried on in such a way that the company must have known, at the time the bulletin was posted, that persons other than employés would probably read the same. But the company knew that the bulletin in this place would be read by a large number of employés who had no concern whatever with the matter to which it referred, and the mere fact that the persons who saw and read it were employés does not make the communication privileged, unless it was necessary for the protection of the company that these employés should know of the matter. If the company had reason to believe that its interests were imperiled by the failure or refusal of the plaintiff to deliver these tickets, it had the right to communicate to its employés connected with that department of the work where the tickets would be used the facts in relation to them, with appropriate instructions as to what should be done in case they were presented. But it was in no way necessary that these facts should be communicated to the large body of its employés, without reference to whether they had any connection with this department of its business. If, in its system of business, its bulletins are so posted as to be read by all of its employés, without reference to whether they have any connection with the matter stated in the bulletin, the company must take care that the bulletins are couched in such terms that they will not be defamatory of any person. The company was privileged through its bulletin to submit to its conductors, division superintendents, and even porters of sleeping cars, statements and instructions on the subject of the tickets; and, if it made a mistake honestly and in good faith, the person injured would be remediless. But if it spoke to the large body of its employés who had no concern in the matter, and if the bulletin was so worded as to be libelous in its terms, or libelous under circumstances which were probably known to those who read, the company must be satisfied to rest under the same liability that any other would rest who frames and publishes a libel. It was not at all necessary that the name of Sheftall should have been embraced in the bulletin. Neither was it necessary that the expression "tickets lost and scalped" should have been used. The purpose of the bulletin could have been fully accomplished by omitting those words and all reference to Sheftall, giving merely the numbers of the tickets and the instructions with reference thereto. The company had the right, however, to use the name of Sheftall, if it had reasonable grounds to suspect that he was misappropriating, or would misappropriate, the tickets, and to use words that would convey that idea in communicating the facts to employés who were concerned with the tickets. But if, in communicating the facts to other employés, it used the name of Sheftall in a connection which would carry the implication that he had been guilty of wrongdoing, it has no right to claim the privilege of the law.

9. The court in the opening of its charge stated to the jury the substance of each of the allegations in the petition, following such statement with the defendant's reply thereto; but there was no distinct, clear, and unequivocal submission to the jury, in the main body of the charge, as to the effect upon the

claim of privilege of the fact that the defendant unnecessarily published the communications to those who had no concern with the subject-matter thereof. This was the gist of the plaintiff's case. He could not hope to recover under the evidence if the publication was only to the conductors and to other employés connected with the ticket department of the company. His right to recover, if any exists at all, is upon the claim that this communication, privileged as to one class of employés, was published to another class of employés, when the right to publish to them was not embraced within the privilege of the law, or that it was published to others than employés, and that the publication was either intentional, or it was due to negligence in the manner of publication to proper employés. We think this was such a vital issue in the case that the plaintiff was entitled to a clear and specific instruction on the subject, even though no written request was made therefor.

10. When the case was here before it was held that it was a question for the jury to determine whether the words complained of were really libelous under the circumstances, and that those who read understood them in the sense alleged. 118 Ga. 867, 45 S. E. 687. See, also, Holmes v. Clisby, 118 Ga. 820, 45 S. E. 684. It was not intended, in the language used by the learned justice who wrote the opinion in the case, to lay down the rule that it was a part of the plaintiff's case to show, as a matter of affirmative proof, what was understood by each person who read the bulletin; but it was intended to mean that the jury should be left to determine whether the language of the publication, under the circumstances under which it was published, would convey to the mind of an ordinary person—that is, a person of average intelligence—that Sheftall was charged with an intentional and willful misappropriation of the property of his former employer, and that he was for that reason guilty of a crime against the laws of the state. It may be that many persons would read the bulletin and be able to swear that no such impression was made upon their minds, and it may be that many other persons could swear to the contrary. But this was a question to be determined not by witnesses, but by the jury, and it was for them to say whether the writing, under all the circumstances, was such as inevitably to convey to the mind of a man of average intelligence the impression that Sheftall had misappropriated the property of his employer. If the jury were to reach this conclusion, taking into consideration their knowledge of the meaning of the words, the impression they carried, and the circumstances under which they were used, it was not incumbent upon the plaintiff to prove any more than that some person other than those who were entitled to read the bulletin actually read it. Any persons who read the bulletin could be called on as witnesses to testify as to the impression made upon their minds as a result of the reading, to aid the jury in determining the question of libel or no libel, but their evidence would not be conclusively binding on the jury as to the character of the writing and its true meaning under the circumstances under which it was published.

11. The motion for a new trial complains of various parts of the charge, but we do not deem it necessary to refer to these assignments of error in detail. Some of them were not at all in accord with the views above expressed, and there were some inaccuracies in the charge which will be apparent to the judge on another trial when what is now said is read in connection with what was said by Mr. Justice Lamar when the case was here before. The motion also contained complaints of certain rulings upon the admission of evidence. The plaintiff sought to prove the effect of the publication upon members of his family when the matter was discussed at home. We think this evidence was properly rejected. If the writing was a libel, it could have no other effect than an injurious one upon the feelings of any one interested in the plaintiff; and human experience, and not direct testimony, was all that was necessary to convey this to the jury. It was also sought to prove by the plaintiff that the libel had injuriously affected him with his friends, and that their conduct had changed towards him. This was also properly rejected, for the same human experience which would enable the jury to say that a man's family would be harassed and distressed by the publication would enable them to ascertain that it would have the effect to estrange his friends.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 692)

WESTERN & A. R. CO. v. BRANAN.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. APPEAL — REVIEW — OBJECTIONS TO EVIDENCE.

To properly bring under review the correctness of a ruling as to the admissibility of evidence which a trial judge declines to exclude, the complaining party must make it appear not only that the evidence was admitted over his objection, but also what grounds of objection he urged at the time the evidence was offered.

2. WAREHOUSEMAN—NEGLIGENCE — IMPROPER STORAGE OF GOODS—EVIDENCE.

In an action to recover damages of a warehouseman because of an alleged failure on his part to comply with the duties imposed upon him by law with respect to the proper storage and care of goods intrusted to his care, the plaintiff must recover, if at all, upon proof of the specific acts of negligence which he sets forth in his pleadings; and the trial judge should not, in his charge to the jury, give the plaintiff the benefit of any theory of recovery not covered by the allegations of his petition.

3. SAME—ISSUES—INSTRUCTIONS.

If the plaintiff fails to sustain by evidence a charge of negligence made against the defendant, the judge should eliminate this feature of

the case when instructing the jury as to the issues upon which they are called to pass, and not leave them to determine whether the defendant was negligent in the respect alleged but not proved.

4. SAME—INSTRUCTIONS.

In so far as the written requests to charge presented by the defendant in this case were pertinent and in accord with the law controlling the questions at issue, they were substantially covered by the charge which the judge gave of his own motion.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Charles I. Branan against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

In the latter part of the year 1899 Charles I. Branan entered into an arrangement with the Western & Atlantic Railroad Company whereby it was to transport over its line of railway a quantity of dried fruit which he had purchased in California, and upon the arrival of the fruit in Atlanta to store the same for a few months in a warehouse it had leased in what was known as the "Austell Building." During the month of October five car loads of dried peaches were transported to Atlanta, and stored in the company's warehouse, wherein the fruit remained till the spring of 1900. In the latter part of February Branan went to the warehouse to get samples of the peaches, with the view to placing the fruit on sale in the market. He found the fruit damaged, some of it being dried up and shriveled, and part of it "gummy" and caked together. Between March and June so much of the fruit as was marketable was sold, the price received being far below that which it would have brought if in first-class condition. To recover the loss sustained by reason of the deterioration in the quality of the peaches, Branan brought suit against the railway company, basing his right of recovery upon the following allegations of fact: As an inducement to the plaintiff to have the fruit transported over its line of railway, the company represented that it could store the fruit in Atlanta, where it had ample, safe, and proper warehouse facilities. Upon the arrival of the fruit, it was examined by the plaintiff, and found to be in a good and merchantable condition, and without defect. The warehouse in which the company stored the peaches was not a suitable place for the storage of fruit, in that it was situated in an office building, directly over the engine room, in which a high degree of heat was maintained, the temperature being sometimes as high as 114 degrees. As a result of this excessive heat maintained in the basement, which was communicated to and through the floor of the wareroom at the place where the peaches were stored, they were heated and cooked and caused to sweat and expand. Large pipes, used in conveying heat to the upper floors of this office building, ran through the wareroom and along its walls, increasing the temperature of heat caused by the fires maintained in the basement, and rendering the storeroom an improper and unsafe wareroom for the storage of dried fruit. The peaches, which were packed in sacks, were negligently piled in great masses, sack upon sack, without any opportunity for the air to penetrate them; and the peaches in the sacks lying on top of the piles were dried almost to a crisp, while the peaches in the sacks placed on the inside and in the middle of these piles seemed to be melted and run together in cakes and in lumps. To in this manner store the fruit was especially negligent in view of the excessive heat maintained in the storeroom. The defendant was aware of the character of the storeroom, and knew of the heating apparatus, which rendered it a dangerous and unsafe wareroom for the storage of fruit, whereas the plaintiff was ignorant of the surrounding conditions. The company, after holding itself out as a warehouseman having a place reasonably well suited for the storage of such fruit, negligently failed to furnish a proper storeroom, and placed the fruit in a wareroom which was unsafe and ruinous to the fruit. The damage to it would not have resulted but for the superheated condition of the warehouse, for otherwise it would have kept fresh and sound, and the defendant company was negligent in storing the fruit there, and, after receiving it, should either have kept the wareroom at a proper temperature or have notified the plaintiff of the probable damage, which it failed and neglected to do. The loss he sustained by reason of the negligence aforesaid amounted to the sum of $7,578.73, and resulted from the lack of ordinary care on the part of the defendant company in handling the peaches stored with it. The jury returned a verdict in favor of the plaintiff for the sum of $3,629.74. The company made a motion for a new trial, which was overruled, and it excepted.

Payne & Tye, for plaintiff in error. Mayson, Hill & McGill, for defendant in error.

EVANS, J. (after stating the facts). 1. Error is assigned upon the admission in evidence, over the defendant's objection, of certain receipts issued to the plaintiff by the defendant company as a warehouseman, and also five "expense bills" issued to him by the Nashville, Chattanooga & St. Louis Railway, showing the weight of the peaches. What objection was urged against the introduction of this evidence at the time it was offered does not appear, and for this reason the assignment of error cannot be considered. Powell v. Railway Co., 121 Ga. 803, 49 S. E. 759.

2. Exception is taken to a charge of the court in which the judge submitted to the jury, as one of the contentions of the plaintiff, the question whether or not the company was negligent in failing "to admit air

into the warehouse, in view of its heated condition, in a proper way, and at proper times and periods." The complaint made of this charge is that there was no allegation in the petition upon which the same could be predicated. The plaintiff did not in point of fact so contend, and the charge presented to the jury an additional ground of negligence in no way claimed by the plaintiff himself. The assignment of error upon this instruction is well taken. The allegations of negligence upon which the plaintiff based his right of recovery were (1) that the company undertook to store his peaches in a wareroom which it knew was not suitable, because of the heat generated in the basement below and communicated to and through the warehouse; and (2) that the peaches were piled in huge masses, sack upon sack, so that the air could not penetrate them. The plaintiff confined himself to an effort to prove the first of these two charges of negligence by showing that the wareroom was so situated, relatively to the engine room, that a man of ordinary care and observation should have known that the excessive heat generated in the basement rendered the wareroom an improper place for the storage of dried fruit, inasmuch as the high temperature would inevitably cause the peaches to be heated and cooked on the outer surfaces of the piles, and to sweat and expand in the middle of the piles, where the air did not circulate. The evidence disclosed incidentally that there were doors and numerous windows upon two sides of the wareroom, but no attempt was made to show whether the company did or did not use the means at its command to ventilate the warehouse, nor was there any testimony to warrant the conclusion that, had proper precautions in this respect been taken, the temperature therein could have been regulated and reduced to a normal degree of heat, notwithstanding its alleged ill-chosen location and want of adaptability to the use to which it was put. The instruction complained of gave to the plaintiff the benefit of a theory which he did not plead nor undertake to prove. As to whether the heat generated in the basement of the building was such as to make the wareroom an unsafe and unsuitable place for the storage of hay, grain, dried fruit, and other commodities which would suffer injury if subjected to an excessive temperature, the testimony was painfully conflicting; and the jury may have found that, whatever might be the truth in this regard, the company had not shown any effort to obviate loss to its patrons by at least attempting to maintain a normal temperature in the wareroom by means at its command to insure proper ventilation.

3. The presiding judge also submitted to the jury the question whether or not the defendant company "was further negligent in the manner in which it stored the peaches, in that they were piled in great masses, sacks upon sacks, without any opportunity for the air to penetrate them." As is pointed out by counsel for the plaintiff in error, there was no evidence to sustain the charge of negligence made against the company with reference to the manner in which the sacks of peaches were piled. The testimony showed that the peaches were piled in the usual way, and several of the plaintiff's witnesses, who professed to be experts on the subject of handling dried fruits, expressed the opinion that peaches so piled in bulk would keep better than they would if the sacks were kept apart, and the air permitted to circulate freely among them, as, when so stored, the peaches would dry out and lose in weight. The plaintiff himself testified that there was no particular way for storing peaches of this kind; that the fruit would keep either way; and, in his opinion, the manner of piling had very little to do with the matter, though when piled in rows the sacks would absorb the moisture in the air, and the fruit would be pliable and more salable. He did not pretend that the manner in which his peaches were piled caused any injury to them, but attributed their unmarketable condition solely to the high temperature which he claimed was produced in the warehouse because of the heat maintained in the engine room, immediately above which the major portion of the peaches were stored.

4. The court was requested by defendant's counsel to charge the jury: "If you believe from the evidence that the peaches stored by the plaintiff in the warehouse were injured by reason of the steam pipes running through and on the walls of said warehouse, but that said pipes were there at the time the plaintiff was storing his fruit, and if you further believe the condition of the pipes was perfectly apparent and entirely manifest to any one visiting said warehouse, then I charge you that the plaintiff is presumed in law to have acquiesced in such condition of affairs, and is bound by all the consequences naturally flowing from the ordinary use of these steam pipes." The court properly declined to give this request to charge. It was framed on the theory that the proposition therein stated would be true independently of whether Branan had ever visited the warehouse, or had any opportunity to note surrounding conditions. He certainly could not be presumed to have acquiesced in the condition of affairs unless he either knew, or had an opportunity to know, of the presence of these pipes, and the use to which they were put. Whether his opportunities for becoming acquainted with the premises were such as to charge him with notice that the pipes rendered the wareroom an unsuitable place for the storage of his fruit was peculiarly a question for the jury to determine. Furthermore, the request to charge ignored the plaintiff's contention that the excessive temperature was caused principally by the undue heating of the floor of the

wareroom by the fires maintained in the engine room directly underneath, and assumed that the damage to the fruit was caused solely by the heat given off by the steam pipes which passed through the storeroom. The evidence did not support any such theory of the case. The testimony introduced by the plaintiff was to the effect that the damage to the peaches was caused principally by piling them on the superheated floor directly above the engine room, and that the steam pipes were only a minor cause of the damage, inasmuch as the heat they gave off increased the temperature in an appreciable degree. That they of themselves were sufficient to produce the damage, and to put the plaintiff on notice that the warehouse was not adapted to the storage of dried fruit, does not appear, and the jury would not have been justified in so finding.

The court also declined to give in charge two other written requests presented by the defendant—one to the effect that a warehouseman is not an insurer, and the other embracing an instruction that if the loss in the sale of the peaches was due, not to any depreciation in quality, but to the fact that Branan had purchased peaches in such large quantities as to glut the market and cause a decline in the price of dried fruits, then the company could not be held accountable for such loss. These requests were substantially covered by the charge of the court.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 712)

E. E. LOWE CO. v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Aug. 3, 1905.)

JUSTICE OF THE PEACE—PROCEDURE—ACTION AGAINST CARRIER.

Section 4130 of the Civil Code of 1895, which provides the mode of proof and defense in a suit in a justice's court upon an open account, does not apply to an action for the loss of or damage to personal property by a common carrier, even though the cause of action is set out in detail in a statement attached to the summons and verified by the affidavit of the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the E. E. Lowe Company against the Central of Georgia Railway Company. Judgment for plaintiff before a justice was reversed on certiorari, and plaintiff brings error. Affirmed.

Moore & Pomeroy, for plaintiff in error. John B. Hutcheson, for defendant in error.

FISH, P. J. The E. E. Lowe Company brought suit against the Central of Georgia Railway Company in a justice's court upon an "account" for the loss of a hay press and certain freight overcharges. A copy of the statement of "account" was attached to the summons, and verified by the affidavit of E. E. Lowe. The item in reference to the hay press was as follows:

"September 23, 1903, 1 hay-press shipped to A. Faber.
Freight prepaid, 9/16, 4.70
Sharpes, Fla. 29.70."

Annexed to the statement was the following affidavit:

"Personally appeared before me E. E Lowe, president of the E. E. Lowe Co., who deposes and says the above account is correct, true, and unpaid. This is the 16th day of March, 1904. E. E. Lowe. J. A. Stauffacher, N. P. Fulton Co., Ga."

On the day of the trial the plaintiff, without offering evidence, "asked the court for a judgment, and rested the case as made out by the pleadings in said case." The defendant had filed no written defense under oath, and the justice rendered a judgment as requested. The defendant objected to this ruling of the magistrate, for the reason that the affidavit was not sufficient, as it had no jurat, and did not recite that it was sworn to before any one, and, after the judgment was rendered, carried the case to the superior court by writ of certiorari, still complaining of the insufficiency of the affidavit, and further alleging that section 4130 of the Civil Code of 1895, which authorizes a judgment to be taken in a justice's court in a suit upon an open account supported by the written affidavit of the plaintiff without further proof, in the absence of a counter affidavit by the defendant, does not apply to the present case. The certiorari was sustained, and the case sent back to the magistrate for a new trial. To this ruling the plaintiff excepted.

It is not necessary to decide whether or not the affidavit was valid; for, granting that it was, the ruling of the judge of the superior court in sustaining the certiorari was still correct, for the reason that this was not a suit upon an "open account" within the meaning of that term as used in Civ. Code 1895, § 4130. Whether or not a suit for overcharges on freight is a suit upon an "open account" within the meaning of the statute referred to, a claim for the loss of a hay press certainly is not, it having been held in the case of Caudell v. Southern Railway Co., 119 Ga. 21, 45 S. E. 712, that "section 4130 of the Civil Code, which provides the mode of proof and defense in a suit in a justice's court upon an open account, does not apply to an 'action for damages and loss or destruction of goods' by a common carrier, although an itemized list of the articles and their value is attached to the summons and sworn to as correct." Counsel for plaintiff, however, contend that, granting that the item in reference to the hay press was not clearly a proper item in a suit upon an open account, yet it "could have been cleared had defendant demanded a bill of particulars," and this it should have done.

But in our opinion it was not incumbent upon the defendant to ask for a bill of particulars. The statement attached to the summons was itself in the nature of a bill of particulars, and the item of the hay press, as above set out, in connection with the caption, "Central of Georgia Railway Co., Account E. E. Lowe Co.," was on its face a claim against the railway company for the loss or damage to the articles and the freight charges which had been paid for their transportation. We therefore hold that the judgment of the superior court in setting aside the judgment and remanding the case for a new trial was not error, the judgment of the magistrate not having been authorized by the evidence.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, J., disqualified.

(123 Ga. 618)

BENNETT et al. v. SOUTHERN PINE CO. et al.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. TAXATION—TAX DEED—TITLE ACQUIRED—REDEMPTION.

While under the law of this state, where property is sold for taxes, the officer making the sale executes a deed to the purchaser before the time for redemption has lapsed, yet the title acquired by such purchaser is not a perfect fee-simple title, but an inchoate or defeasible title, subject to the right of the owner to redeem within the time prescribed by the statute.

2. SAME—NOTICE—RECORD.

Although such a tax deed may be recorded, and on its face may contain no reference to the right of redemption, the public law of this state gives notice to all persons dealing with such title of the existence of that right, and the nature and character of the title conveyed by the deed.

3. SAME—UNPAID TAXES—WILD LANDS—EXECUTION.

Under the act of 1874 (Acts 1874, p. 106), an execution issued by the Comptroller General against a lot of wild land for unpaid taxes due upon it was somewhat in the nature of a proceeding in rem.

4. SAME — REDEMPTION — DEED FROM PURCHASER.

Where a lot of wild land was sold and the deed made to the purchaser and placed upon record, but during the time allowed for redemption the owner paid to the purchaser the proper amount, and redeemed the land, and received the tax deed into his possession, but took no reconveyance, and after the lapse of the redemption period the purchaser conveyed the land to a third person for value, the latter would not acquire a title superior to that of the owner who had in fact redeemed, although he bought without notice that the redemption had taken place.

(Syllabus by the Court.)

Error from Superior Court, Ware County; T. A. Parker, Judge.

Action by the Southern Pine Company and J. L. Crawley against B. A. and C. O. Bennett. Judgment for plaintiffs, and defendants bring error. Reversed.

The Southern Pine Company of Georgia and J. L. Crawley filed their equitable petition against B. A. and C. O. Bennett, seeking to obtain an injunction against the defendants to prevent them from cutting timber, for the purpose of making cross-ties, on certain land. The corporation claimed to be the owner, and Crawley to have a lease to the land from it for the purpose of cutting cross-ties, and also for making turpentine. The chain of title under which the plaintiffs claimed was as follows: A fi. fa. issued by the Comptroller General against the lot of land as wild land for state and county taxes due thereon for the year 1875, with costs, dated October 16, 1877, together with a levy of the sheriff, dated April 2, 1878, and a memorandum showing a sale to R. B. Reppard June 4, 1878; a deed from the sheriff to Reppard, dated June 5, 1878; a deed from Reppard to the Reppard Land, Lumber & Sawmill Company, dated July 18, 1883, including this and other lands, for a valuable consideration; a decree from the superior court of Chatham county in the case of Talmadge et al., trustees, against the Reppard Land, Lumber & Sawmill Company, ordering a sale of the land and other property of the defendant; a report of the commissioners, and a judgment confirming the sale; a deed from the commissioners to Talmadge; a deed from the defendant company to Talmadge for the purpose of confirming and approving the sale and perfecting the title; a deed from Talmadge to the plaintiff company, and leases from it to Crawley.

The defendants denied that the plaintiff company was the owner of the land, or that the plaintiffs were entitled to the injunction. They set up the following defense: The land was granted by the state to Hiram Sears in 1848, and was sold and conveyed by him to Dennis Paulk in 1872. Paulk regularly made his tax returns of the land; but through an error of the receiver of tax returns the lot was sold by the sheriff in 1878 as being in default, and was bid in by Reppard for $14. The deed made by the sheriff was duly executed, delivered, and recorded. Soon thereafter Paulk, having heard of the sale, proceeded within the time allowed by law to redeem the land, and for that purpose paid to Reppard the amount of his bid, together with interest and costs. Reppard thereupon delivered to him the sheriff's deed, but neglected to make any transfer thereof in writing. Paulk held the deed during his lifetime, claimed the lot as his property, returned it for taxes, and paid them. He died in 1899, leaving his wife and daughters as his sole heirs. The daughter died, leaving her husband surviving her. The land was conveyed by deeds from the widow Paulk as to one half interest, and by the husband of the deceased daughter as her executor or administrator as to the other half interest, under an order from the ordinary to the Downing Company. The defendants acquired the right to cut the timber under that company. Paulk claimed

the land continuously, and the representatives of his estate likewise did so, and several years ago, for a period of three years or more, certain persons boxed the timber on the lot and worked on the land for turpentine purposes openly and notoriously, and without any interference, acting under the authority of Paulk.

On motion the court struck that portion of the answer setting up the defense just stated. This ruling is assigned as error. After the introduction of evidence the court directed a verdict in favor of the plaintiffs. The defendants moved for a new trial, which was refused, and they excepted.

J. L. Sweat, for plaintiffs in error. John C. McDonald, for defendants in error.

LUMPKIN, J. (after stating the facts). Certain allegations of the defendants' answer were stricken on motion. One of them was that the owner of the land in dispute had regularly returned and paid taxes on it, "but that through an error of the receiver of tax returns said lot was sold in the year 1878, as being in default." There is no law, and it is hardly conceivable that there could be one, which would authorize a sale of land for taxes, if they had been regularly returned and the taxes paid. Such a sale would be without authority, and would convey no title. This particular allegation, however, is not referred to in the briefs. The argument before this court rested on one question: If, while unoccupied, wild land was properly sold for taxes and the deed recorded, and after the lapse of the period for redemption the purchaser conveyed the land to another for value and without notice of the redemption having taken place, but in fact, within the time allowed by law for that purpose, the owner had redeemed it, but took no reconveyance from the purchaser, merely receiving possession of the tax deed from him, would the title of the vendee of the purchaser at the tax sale, or that of the original owner or his heirs (he having died), prevail? The presiding judge struck a portion of the answer setting up such redemption, on the ground that it did not appear that the subsequent vendee of the purchaser at the tax sale, or those holding under him, had any notice of the redemption. The plaintiffs claimed by regular conveyances under the purchaser at the tax sale. The defendants claimed by conveyances under the heirs of the original owner of the land.

Tax sales are creatures of statute. When, how, and under what circumstances they are to be made, and their effect when made, are matters depending upon the statute governing them. The decisions of the courts of other states throw more or less light on the case, according to whether such states have similar or dissimilar statutes. In many states a deed is not made to the purchaser at a tax sale until the time for redemption has elapsed, and is then made in such a manner, or upon such procedure, as the statute prescribes. In some, certificates of sale are issued to the purchaser, to be held until the time allowed for redemption has expired, and, if no redemption is made, a deed is then executed. 2 Cooley on Taxation (3d Ed.) 982 et seq. In Georgia a deed is made at once by the selling officer, but the owner may redeem within the time fixed by law. In regard to the right of redemption from tax sales it has been said: "The statutes which give the right are to be regarded favorably and construed with liberality. * * * But though the statutes are to be construed favorably, yet, as the right depends upon them, the person seeking to redeem must bring himself within their provisions." 2 Cooley on Taxation (3d Ed.) 1023, 1025. As between the purchaser at a tax sale and the person whose property is sold, the redemption extinguishes the title, and the land is restored as it was before the sale. 2 Cooley on Taxation (3d Ed.) 1051, 1052; Black on Tax Titles (2d Ed.) §§ 377, 448. If the purchaser at a tax sale, within the time allowed for redemption and for the consideration of the redemption money, makes to the owner a deed of reconveyance, it creates no new title, but simply restores the property to the same position in which it was before the sale. See authorities just cited, and also Ivey v. Griffin, 94 Ga. 689, 21 S. E. 709; Morrison v. Whiteside, 116 Ga. 459, 42 S. E. 729. In Bourquin v. Bourquin, 120 Ga. 115, 119, 120, 47 S. E. 639, Mr. Justice Lamar, after referring to the effect of a tender of payment upon a security for a debt, says: "The same principle is applicable to a tender made by the owner for the purpose of redeeming from a tax sale, under Pol. Code 1895, § 909. Thereafter the purchaser's inchoate, qualified, or defeasible estate terminates." In McCalla v. Clark, 55 Ga. 53, it was said: "Tender of the debt on the day it becomes due terminates the creditor's right to retain possession of a pledge held as collateral security; and it is an immediate conversion for him to refuse the tender and retain the pledge on a claim of title based upon an alleged forfeiture for delay to make payment." In Legro v. Lord, 10 Me. 161, it was said: "A legal tender within the time prescribed by law of the amount for which an equity of redemption is held under an execution sale is sufficient to revest the property without a deed of conveyance to the purchaser." In Burns v. Ledbetter, 54 Tex. 374, it was said: "A tender to the purchaser at tax sale, under the third section of the act of June 2, 1873, concerning taxes, of the full amount of the purchase money paid for land at such sale, within twelve months, with one year's interest on the same, at the rate of twenty-five per cent. per annum, worked ipso facto an immediate redemption of the land by the original owner, and left the purchaser at tax sale without title." In the report of this case it appears that a deed had been

made to the purchaser. See page 377. See, also, Bender v. Bean (Ark.) 12 S. W. 180.

Pol. Code 1895, § 913, declares: "The deed or bill of sale made by such officer shall be just as valid to the purchaser as if made under the ordinary process of law issuing from the superior court." Under this section recitals in such a deed in regard to the conduct of the selling officer, and of the levying officer, with respect to advertisement and the like, are presumptively correct. Livingston v. Hudson, 85 Ga. 835, 12 S. E. 17. And it has been held that "a purchaser at a tax sale duly made under legal levy, who is neither implicated in nor aware of any fraud contemplated by the selling officer, is not affected thereby." Boyd v. Wilson, 86 Ga. 379, 12 S. E. 744, 13 S. E. 428. But this section of the Code is to be construed with other laws in reference to tax sales and redemptions. It does not confer an absolute and perfect title at once upon the purchaser, but a title subject to be defeated by the exercise of the right of redemption. The owners of wild lands sold for taxes were allowed the privilege of redeeming them at any time within one year from the date of sale by the act of 1874. Acts 1874, p. 106. This time was extended to two years by the act of 1881. Acts 1880–81, p. 46; Pol. Code 1895, § 910. The title obtained by the purchaser at a tax sale has been sometimes referred to as an inchoate, qualified, or defeasible estate. Bourquin v. Bourquin, 120 Ga. 120, 47 S. E. 639. He is not entitled to possession, or to rents, issues, and profits, during the time allowed for redemption. Jones v. Johnson, 60 Ga. 260; Elrod v. Groves, 116 Ga. 468, 42 S. E. 731. The nature of the title which he has may be compared to an estate which will ripen upon a condition, or rather, perhaps, to one which will be defeated upon the happening of a condition. In either event it is not a perfect title, but one subject to the right of redemption. Under the act of 1874 it was not required that the execution issued by the Comptroller General for unpaid taxes on wild lands should recite in it that the lands had been unreturned and that the taxes thereon had not been paid. Greer v. Fergerson, 104 Ga. 552, 30 S. E. 943; Bentley v. Shingler, 111 Ga. 780, 36 S. E. 935. Under the act of 1881 (Pol. Code 1895, § 821), amended by the act of 1882 (Acts 1882–83, p. 47), an execution issued by a tax collector must recite that the lot against which the execution issued was not returned for taxation. Southern Pine Co. v. Kirkland, 112 Ga. 216, 37 S. E. 362; Leonard v. Pilkinton, 99 Ga. 738, 27 S. E. 753.

It is contended that, under the registry laws of this state, the record of the tax deed gave notice of a title in the purchaser; that no reconveyance having been made by him, and nothing appearing of record to show that redemption had taken place, one who bought from him without notice of a redemption would acquire a perfect title; and that to defeat the title of such a vendee it was necessary to have alleged and proved notice. Section 3618 of the Civil Code of 1895 is as follows: "Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land lies. The record may be made at any time, but such deed loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first." It is true that a purchaser in good faith and without notice acquires title as against a prior unrecorded conveyance by the same owner, and this protection extends also to a purchaser of land at a judicial sale. Ousley v. Bailey, 111 Ga. 783, 36 S. E. 750; Goodwynne v. Bellerby, 116 Ga. 901, 43 S. E. 275; Harvey v. Sanders, 107 Ga. 740, 33 S. E. 713. But all purchasers are charged with a knowledge of the public laws of this state, and that under them a tax deed does not convey a perfect title upon its execution, but a title subject to be defeated by redemption, or one which can only ripen by a failure to redeem. The record of a tax deed gives notice when the sale took place, and, read in the light of the law of this state, one who takes a conveyance from the purchaser at such a sale is put on notice, just as if the public law were written in the face of the deed. If a deed were placed on record which contained on its face a statement that it did not create a perfect title in the grantee, but only an inchoate, imperfect title, which gave him neither right of possession nor use during a specified time, and would never become a perfect title if a certain sum were paid within the time for redeeming, all persons dealing with the grantee would be put upon notice of its conditional and defeasible character, and would take a conveyance from him subject thereto. Suppose that a deed were made to secure a debt, and on its face it declared that it conveyed title only for that purpose, and that, if the debt should be paid within a time named, it would cease to be of force or would be defeated, would not any person who took under the grantee take subject to the condition, and be put upon notice thereof, and inquiry as to whether the debt had been paid or the note secured thereunder surrendered, if past due? Some of the language in the decision of Cumming v. McDade, 118 Ga. 612, 616, 45 S. E. 479, might appear to indicate that a taker of a title made to secure a debt might stand in the position of an innocent purchaser. But neither the opinion in that case, nor the record of file in this court, shows that there was anything on the face of the deed then under consideration to show that it was made to secure a debt, rather than that it was a deed of bargain and sale. If the law writes into the face of a record that a deed is conditional or defeasible, all who deal with it are as much put upon notice as if it were expressed by the words of the deed.

It is also contended that those holding un-

der the purchaser at the tax sale in this case were protected on the ground that they were innocent purchasers without notice of an equity. Dill v. Hamilton, 118 Ga. 208, 44 S. E. 989; Johnson v. Equitable Securities Co., 114 Ga. 604, 40 S. E. 787, 56 L. R. A. 933; Civ. Code 1895, § 3938. What has been said above in regard to the notice given by the record of the tax deed applies with equal force to this contention. One buying the land from the grantee in that deed was not in the position of a purchaser who acts in reliance on a recorded deed which on its face conveys perfect title. On the contrary, as already stated, the laws of this state put him upon notice that the tax deed did not convey a perfect and indefeasible title, but only a title which might be defeated by redemption.

It is urged that the execution having been issued, not against the person as owner of the land, but against the land itself, the proceeding was in the nature of one in rem, and therefore the title conveyed by the tax deed was good. In Hilton v. Singletary, 107 Ga. 826, 33 S. E. 718, it was said: "It follows from the above that, when a plaintiff in a suit for the recovery of land shows a title thereto founded upon such a sheriff's sale occurring more than 12 months prior to the commencement of his suit, and that this sale was regularly had under a fi. fa. issued by the Comptroller General, this makes out a prima facie case in favor of the plaintiff." But a prima facie case is not one which is absolutely conclusive. If it be conceded that the plaintiff made out a prima facie case, the defendants desired to rebut it by showing that in fact there had been a redemption, and the court declined to allow this to be done.

It is further argued on behalf of the defendants in error that they should be protected, under the principle that, when one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury must bear the loss. Civ. Code 1895, § 3940. The statute made no direct requirement of a reconveyance for one who redeems land sold at a tax sale prior to 1898. Acts 1898, p. 85. It seems doubtful whether that act applies to wild land, as it refers to redemptions within one year. Probably the owner could have obtained a cancellation by a proceeding in equity, on the ground that the recorded tax deed constituted a cloud on his title. 2 Cooley on Taxation (3d Ed.) 1447-1449. But the failure to do so was not such an act on his part as brought him within the legal principle relied on. He did not voluntarily make the conveyance to the purchaser, nor do anything, except fail to pay his taxes. It is alleged in the answer that the owner redeemed the land within the time prescribed by law and received possession of the tax deed. In view of what has been said above in regard to the law in relation to tax sales, we do not think that the mere failure to demand a reconveyance or to proceed in equity to have the recorded deed canceled was such conduct on his part as would prevent him from showing that there was in fact a cancellation within the time prescribed by law. Neither party appears to have been in actual possession of the land, except as evidenced by the cutting of timber, etc., for a time by persons acting under the original owners, and the purchaser at the tax sale had no other indicia of ownership than the tax deed. Had there been possession by those claiming under the tax deed, a title by prescription might have ripened. Greer v. Fergerson, 104 Ga. 552, 30 S. E. 943.

We are of the opinion that the court erred in striking the portions of the answer which set up the defense indicated, and in refusing to admit evidence in support thereof.

Judgment reversed. All the justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 605)

TOWN OF POULAN et al. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Georgia. Aug. 2, 1905.)

1. APPEAL—REVIEW—DEFECTIVE RECORD.

The affidavits sent up with the record and purporting to have been used as evidence on the hearing of the application for injunction cannot be considered, not being identified in any way by the judge as having been so used.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2408.]

2. EMINENT DOMAIN — MUNICIPAL CORPORATIONS—RAILROAD RIGHT OF WAY—STREET CROSSING.

Where a railroad company acquired the fee in land which was afterwards embraced within the limits of an incorporated town, and constructed a railroad over such land, the municipal authorities could not, without the payment of compensation to the company, construct a street crossing and extend a street over its right of way and track; and where an attempt was made to do so an injunction was properly granted.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 224, 225.]

3. SAME—POWER OF MUNICIPALITY.

Power delegated by the state to a municipal corporation to "condemn property for the purpose of laying out new streets and alleys, and for widening, straightening, or grading, or in any way changing the street lines and sidewalks of said town," is sufficiently broad to authorize the condemnation of so much of the right of way of a railroad company as may be necessary for the construction of a street crossing and the extension of a street over such right of way.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 108.]

4. STATUTES—TITLE OF ACT—EMINENT DOMAIN.

The act approved August 4, 1904, amending the charter of the town of Poulan, and conferring upon it power to condemn private property for the laying out of streets, is not subject to the constitutional objections that it contains matter in the body of the act different from what is expressed in the title, and amends a law by mere reference to its title. Nor is such act unconstitutional because it fails to provide a method for assessing the damages to be paid

the owner of property condemned. The general law furnishes the method for making such assessment.

5. MUNICIPAL CORPORATIONS — LAYING OUT STREET—JUDICIAL SUPERVISION.

The decision of a municipal corporation, to which the general power has been delegated to lay out streets, that a street at a given point is necessary for the welfare of the inhabitants of the municipality, will not be interfered with by the courts, unless there has been a palpable abuse of the discretion vested in the municipal authorities, or manifest injustice and oppression is shown.

6. INJUNCTION — CONDEMNATION PROCEEDINGS.

The facts alleged in the petition do not show that the use of a part of the right of way of the railroad company for the street and crossing will be so inconsistent with the use to which the company has already devoted it as to authorize a court of equity to enjoin the municipal authorities from instituting condemnation proceedings.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Action by the Atlantic Coast Line Railroad Company against the town of Poulan and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The Atlantic Coast Line Railroad Company filed a petition for an injunction against the town of Poulan and its municipal officers. The material facts as set out in the petition are substantially as follows: For more than 20 years the plaintiff and its predecessors in title have been in the complete, exclusive, and adverse possession of a line of railroad through territory now within the limits of the town of Poulan. In 1897 the Brunswick & Western Railroad Company, in order to confirm its title, obtained a deed conveying to it a right of way through the limits of the present town of Poulan, together with other adjacent lands, covering a strip measuring 100 feet from the center of the track of the railroad company each way. The plaintiff obtained title to this strip from the grantee of the railroad company above named, and holds the same in fee. In March, 1905, the mayor and council of Poulan undertook, without the knowledge or consent of the plaintiff, and without any notice to it, and without proceeding to condemn, to put a crossing over the track of the plaintiff, bridging a ditch on the side of the track, at the foot of where Hunton street would cross the railroad, and extending that street through the plaintiff's land to a named creek. When the work of building the crossing was partly finished, agents of the plaintiff were proceeding to restore the property to its original condition, when they were arrested by the municipal authorities, and confined in the city prison, and, after a trial, fines were imposed upon them. Several years before the town was incorporated the plaintiff selected a convenient site for a depot and erected a depot thereon upon its right of way, and has since put in a side track on the opposite side of the depot from the main line. At the time the depot and side track were constructed there were two street crossings over the railroad within two blocks of each other, both of which were convenient and accessible to all parts of the town. Since that time Hunton street has been opened down to and against the railroad on the north side, and this street is the main thoroughfare to and from the depot and yards. This is the point where most of the necessary shifting of cars takes place to and from the side track. The depot is only about 50 feet away from the proposed crossing, and it would be very inconvenient and dangerous to allow such crossing to be constructed. The uses to which the town authorities design to put this crossing are inconsistent with the use to which the plaintiff has already appropriated the land. The defendants have given notice that they will proceed to condemn the property of the plaintiff for the aforesaid crossing, claiming the power to do so under an act amending the charter of the town, approved August 4, 1904, (Laws 1904, p. 555). This act is unconstitutional, because there is nothing in the title to indicate what is contained in the body of the act. It refers to the act sought to be amended only by name. There is no description of the law sought to be amended, either in the title or the body of the amending act; and the act does not provide a method for ascertaining the amount of damages resulting from the condemnation. The plaintiff has, at great expense, arranged to use and has appropriated the land at the point where the crossing is to be constructed for depot grounds, not only with a view to present necessities, but with a view to increased business and additional tracks in the future, and the use of the crossing by the town involves the practical extinguishment of the former use to which the plaintiff has appropriated the land at that point. The plaintiff has no complete and adequate remedy at law. The prayers were that the defendants be enjoined from in any manner interfering with the plaintiff in its complete enjoyment and use of the land, right of way, track, and other property at the proposed street crossing as heretofore, or from interfering with the plaintiff in removing whatever part of the crossing has already been put down, and in restoring the track and grounds to their original condition before the acts of the defendants herein complained of; that the defendants be also enjoined from instituting condemnation proceedings under the act of 1904; and for general relief. A restraining order was granted, and at the hearing the defendants showed, for cause against the granting of the injunction, a demurrer, an answer and affidavits of various persons. The court granted an order that "the injunction do issue as prayed until the final hearing of this cause, enjoining and restraining the said defendants from in any manner seeking to open Hunton street south of the track of the complainant, upon all of the grounds alleged

and relief prayed for in plaintiff's petition." The defendants excepted.

Payton & Hay, for plaintiffs in error. Perry & Tipton and Kay, Bennet & Conyers, for defendant in error.

COBB, J. 1. The bill of exceptions specified, as necessary to an understanding of the case to be transmitted with the record, the affidavits of various persons, and the record contains numerous affidavits which it is claimed were used at the hearing. There is, however, nothing to identify these affidavits as having been so used. None of them are incorporated in the bill of exceptions, or identified by the judge. Under such circumstances it is settled that this court cannot consider the affidavits in determining the questions raised in the case. Sayer v. Brown, 119 Ga. 539 (1), 46 S. E. 649. As the judge granted the injunction prayed for, in passing upon the question whether he erred in so doing the allegations of the petition must be taken as true.

2. The order granting the injunction was as broad as were the prayers of the petition. The first question to be determined is whether or not there is error in so much of the order as restrained the defendants from proceeding to build the crossing without the institution of condemnation proceedings or the making of any arrangement with the plaintiff for compensation. This question may be briefly disposed of. The petition distinctly alleges that the plaintiff is the owner of the fee in the land over which the street is proposed to be extended, and that its title was acquired before the town of Poulan was incorporated, the act of incorporation having been passed in 1899. Acts 1899, p. 265. This being so, it was not competent for the town to construct a street crossing over the land of the plaintiff without making provision for compensation for the damage thus inflicted upon it. Mayor of Savannah v. Shell Road Co., 88 Ga. 342, 14 S. E. 610; Id., 95 Ga. 387, 22 S. E. 625; Atlantic R. Co. v. S. A. L. Ry., 116 Ga. 412, 42 S. E. 761; Ga. R. Co. v. Union Point, 119 Ga 809, 815, 47 S. E. 183, and cit. The act of the defendants in endeavoring, against the consent of the plaintiff, and without instituting condemnation proceedings, to construct a street crossing over the company's property, was clearly illegal, and the judge properly granted an injunction to prevent the completion of such act.

3. A general authority to a municipality to lay out, widen, straighten, or change streets includes the power to construct a street crossing across a railroad track in the city. Trustees v. Atlanta, 93 Ga. 468, 21 S. E. 74; 1 Lewis on Eminent Dom. § 266; Elliott on Roads & Streets, § 221; 2 Dill. Mun. Corp. (4th Ed.) 689, note 1. This power cannot, however, be exercised against the consent of the railroad company, unless the further power is given the municipality to condemn so much of the property of the company as may be necessary for such use. The act of August 4, 1904 (Laws 1904, p. 555), amending the charter of the town of Poulan, was entitled "An act to amend the charter of the town of Poulan, and for other purposes." It was provided in section 2 of the act that the town council should "have full and complete control of the streets and sidewalks, alleys and squares of the town, and shall have full power and authority to condemn property for the purpose of laying out new streets and alleys, and for widening, straightening, or grading, or in any way changing the street lines and sidewalks of said town." The power thus conferred is certainly sufficiently broad to authorize the construction of a street crossing over the plaintiff's property, if the act is not subject to some constitutional objection.

4. The objection raised to the title of the act is without merit. An act to amend an act incorporating a named town is sufficiently broad to cover any enactment germane to the general subject of incorporating a town. Mayor of Macon v. Hughes, 110 Ga. 795 (1), 36 S. E. 247; Dallis v. Griffin, 117 Ga. 411, 43 S. E. 758, and cit.

A further objection was made that the act of 1904 was obnoxious to the constitutional provision (Civ. Code 1895, § 5779) prohibiting the passage of an amendatory law which merely refers to the title of the law to be amended. The title of the amending act refers to the charter of the town of Poulan, and the first section of the act describes the act to be amended as "an act incorporating the town of Poulan, in the county of Worth, approved December 21, 1899." This is a sufficient identification of the act sought to be amended. Welborne v. State, 114 Ga. 794 (7), 821, 40 S. E. 857.

It is also insisted that the act is unconstitutional, because no method of ascertaining the damages is provided, and no provision is made that they shall be paid before the property is taken or damaged. When the state delegates to another the right to condemn property for a public use, and does not, in the act delegating such power, provide a method for its exercise, the general law of the state prescribing the procedure and the method of ascertaining the damages is by implication a part of the law delegating the power, and must be pursued when property of another is sought to be taken or damaged. Marietta Chair Co. v. Henderson, 121 Ga. 399 (5), 49 S. E. 312. As the time when payment is to be made is not stated in the act, it is necessarily to be inferred that the General Assembly intended that the constitutional requirement that the damage should be first paid should be complied with.

5. It is next contended that it was not necessary to the welfare of the inhabitants of the town of Poulan that the track of the

railroad company should be crossed by a street at the point where the crossing was proposed to be constructed. The general rule is that "private property cannot be taken for public use unless there is a necessity for such taking; for the taking of property, when not at all necessary for a public purpose, or the taking of more property than is necessary for a given public purpose, is, in effect, a taking for private use." Atlantic Railroad Co. v. Penny, 119 Ga. 481 (2), 46 S. E. 665. The state can determine the necessity for the taking, and the courts will not interfere. If the state delegates to a municipal corporation the right to judge of the necessity, the courts will not generally control its decision. Matthiessen Refining Co. v. Jersey City, 26 N. J. Eq. 247; Curry v. Trustees, 15 Ill. 320; Methodist Prot. Church v. Baltimore, 6 Gill, 391, 48 Am. Dec. 540. A general grant of authority to control streets and sidewalks, and lay out, open, widen, etc., streets and sidewalks, does not vest in the municipal corporation the exclusive power to decide the question of necessity; but its decision is, under some circumstances, subject to review by the courts. The decision of the question is, however, in the first instance vested in the municipal authorities, and is one addressed to their sound discretion. This discretion will only be controlled by the courts when there has been a palpable abuse of it; or, as intimated in one case, where "the case shows manifest injustice, oppression, and gross abuse of powers." Dunham v. Hyde Park, 75 Ill. 371. See also, on this subject, 1 Smith's Mod. Law Mun. Corp. §§ 701, 702; 27 Am. & Eng. Enc. Law (2d Ed.) 105; Elliott on Roads & Streets (2d Ed.) §§ 189, 345; 2 Dill. Mun. Corp. (4th Ed.) § 601. The allegations of the petition make a case where the extension of the street will be greatly to the inconvenience of the plaintiff, and possibly of little benefit to the inhabitants of the town. But these allegations do not present a case of such a palpable abuse of discretion that a court of equity ought to interfere by injunction to prevent its exercise.

6. Finally, it is claimed that the construction of the crossing would be an appropriation of the land of the plaintiff to an inconsistent use from that to which the railroad company had previously devoted it, that the company would be practically deprived of the use of its property, and that such an appropriation cannot be made by the town without express legislative authority to make the particular appropriation sought to be made in this case. The case of City Council of Augusta v. Georgia Railroad & Banking Company, 98 Ga. 161, 26 S. E. 499, is relied on to support this contention. In that case the city sought to lay a street through the yard of the railroad company, in which were situated numerous tracks, switches, etc., in constant use in the business of the railroad. The railroad company applied for an injunction, which was granted. The chancellor found from the evidence that "the opening of the street would practically amount to a destruction of the railroad company's use of its yard for shifting and drilling cars, though it might not seriously interfere with the lesser use of the main tracks for the ordinary travel of trains." The judgment granting the injunction was affirmed, Mr. Justice Atkinson, in the course of the opinion, saying: "If the conditions are such that they may be reasonably made to consist, there is no such encroachment upon the prior public use as even appreciably to impair, much less extinguish, it; and therefore, even though some slight inconvenience may result to the prior occupant, there is no reason why a second public use, when granted even in general terms, may not be held to confer upon the public authorities the right in such manner to exercise it. A different result follows, however, when the enjoyment of the second use involves the practical extinguishment of the former, or renders its exercise so extremely inconvenient and hazardous as practically to destroy its value. In such a case the right to enjoy the second use must rest upon express legislative authority, and will not be implied." We do not think the petition in the present case makes such a case of inconsistent uses as, under the decision just cited, would authorize the court to enjoin the exercise by the town of the power to condemn conferred upon it by the General Assembly. The crossing is to be 50 feet from the company's depot, and traverse only two tracks—the main line and a siding at a small station—and therefore would not seriously interfere with the use of the depot and grounds. The crossing might at times somewhat inconvenience the company in the conduct of its business, and possibly require it to be more circumspect and careful in order to avoid injury to persons using the crossing; but its use is not, under the facts alleged, so inconsistent with the prior appropriation by the company as to destroy, or even seriously impair, the company's right to use its property for the purposes to which it had previously devoted it. On the subject of inconsistent uses, see Brunswick Railroad Co. v. Waycross, 91 Ga. 573, 17 S. E. 674. See, also, in this connection, Elliott on Roads & Streets (2d Ed.) § 221; 1 Lewis on Em. Dom. (2d Ed.) § 266; 2 Dill. Mun. Corp. (4th Ed.) § 588 (noted). Our conclusion is that the judge properly enjoined the defendants from constructing the crossing before making provision for compensation to the company for the damage which might thus be inflicted upon it, but that he did err in restraining the municipal authorities from instituting proceedings to condemn so much of the company's property as might be necessary for the crossing and street extension. Direction is therefore given that the order be modified so as to permit the defendants to institute such proceedings to condemn.

Judgment affirmed, with direction. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 557)

EADY v. NEWTON COAL & LUMBER CO.

(Supreme Court of Georgia. Aug. 1, 1905.)

1. PARTNERSHIP—CONTRACT OF MEMBER.
An agreement between a customer and a member of a partnership that its goods may be purchased and paid for by the customer in commodities furnished by him for the private use and benefit of such member of the firm is void, as being beyond the scope of the partner's apparent authority. So much of the decision in Perry v. Butt, 14 Ga. 699, as is in conflict with the above, is upon a formal review overruled.

2. SAME—CONSTRUCTION OF ARTICLES.
Articles of partnership may be enlarged by implication from a general usage and habit of the firm, acquiesced in by all of the partners. But, before such a custom would become binding upon a partner who did not expressly authorize it, the circumstances would have to be such as to indicate that he not only knew of the course of dealing in particular instances, but contemplated and tacitly assented to a regular course of dealing with the public, rather than a departure from the partnership articles in the excepted cases.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Action by H. P. Eady against the Newton Coal & Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed.

A partnership was formed in 1893 or 1894, under the firm name of H. P. Eady & Co., between H. P. Eady and J. A. Brooks, for the purpose of engaging in the wagon and buggy business and conducting a blacksmith and general repair shop. Brooks had charge of the books and looked after the office affairs of the firm, while Eady assumed the management of the shop. Shortly after the partnership was formed Brooks approached J. M. Mills, manager of the Newton Coal & Lumber Company, and solicited the business of that concern, proposing to Mills that, if he would give the patronage of his company to Eady & Co., the individual accounts of its members for supplies purchased from his company would be allowed as a credit on such account as he might run with the partnership, and that they would in this manner "swap" accounts. Mills assented to this arrangement, and Brooks afterwards purchased from the Newton Coal & Lumber Company supplies for his individual use to the amount of $113.51, and supplies for his firm to the amount of $59.02. In January, 1898, Mills and Brooks effected a settlement of accounts, which included the individual indebtedness of the latter. Brooks made no entry of this settlement on the books of his firm, and his partner had no knowledge thereof or of the arrangement under which it was made. In June, 1902, Brooks effected another settlement with a representative of the Newton Coal & Lumber Company, whereby an account of $19.36 against Eady & Co. and an account against Brooks of $121.44 were satisfied. Eady was not present and took no part in this settlement, and the transaction was not entered on the books of his firm, nor did Brooks charge his individual account with the amount which he received thereunder. In April, 1903, the partnership was dissolved, and Eady became the sole proprietor of the business. Brooks was at the time hopelessly insolvent. On December 5, 1904, Eady, as the successor of the firm and as transferee of the accounts which it held against its debtors, brought suit against the Newton Coal & Lumber Company and the individuals who conducted business under that firm name to recover $200.80 on an open account claimed to be due by it to Eady & Co. The defendants filed an answer in which they admitted an indebtedness of $16.65, but by special plea they set up the agreement made between the manager of the Newton Coal & Lumber Company and Brooks, one of the members of the firm of Eady & Co., and the settlement of the accounts made in pursuance of that agreement. The defendants alleged that Brooks was authorized to enter into this agreement; that it was made in the usual course of dealings which had prevailed for a number of years, with the knowledge and approval of all of the members of the two partnerships; and that the settlement of accounts was made with the knowledge and consent of Eady and in accordance with the custom recognized and followed by his firm in settling accounts between it and other firms in Griffin with which it transacted business.

On the trial of the case Brooks testified that he had no direct authority from Eady to enter into the agreement made with the manager of the Newton Coal & Lumber Company, but that Eady had knowledge that settlements of the character made with that company were effected with parties with whom his firm had business dealings, and that he never raised any objections to settlements being made which included the individual accounts of its members. Eady testified that he never authorized any such agreement, had no knowledge that it was entered into, and never consented to any settlement in accordance with its terms. As to transactions with other firms in Griffin, he explained that on certain occasions he had consented that, when parties called for a settlement of accounts, the indebtedness of the members of his firm should be entered as a credit on the demands which his firm had against such parties, but that in each instance the account against him individually had been presented to him, he had marked it "O. K.," and he and his partner had agreed that the settlement with the firm should embrace an allowance of the indebtedness held by its debtor against them individually. He denied that he had ever conferred upon Brooks any authority to make any such set-

tlement without his express assent and approval. A number of merchants testified to having made settlements with the firm of Eady & Co., in which demands against the members of that firm were allowed. In some instances Eady was present and consented to this arrangement; in other instances the settlement was made with Brooks in the absence of Eady. Only one of the transactions of this nature which was made by Brooks without the express consent of his partner appeared on the books of the firm, and Eady undertook to swear positively that the entry thereof was made after the firm was dissolved, by changing a former entry of $2.75 to $580.95, and that he had no knowledge of this transaction till after he had become the sole owner of the business. After the dissolution of the partnership, Eady repudiated the agreement entered into between Brooks and the manager of the Newton Coal & Lumber Company, saying he had no information in regard to it, and that the company would have to look to Brooks for the payment of his individual indebtedness to it. The defendants sought to show that Eady in point of fact knew of and tacitly assented to that agreement, but the only evidence adduced on this point was to the following effect: After this arrangement was agreed on between Brooks and Mills the latter was asked by Eady if he "didn't want a wagon." Mills replied, "You don't owe us quite enough to get a wagon yet," and Eady then said, "We will owe you enough." Subsequently Eady & Co. wanted to buy a car load of coal. Mills went to the office of the firm, and in the presence of both members said that coal was sold at a very small profit, and that he could not charge it—that he "could not swap accounts as to this." They accordingly paid cash for the coal, giving him a check for the price of it, and Eady took part of the car load, Brooks part of it, and a part of it was devoted to the use of the firm. Several bookkeepers, who had at different times been in the employ of the firm, knew of the custom of settling the individual indebtedness of its members when settlements were effected between the firm and other business concerns, and they were under the impression that Eady knew of this practice, as he looked pretty closely after the business.

After both sides had announced closed, the court, on motion of the defendants, directed the jury to return a verdict for only the amount which they admitted to be due, $16.65, holding that the plaintiff was not entitled under the evidence to recover the amount sued for. To the direction of this verdict exception is taken. Complaint is also made that the court admitted, over the plaintiff's objection, evidence as to the making of the agreement under which Brooks settled his individual indebtedness to the Newton Coal & Lumber Company, and as to the general custom of the firm of Eady & Co. to make with persons with whom it dealt settlements of the character effected by Brooks with the defendant partnership.

M. W. Beck and Robt. T. Daniel, for plaintiff in error. Lloyd Cleveland, for defendant in error.

EVANS, J. (after stating the facts). 1. Counsel for the defendant in error insists that the agreement between Brooks and the manager of the Newton Coal & Lumber Company was an engagement in furtherance of the partnership business, which Brooks had the right to make, and by which his copartner is bound. This proposition is claimed to be supported by the case of Perry v. Butt, 14 Ga. 699. The report of that case discloses that the partnership concern did a cash and credit business and bartered goods for other articles. The defendant was a tavern keeper, and, in a conversation with one of the partners upon the subject of boarding, said that, when merchants or their clerks boarded with him, it was his custom to trade it out, and that he did not expect cash. It was the understanding that the tavern keeper's charge for the board of one of the partners was to be allowed for any goods he might buy of the firm. The tavern keeper had twice settled his account with the firm for goods purchased prior to the time the note in suit had been given, and in each settlement the partner's board had been allowed as a credit. These settlements were duly entered on the books of the firm. Upon these facts the great judge who delivered the opinion of the court said that one partner, in furtherance of the joint business, may agree with a hotel keeper that, if he will deal with the firm, his account shall be settled by the board of the partners, and the contract will be binding on the firm. It is perfectly clear and manifest from the entire report of the case that the court did not intend to hold that one partner could sell the firm's goods for his private benefit. Otherwise it would have been entirely useless for the court to discuss ratification because of prior entries on the books. And to make it more clear that such was not the intent is the express recognition of the principle that one partner cannot appropriate the partnership effects in payment of his individual debt. Still, as the language used is susceptible of the construction placed upon it by counsel for the defendant in error, leave was granted to review the ruling announced in the fifth division of the opinion filed in that case.

We think the true rule of liability is well stated in Warder v. Newdigate, 11 B. Mon. (Ky.) 177, 52 Am. Dec. 567: "If a firm sells goods and receives various commodities in payment, the act of one partner in relation thereto binds the firm, because it is in the course of its trade and done in the name and for the benefit of the partnership. But, when goods are purchased to be paid for in commodities furnished, not for the firm, but

for one of the partners individually, and this fact is known to the purchaser, the act of one partner in such a case does not bind his copartners, unless they assent to it." To bind the partnership it is not only essential that a contract of this character be made in the name of the firm, but at least ostensibly for the firm's benefit. Otherwise it will not be binding on the partnership. One of the reasons advanced why such a contract would be binding on the copartners is that a partner has a right to accept specifics in payment of the goods of the firm, and when firm goods are sold under a contract to be paid for in specifics for the individual use of one of the partners, and the goods are paid for in this way, a suit in the firm name to recover the value of the goods is not maintainable, because the goods have been paid for in terms of the contract under which they were purchased. Fay v. Green, 1 Aikens, 71; Strong v. Fish, 13 Vt. 277; McKee v. Stroup, Rice, 291; White v. Toles, 7 Ala. 569 (overruled in Cannon v. Lindsey, 85 Ala. 198, 3 South. 676, 7 Am. St. Rep. 38). The fallacy of this argument is that the truth of the premise is assumed. The goods have never been paid for. The firm has never received any quid pro quo from the customer. As was said in Thomas v. Pennrich, 28 Ohio St. 55: "The assumption is true, if the setting off of a debt due the firm against the private debt of the partner is a payment of that debt; but it is conceded that a partner cannot pay his own debt by using the firm property to that end." Other cases are based on the observation of Lord Ellenborough, in Henderson v. Wild, 2 Campb. 561, to the effect that a receipt by one of the partners discharging the firm debtor in consideration of the settlement of a private debt of the partner executing the receipt is binding on the firm. Hall's Survivors v. Coe, 4 McCord, 136. But this doctrine is repudiated by the great weight of authority, and recognition is given to the principle that one member of a partnership has no implied authority to dispose of property of the partnership in satisfaction of his individual debt or for his individual benefit. Bank v. Rice, 48 Neb. 428, 67 N. W. 165; Evernghim v. Ensworth, 7 Wend. 326; Thomas v. Pennrich, 28 Ohio St. 55; Minor v. Gaw, 11 Smedes & M. 322; Flower v. Williams, 1 La. 22; Atkin v. Berry, 1 Lea, 91; Thomas v. Stetson, 62 Iowa, 537, 17 N. W. 751, 49 Am. Rep. 148; Dob v. Halsey, 16 Johns. 34, 8 Am. Dec. 293; Cotzhausen v. Judd, 43 Wis. 213, 28 Am. Rep. 539; Chase v. Buhl Iron Works, 55 Mich. 139, 20 N. W. 827; Brooks v. Carpenter (Ky.) 53 S. W. 40; Taylor v. Rasch, 23 Fed. Cas. 789; McNair v. Platt, 46 Ill. 211; Bell v. Faber, 1 Grant. Cas. 31; Gullat v. Tucker, 2 Cranch, C. C. 33, Fed. Cas. No. 5,866.

Several American courts have followed the English case of Jones' Assignee v. Yates, 9 B. & C. 532, assigning as the reason why a partnership could not sue for the value of goods sold by one of the partners to a customer, under an executed agreement that the goods were to be paid for by delivery of specifics to the partner's private use, that it would allow a plaintiff in a court of law to rescind his own act on the ground that such act was a fraud on some other person. Greeley v. Wyeth, 10 N. H. 15; Homer v. Wood, 11 Cush. 62; Craig v. Hulschizer, 34 N. J. Law, 363. As was clearly demonstrated in Purdy v. Powers, 6 Pa. 494, "this action does not proceed upon a suggestion of mala fides or imputed fraud in one of the parties, but upon the foot of the original claim springing from the debt contracted with the firm in the usual course of dealing, and there is nothing standing in the way of the action which requires to be rescinded." An agreement between one partner and a purchaser to sell partnership goods and receive in exchange therefor commodities to be applied to the private benefit of the individual partner is a void act, in that it is beyond the scope of the authority of a partner to make such an agreement, and the very nature of the agreement informs the purchaser that the firm is parting with its property and receiving nothing in exchange. A private agreement by one partner for his separate advantage would work a great injury to partnership assets, and thereby to associates in the firm and the creditors of it. Several cases upon practically the same facts as are involved in the case under consideration have been before the courts, and a brief reference to some of them may aid in illustrating our position. In Brickett v. Downs, 163 Mass. 70, 39 N. E. 776, Brickett and Shorey were coal dealers, and the defendant was a dentist. The suit was for the price of coal, and the defendant pleaded that Shorey was having teeth fixed in the defendant's office, and proposed that defendant take coal in part payment for dental work done and to be done for Shorey and his family, and to this proposition the defendant assented. At that time Shorey owed defendant from $23 to $27, and defendant soon afterwards did work that increased the bill to $38.75. He had received the coal in part payment of his bill for dental work. Knowlton, J., said: "To receive property of a partnership from one of the partners in payment of his personal debt, without the consent of his copartner, is no less a fraud upon the partnership than to pay a debt due the firm by doing or furnishing something for the personal benefit of one of its members. Such an arrangement, accompanying the receipt of partnership property, would be void against the other partner, and would leave the party receiving the property liable on an implied contract to pay the firm its value." In North Carolina it was held that, in an action by a surviving partner for a debt alleged to be due to the firm, the defendant cannot avail herself of a debt due to her by a deceased member of the firm.

though the contract between the latter and the defendant was that the debt, which was for the board of this partner, should be paid out of the store in which the plaintiff and the defendant's debtor were partners. Norment v. Johnston, 32 N. C. 89. In Goode v. McCartney, 10 Tex. 193, the plaintiff brought suit upon an account for merchandise sold the defendant. The latter pleaded in set-off an account for medical services rendered a partner of the plaintiff, who had furnished the goods under an agreement that the medical services rendered him by the defendant should be received in satisfaction. The court held that such an agreement between the customer and one of the partners did not bind the copartners, and the plaintiff was allowed to recover. To the same effect is Pierce v. Pass, 1 Port. 232.

It has frequently been held that, while a partner may apply partnership property to the payment of a partnership debt contracted in the prosecution of the partnership enterprise, he has neither a legal nor a moral right to appropriate partnership effects to the payment of his individual debt without the assent of his partner. Wise v. Copley, 36 Ga. 508; Harper v. Wrigley, 48 Ga. 495; Murphey v. Bush, 122 Ga. 715, 50 S. E. 1004. There can be no distinction in reason between the payment of a private debt with partnership assets and the delivery of partnership goods to one who engages to do or to give something in exchange for the exclusive benefit of one of the partners. In either instance the transaction amounts to a conversion of partnership property to the private use of one of the partners, with the knowledge of the person who receives the firm's property. Hence we conclude that an agreement between a customer and a member of a partnership that its goods may be purchased and paid for by the customer in commodities furnished by him for the benefit of such member of the firm is neither in furtherance of the partnership business nor within the scope of his apparent authority. See Parsons on Partnership, § 90, and cases cited. In so far as the decision rendered in Perry v. Butt, supra, conflicts with the views above announced, that decision is formally overruled. We are not constrained to follow the early English decisions hereinbefore referred to, as they were pronounced subsequently to the period mentioned in our "adopting statute" as that to be looked to in ascertaining what was the common law as understood and declared by the courts of England prior to the Revolution.

2. During the course of his examination as a witness, Brooks was permitted to testify as to the custom of his firm with reference to making settlement with its customers which embraced accounts held by them against its members as individuals. This testimony was admissible, as the witness undertook to swear that his partner had knowledge of the custom which prevailed and raised no objection thereto. It is pertinent to remark, however, that, before such a custom or business usage would become binding upon a partner who did not expressly sanction or authorize it, the circumstances would have to be such as to indicate that he not only knew of settlements being made in particular instances in accordance with the custom, but contemplated and tacitly assented to a regular course of dealing with the public, rather than with a few customers who held small demands against the individuals composing the firm. The mere fact that in two or more isolated instances he agreed to a settlement whereby the customer was given credit for a private debt against his copartner would not suffice to establish his assent to a practice so general as to amount to a custom. It would have to appear that there was a general usage or habit of so conducting the affairs of the firm, acquiesced in by all of its members. 1 Bates on Partnership, § 319. In a case where a partnership had frequently drawn checks against its funds in bank for the purpose of paying the individual debts of its members, this court held there was not sufficient proof of such "a course of dealing" as would justify the bank in assuming that it was within the scope of the partnership business to pledge its credit and give its promissory note in satisfaction of a debt due by one of the partners to the bank. People's Saving Bank v. Smith, 114 Ga. 185, 39 S. E. 920. A customer has no right to assume that, because a partner expressly assents on one occasion to the allowance of a set-off of a demand for a particular amount held against his copartner, a like assent will be given to a similar settlement on another occasion, or that his copartner has any authority to bind the firm by any promise to settle its accounts in this manner.

What is said above disposes of all the questions which the record before us presents for determination. The next trial of the case should be conducted in accordance with the rulings above announced.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(128 Ga. 666)

FIRST STATE BANK v. AVERA et al.

(Supreme Court of Georgia. Aug. 2, 1906.)

1. EQUITY—AUDITOR'S REPORT—EXCEPTIONS—SETTING FORTH EVIDENCE.

It is incumbent upon a party excepting to the report of an auditor in an equity case, when the exceptions thereto involve a consideration of the evidence on which the auditor based his findings, to set forth in connection with each exception of law or of fact the evidence necessary to be considered in passing thereon, or to attach thereto as an exhibit so much of the evidence as is pertinent, or to at least point out to the court where such evidence is to be found in the brief of the evidence prepared and filed by the auditor. The decision in the case of White v. Reviere, 57 Ga. 386, was made with reference to the procedure which obtained prior to the passage of the act of December 18, 1894 (Laws 1894, p. 123), which outlines the practice now to be observed in excepting to an auditor's report in such cases.

2. SAME—AMENDMENT OF PLEADINGS—APPEAL—REVIEW.

A party may, after the hearing of a case before an auditor has been concluded, but before he has made his report, so amend his pleadings as to make the same conform to the evidence admitted on the hearing without objection; but he cannot, as matter of right, then insist upon being afforded an opportunity to offer evidence to sustain an amendment which introduces new and distinct issues of fact. What was the character of the proffered amendment in the present case cannot be determined without considering certain evidence which the party offering it claims was admitted without objection, and which is relied on as authorizing the amendment so as to make the pleadings conform to the proof; and, as such evidence is not set forth or pointed out in the exception taken to the refusal of the auditor to allow the amendment, the court below was not constrained to pass on the merits of the complaint made of its disallowance.

(Syllabus by the Court.)

Error from Superior Court, Terrell County; H. C. Sheffield, Judge.

Action by John D. Avera, for himself and as next friend of certain minors, against the First State Bank and J. W. Wooten. Judgment for plaintiffs, and the bank brings error. Affirmed.

H. A. Wilkinson and J. G. Parks, for plaintiff in error. C. L. De Vaughn, Haygood & Cutts, and A. M. Raines, for defendants in error.

EVANS, J. This was an equitable proceeding instituted by John D. Avera, in behalf of himself and as next friend of certain minors, against the First State Bank and J. W. Wooten. The case was referred to an auditor, who duly made his report. Exceptions both of law and of fact were filed by the First State Bank, but the court disallowed each and all of them, and the bank sued out a bill of exceptions to this court.

1. On the hearing here, counsel for the defendants in error called attention to the fact that the report of the evidence made by the auditor consisted of the questions and answers taken down by the stenographer, with no attempt to brief the testimony, and that in none of the exceptions filed to the auditor's report did the complaining party undertake to set forth the testimony bearing upon the particular conclusion of law or of fact excepted to, or attempt to point out such testimony in the report of the evidence filed by the auditor. To intelligently pass upon any given exception would, therefore, involve a close reading and scrutiny of all of that voluminous report. The exceptions serve no other office than to voice the general complaint of the bank that certain findings of the auditor were wrong, and and no effort has been made to save the time and labor of the court, and thus effectuate the object of the statute authorizing the submission to an auditor of cases of this nature. In Hudson v. Hudson, 119 Ga. 638, 46 S. E. 874, it was held that an exception to an auditor's report "should not be so incomplete as to force the court to search through the record to find error"; and in the later case of Butler v. Railway, 119 Ga. 959, 47 S. E. 320, it was distinctly ruled that "the neglect of a party excepting to an auditor's report on matters of fact, or on matters of law dependent for their decision upon the evidence, to point out by appropriate reference to the auditor's brief of evidence, or to attach as exhibits to his exceptions, those portions of the evidence relied on to support the exceptions, renders the report of the auditor of little or no assistance to the court, and is a sufficient reason, in an equity case, for refusing to approve the exceptions of fact and for overruling the exceptions of law." This ruling was in accord with the equity practice which generally obtains elsewhere, and was followed in Weldon v. Hudson, 120 Ga. 699, 48 S. E. 130, Perkins v. Castleberry, 122 Ga. 294, 50 S. E. 107, and Armstrong v. Winter, 122 Ga. 869, 50 S. E. 997. Tested by these decisions, the exceptions to the auditor's report filed in the present case were fatally defective, and the judgment disallowing them should be upheld.

But it is insisted that these decisions ignore and override that pronounced in the case of White v. Reviere, 57 Ga. 386, wherein this court held that "exceptions to an auditor's report need not set forth any of the evidence" adduced on the hearing before him, "more especially where the auditor himself has reported all the evidence and thus made it part of the record." As the practice stood at the time that case was decided, it was not incumbent on the auditor, nor was he to be expected, to report the evidence, so no brief thereof could be referred to, as can now be done; the auditor now being required to "reduce to writing a brief of the oral and documentary evidence submitted by the parties." Civ. Code 1895, § 4585. The practice then was altogether different; for, when exceptions were filed to the report of an auditor, the facts therein reported were taken as prima facie true, and had to be overcome by evidence submitted by the excepting par-

ty to a jury, unless the record disclosed that evidence to rebut them was offered and illegally rejected, and the report was admitted on the trial as evidence of the truth of the recitals of fact therein made. Camp v. Mayer, 47 Ga. 414, 421, 422. It was not necessary, under the practice which then obtained, that the auditor "should append to his report the evidence on which it" was based. Id. 415 (9). His report, which was treated as prima facie evidence, was "not a report of the facts, but a report on facts, or, in other words, the result or conclusion which the auditor [drew] from the testimony before him." Anderson v. Usher, 59 Ga. 581. And "the burden was on the exceptor to show error in it, and to make good his exceptions. When it was ordered filed, and leave and time were given to except thereto, it became such evidence." Arthur v. Commissioners, 67 Ga. 224. It was incumbent on the excepting party to satisfy the court that he had just cause of complaint; but this, it was held in 57 Ga., he could do by specifically excepting to the conclusions reached by the auditor, without exhibiting to the court a brief of the testimony on which such conclusions were based, and his exceptions were treated as pleadings, which had to be sustained by original evidence on a trial before a jury, in the event the court approved them as good upon their face. This procedure, which was a departure from the English equity practice, no longer obtains. It has been superseded by an altogether different system, more in accord with the practice originally adopted by courts of equity, which was introduced by the act of December 18, 1894. Acts 1894, pp. 123–126; Civ. Code 1895, §§ 4581–4601. The auditor must now report, not only his conclusions, but the evidence upon which he based the same; and while his report is yet treated as prima facie true, the excepting party is at liberty to overcome this presumption of its correctness by directing the attention of the court, by way of proper exceptions, to the fact that the evidence reported by the auditor does not sustain his findings. If it be doubtful, when the testimony is meager or conflicting, whether a particular finding of fact was warranted, the court, in the exercise of a broad discretion, may order a jury trial on that or other similar issues; but the trial is to be had only upon such evidence as was adduced before the auditor, and such newly discovered evidence as could not have been procured and submitted on the hearing before him. That is to say, the rulings and findings of the auditor are merely brought under review by exceptions filed to his report, as would be the decisions and judgment of an inferior court of original jurisdiction; and "all exceptions shall clearly and distinctly specify the errors complained of," and not leave the court to seek errors to which its attention is not thereby specifically directed by proper reference to the report of the auditor and the brief of the evidence, which the statute prescribes shall accompany it. The requirement that the auditor shall prepare and file a brief of the evidence is for the very purpose of enabling the excepting party to sustain his exceptions by pointing out the fact that the conclusions reached by the auditor were not supported by the evidence submitted before him. See 4 Cur. Law, 1261.

2. A hearing of the case was had before the auditor on February 3, 1904, and at the conclusion of the evidence counsel for the respective parties were granted the privilege of submitting written briefs on or before May 6th. On May 10th, after the hearing, but before the auditor had made his report, an amendment to the answer of the defendants was presented to him by their counsel. He declined to allow this amendment, and exception to his refusal to do so is taken by the defendant bank. Under Civ. Code 1895, § 4583, an auditor is authorized to allow amendments to pleadings; and he should allow any appropriate amendment submitted after the hearing before him has been concluded, and prior to his report. But the amending party is not entitled, as matter of right, to offer evidence to sustain an amendment which introduces new and distinct issues of fact. No motion to reopen the case was made, and it was at least discretionary with the auditor whether or not he would afford the defendants an opportunity to present matters of defense for the first time set up in the proffered amendment. In so far as it merely adjusted the pleadings to the evidence which had been admitted on the hearing without objection, the amendment was timely and should have been allowed by the auditor. Cureton v. Cureton, 120 Ga. 560 (2), 566, 567, 48 S. E. 162. Counsel for the bank insist this was the sole purpose and effect of the amendment offered. We cannot, however, undertake to pass on this contention, as the exception taken to the refusal of the auditor to allow the amendment does not set forth or point out the testimony or documentary evidence not covered by the original answer upon which counsel rely as justifying its amendment so as to make the pleadings conform to the proof. The overruling of this exception is accordingly upheld.

Judgment affirmed. All the justices concur, except SIMMONS, C. J., absent, and FISH, P. J., disqualified.

(128 Ga. 830)

PHILLIPS v. COLLINSVILLE GRANITE CO.

(Supreme Court of Georgia. Aug. 5, 1905.)

1. WRIT OF ERROR—EXCEPTIONS TO AUDITOR'S REPORT—DISMISSAL.

That the plaintiff in error did not specify his exceptions to the auditor's report as part of the record to be certified by the clerk and transmitted to this court, but incorporated the exceptions, assigning error separately upon the ruling of the court overruling each of the exceptions to the auditor's report, is no ground for dismissing the writ of error.

2. SAME—BILL OF EXCEPTIONS.
The bill of exceptions of the Collinsville Granite Company is not open to the objection that it is argumentative and does not assign error with sufficient clearness and definiteness.
[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 10.]

3. REFERENCE — AUDITOR'S REPORT — RECOMMITTAL.
If, where a case has been referred to an auditor, he fails to embody in his report a statement of fact material to the case on trial, the remedy of the party injured by this failure is to ask for an order recommitting the report, that the omission may be supplied. The error cannot be attacked by an "exception of law as to matters not appearing on the face of the record."
[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reference, §§ 145, 173.]

4. EJECTMENT—MESNE PROFITS.
While the original petition did not pray for a judgment for mesne profits, one of the amendments thereto contained the equivalent of such prayer; and there was evidence to warrant the finding of the auditor on this subject.

5. ADMINISTRATOR'S DEED—CONSTRUCTION.
Where a deed made by an administrator recited the authority given by the ordinary of the county to sell at public outcry the land covered by the deed, "with the exception of all the granite on said lot of land," but in the granting clause failed to make reference to the granite, it will be presumed that the administrator did not undertake to exceed his authority, and that there was no intention to pass title to the granite.

6. SAME.
Where the habendum clause in a deed contained an exception which was not referred to in the granting clause, the exception was not void for repugnancy, if it clearly appears that it was the intention of the parties to make such exception.
[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 270.]

7. MINES—SUPPORT OF SURFACE.
Where the ownership of the surface of land and that of the minerals on the land are in different persons, the owner of the surface has an implied right to support, either natural or artificial, for his land.
[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 243.]

8. SAME—TITLE TO MINERALS—POSSESSION.
It is possible for one to own the title to minerals, and yet not have the right to take possession of his property. Thus, where the ownership of the surface and the mineral interest are in different persons, and the mineral is of such a character that it can only be worked from above, after removing the surface soil (e. g., granite), the owner of the minerals has no right to remove his property until it has become exposed by the removal of the soil.

9. SAME—DEED — CONSTRUCTION — RESERVATION.
A deed conveyed realty, "with the exception of all the granite on said lot of land." *Held*, the owner of the granite had title to all of that mineral on the land, not merely that which was exposed at the time the deed was made. This was so, regardless of his right to disturb the soil for the purpose of removing the granite. When, from the washing away of the soil or from other causes, other granite became exposed, he had the right to remove it.

10. EJECTMENT — AMENDMENTS — EQUITABLE RELIEF—REFERENCE.
When the plaintiff, in an action of "complaint for land," files amendments, which are allowed, praying equitable relief in aid of his petition, and such petition, as amended, is duly answered, the proceeding is converted into an equity case, so that, when the same is referred to an auditor, exceptions of fact to his report need not be submitted to a jury unless the judge approves them, and whether they shall be approved is a matter addressed to the sound discretion of the judge. In the present case it does not appear that there was any abuse of discretion.

11. DEED—DESCRIPTION OF PROPERTY.
Where a deed described the property conveyed as containing 90 acres, more or less, and being the north half of a designated lot of land, and it appeared that the land lot in question contained more than 200 acres, the description by the number of acres should give way to that by the subdivision of the land lot.
[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 333.]

12. ADVERSE POSSESSION—SECURITY DEED.
A security deed cannot be the foundation upon which to begin a prescription by seven years' possession under color of title, so long as the possession of the premises is not surrendered to the grantee therein, but still remains in the grantor.
[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 452.]

13. DEED—INTEREST CONVEYED—ADMISSIBILITY IN EVIDENCE.
When the grantor in a deed describes the property which he therein conveys as all of his interest, as heir at law of another, in described land, the deed is admissible in evidence in favor of one claiming to derive title to the land from him. What the grantor's interest in the land, if any, was at the time the deed was executed may be shown by other evidence; the value of the deed as evidence of title depending upon proof of such interest.

14. SAME—DESCRIPTION.
Where the description of the property conveyed in a deed is "one-fourth interest" in a definitely described lot of land, the description is not "so vague and indefinite as to be void," but is an accurate description of a fractional interest in land.

15. MINES—MINERAL INTEREST—TITLE.
One may show title to a mineral interest in land by showing an unrestricted title to the land wherein the mineral is contained.

16. REFERENCE — AUDITOR'S EVIDENCE — EXCEPTIONS.
An exception of law to an auditor's report does not properly present any question for determination by the court, when it complains of the admission or rejection of evidence, whether the same be oral or documentary, and fails to disclose upon its face, or by an exhibit attached to the exception and referred to therein, what the substance of such evidence was, or to point out where in the auditor's brief of evidence the same may be found. The same rule obtains in an equity case in reference to an exception of law or of fact to a finding of the auditor which involves a consideration of the evidence upon which such finding was based. Armstrong v. Winter, 50 S. E. 997, 122 Ga. 869, and cases cited; First State Bank v. Avera (decided at the present term) 51 S. E. 665.
[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Mines and Minerals, § 160.]

17. EJECTMENT—EVIDENCE OF TITLE.
Where, in a suit for the recovery of realty, the plaintiff relies on a receiver's deed as a link in his chain of title, the fact that the defendant in the case on trial was no party to the action which resulted in the decree under which the receiver sold the property affords no ground for excluding the deed from evidence.

18. SAME—DEED FROM RECEIVER.
Where the receiver sold such realty under and by direction of a consent decree as the property of the parties to the cause wherein such decree was rendered, the fact that he was

not at the time of the sale in possession of all of such property would not render such deed inadmissible in evidence.

19. SAME—SALE—PURCHASE BY ADMINISTRATOR.

The fact that an administrator bid off the property at the receiver's sale, and that it was sold in part as the property of his intestate's estate, did not render the sale and the deed made in pursuance thereof void; and such deed, when offered in evidence in the ejectment suit, could not be collaterally attacked on this ground by the defendant.

20. EVIDENCE—OPINION.

Where the question at issue was who owned the granite interest in a certain lot of land, it was not competent for a witness to testify that granite quarried on this lot belonged to the party who had quarried it.

21. APPEAL—RULINGS ON EVIDENCE—EXCEPTIONS.

An exception to the admission of testimony which was objected to by the exceptor presents no question for determination, when it fails to disclose what the testimony admitted was, but merely gives the question propounded to the witness.

22. SAME—INDEFINITENESS.

Where the ground of an exception to the admission of the answer of a witness cannot be understood from the exception itself, but is so vague and uncertain that it cannot be comprehended without searching through the brief of evidence for light upon the subject, it presents no question for the court's determination.

23. EVIDENCE—ADMISSIONS.

An affidavit made by a party under whom the defendant claimed, while such party was in possession of the land, wherein he admitted that he did not own the "rock or granite" interest therein, was not inadmissible in evidence because the affiant was dead, nor because it was an affidavit used in previous litigation concerning the property to which the defendant in the case on trial was not a party.

24. APPEAL—ESTOPPEL.

Where a party to an action of the present character requests the auditor to whom the case has been referred to personally visit and inspect the premises in dispute, he cannot afterwards object to the impression produced on the mind of the auditor by such inspection.

25. REFERENCE—FINDINGS.

A mere statement by the auditor that "this personal inspection had considerable influence on the mind of the auditor in arriving at the conclusion and recommendation he hereinafter makes," and that "in his opinion much of the evidence and practically all of the objections to the introduction thereof play a very unimportant part in a proper adjudication of the question submitted," is not a finding by the auditor, and cannot be excepted to as such.

26. SAME—EXCEPTIONS.

Where the auditor found a particular portion of the premises in dispute in favor of the plaintiff, and described it by metes and bounds, an exception to such finding, upon the ground that "one of his boundary lines is indefinite, uncertain, and impossible to locate," without indicating which boundary line is referred to, is not properly made.

27. MINES—DEED OF MINERALS.

In this suit only the "exposed granite" could be recovered by the plaintiff. Land whereon the granite was not exposed could not be recovered, even though it was not suitable for cultivation.

28. APPEAL—REVIEW—HARMLESS ERROR.

It is not ground for exception to a decree rendered upon the report of an auditor that the amount of the recovery in favor of the plaintiff therein is less than the evidence before the auditor authorized.

29. INJUNCTION—RELIEF TO BOTH PARTIES.

When, in a case of this character, the court upon the prayer of the plaintiff enjoins the defendant from quarrying stone upon the property awarded by the decree to the plaintiff, it is not error to also enjoin the plaintiff from interfering with the property therein awarded to the defendant.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by the Collinsville Granite Company against R. O. Phillips. From the judgment defendant brings error, and plaintiff assigns cross-error. On bill of exceptions of defendant, judgment affirmed; and on bill of exceptions by plaintiff, judgment reversed.

Thos. F. Corrigan, Bishop & Ripley, and D. P. Phillips, for plaintiff in error. Du Bignon & Alston and C. W. Smith, for defendant in error.

FISH, P. J. The Collinsville Granite Company brought an action at law, in the form of "complaint for land," against R. O. Phillips, to recover "all of the exposed granite upon 123 acres of land, more or less, in land lot 184 of the Sixteenth district of De Kalb county, Ga.," which was described with particularity in the petition. Two amendments to the petition were allowed, both of which invoked the equitable powers of the court. In one it was alleged that Phillips did not own or hold title to the property in dispute, but was tenant in possession under a bond for title from one G. W. Johnson; that the deeds under which the defendant claimed expressly stipulated that the exposed granite was reserved from the conveyances; that Phillips was mining stone upon the property, and extending his operations to other quarries which had not theretofore been opened; that he was insolvent, and the plaintiff was on that account without redress for the waste that would be committed; and an injunction was prayed to restrain the defendant or his agents from quarrying stone on the property. The other amendment prayed for an accounting for the stone already quarried by Phillips, and also that a receiver be appointed to take charge of the property, or to take account of the income and of the stone quarried, and that the plaintiff have judgment for the value of the stone thus removed by Phillips. In pursuance of the prayers of these amendments, or ancillary petitions, temporary restraining orders were granted, but these were subsequently modified by an order granting leave to the defendant to operate the quarries until the final hearing of the petition, provided he should give bond with security to indemnify the plaintiff for any damage to the property by reason of his use of it. The defendant gave the bond required and continued in possession of the property. The answer of the defendant denied the material allegations of the petition, and claimed that he was entitled to possession of the property sued for

under bond for title from one Johnson. It was also denied that the deeds under which the defendant claimed contained any reservation of the exposed granite on the property conveyed. The case was referred to an auditor, who duly reported his findings to the court. Both the plaintiff and the defendant filed exceptions of law and of fact to the auditor's report; but all exceptions were overruled, and a decree was framed substantially following the report. Both parties excepted to the decree, and the case is now before this court for review.

1, 2. A motion was made by Phillips to dismiss the writ of error sued out by the Collinsville Granite Company, on the grounds (1, 2) that the bill of exceptions did not specify the exceptions of law and fact, the overruling of which was assigned as error, as part of the record to be sent to this court, the exceptions being incorporated in the bill of exceptions and error assigned on them separately; (3) that the bill of exceptions is argumentative, and not confined to the errors complained of. We know of no reason why a plaintiff in error may not, if he sees fit, bring exceptions to an auditor's report to this court in his bill of exceptions, rather than in the transcript of the record, so long as they are duly certified by the trial judge who overruled them. While the practice of bringing exceptions to an auditor's report to this court in a bill of exceptions, instead of specifying them as part of the record to be transmitted by the clerk of the court below, may be open to objection, the writ of error will not be dismissed on this account. This question is settled in principle by the decision in Burkhalter v. Oliver, 88 Ga. 478, 14 S. E. 704, where this court declined to dismiss a writ of error on the ground that the different grounds of the motion for a new trial were set out in the bill of exceptions and error assigned thereon separately; the motion not being brought up in the transcript of the record. Nor is there any merit in the ground that the bill of exceptions is argumentative. Every bill of exceptions should be argumentative to the extent of setting out the reasons why the judgment or ruling complained of is alleged to be erroneous. The bill of exceptions now under discussion came up to the full requirements of the law in the clearness and definiteness with which error was assigned, and the writ of error will not be dismissed.

3. The bill of exceptions filed by Phillips complains that the court erred in overruling his exceptions of law and of fact to the auditor's report, and in rendering judgment for the plaintiff for mesne profits. The exceptions of law were 25 in number. One of these purports to be an exception "as to matter not appearing on the face of the record," and complains that the auditor erred in not stating in his report that the plaintiff made an admission in judicio which was alleged to have had a material bearing on the case on trial. We know of no rule of law permitting a party to except in this manner to the failure of the auditor to embody material statements in his report. Exceptions should go to what the auditor reported, not to what he did not report. This is so for the very excellent reason that, in the absence of a report from the auditor, the court has no way of ascertaining whether the matter complained of is true or not. If, indeed, the auditor's report was not full enough, the defendant should have prayed the court for an order recommitting the report, so that the alleged omissions could have been supplied in the regular and legal manner. Civ. Code 1895, § 4593.

4. The assignment of error complaining of the judgment for mesne profits does not complain that the amount allowed by the court was incorrect, or was arrived at in an erroneous manner, but merely that there was no evidence to authorize any judgment for mesne profits at all, and that such a judgment was not warranted by the pleadings. This contention is without merit. While the original petition did not pray in express terms for a judgment for mesne profits, one of the amendments thereto contained a prayer on which such a judgment could be based, viz., that plaintiff have judgment for the value of the stone which defendant had quarried from the land. Cunningham v. Morris, 19 Ga. 583, 65 Am. Dec. 611. The report of the auditor affirmatively shows that ample evidence was introduced to warrant a finding for mesne profits.

5, 6. Two deeds were introduced by the plaintiff, neither of which formed any part of its chain of title, but each of which the plaintiff claimed was a part of the chain of title under which the defendant held. They were evidently introduced for the purpose of showing that W. H. Braswell, under whom the defendant claimed, never acquired any title to the granite in dispute, and therefore those who derived title through him never acquired any title to such granite. How the plaintiff obtained possession of these deeds does not appear. They do not appear to have been produced on the trial by the defendant, under notice served upon him for this purpose. The question whether the plaintiff could, by the introduction of the deeds, show that, as the defendant claimed under Braswell, he must also claim under the grantors in these deeds, does not appear to have been made at any stage of the case; but the case seems to have been tried on the theory, apparently acquiesced in, or not contested, by the defendant, that whatever paper title the defendant had was derived from the grantors in these conveyances, and in the brief of his counsel, filed in this court, it is admitted that these grantors were his predecessors in title. As we shall presently see, each of these deeds purported to convey the land therein described, with the exception of the granite. The proper legal construction

of these two deeds was considered by the auditor to be the main and controlling question in the case, and neither party was satisfied with the construction which he placed upon them in his findings of law, and hence each party filed exceptions of law to such findings.

The first of these deeds, in point of time, was from White, administrator of Boyd, to Wheeler. It was executed in 1854, and recited that it was made by virtue of an order of the court of ordinary of Newton county, granting leave to the administrator to sell as the property of his decedent, "lot one hundred and eighty-four in the Sixteenth district of originally Henry, now De Kalb, county, containing two hundred and two and one-half acres, with the rights, members, and appurtenances thereunto belonging, with the exception of all the granite on said lot of land, the right of way to the Georgia railroad, and the widow's dower." The granting clause of the deed was as follows: "The said David T. White, administrator as aforesaid, hath granted unto the said Simeon Wheeler, his heirs, executors, administrators, and assigns, the said parcel of land, with all the rights, members, and appurtenances thereunto belonging unto the said Simeon Wheeler or any wise appertaining, to his heirs, executors, administrators, and assigns, to his and their own proper use, benefit, and behoof." Subsequently Wheeler executed a deed to Braswell, which in the granting clause undertook to convey to the grantee 90 acres of land lot 184 in De Kalb county, but in the habendum clause excepted "the granite on said lot." The auditor held that under these deeds "all the arable and all the cultivatable land passed to the grantees therein mentioned, but that the exposed granite on this lot of land was reserved to the grantors, their heirs, and assigns"; but he also expressly ruled "that the true intention and meaning of the parties was to reserve only such granite as was exposed at that time. For it appears from the evidence that underlying all of the soil on said lot of land is a foundation of granite capable of being quarried. It appears to the auditor that it could not have been within the intention of the parties to these deeds, notwithstanding the language used in these deeds, to attempt to reserve the support and foundation of the cultivatable soil conveyed. * * * To say the least of it, the plaintiff in the case at bar cannot complain at this construction, because in the declaration filed the plaintiff only sued for 'the exposed granite' on this land lot." Contrary to the auditor's expectations, however, the plaintiff did, as we have already stated, complain of his construction of the deeds, contending that its suit was for the granite which was exposed at the time of the commencement of the action, and not when the deeds were executed, and further contending that the deeds conveyed to the grantees no interest whatever in the granite on the land. The defendant was equally dissatisfied, insisting that the exceptions in the deeds were void for vagueness and for repugnance to the granting clauses. We are clear that there is no merit in the contention of the defendant that the exception of the granite in the deeds referred to was void for inconsistency, and that the deeds passed title to the entire interest in the land, including the granite. "The strictness of the ancient rule as to repugnancy in deeds is much relaxed, so that in this, as in other cases of construction, if clauses or parts are conflicting or repugnant, the intention is gathered from the whole instrument." 13 Cyc. 618. See, also, Civ. Code 1895, § 3673; Thurmond v. Thurmond, 88 Ga. 182, 14 S. E. 198; Bray v. McGinty, 94 Ga. 192, 21 S. E. 284; Rollins v. Davis, 96 Ga. 107, 23 S. E. 392; Henderson v. Sawyer, 99 Ga. 234, 25 S. E. 312. It was clearly the intention of the grantors in the deeds from White, administrator, to Wheeler, and from Wheeler to Braswell, not to convey certain granite on the land—whether the exception extended to all the granite or only to that which was at the time exposed will be considered later—and that intention will not be defeated by the failure of the person who drew the instrument to make the exception specifically in the granting clause of the deed. In the deed from White to Wheeler the instrument recited that it was made in pursuance of an order of the court of ordinary of Newton county, and that the authority granted by that order did not extend to the granite on the land. In the face of this recital it cannot be assumed that the grantor intended to exceed his authority and convey more than he was entitled to convey. And the deed from Wheeler to Braswell, read in connection with that from White to Wheeler, leaves no doubt that it was the intention of the parties that title to the granite should not pass.

7–9. The deed from White, administrator, to Wheeler, conveyed land lot 184, "with the exception of all the granite on said lot of land," the widow's dower, and the right of way of the Georgia Railroad. That from Wheeler to Braswell conveyed 90 acres of land lot 184, "with the exception of the granite on said lot." It would seem, at first glance, that these deeds passed no title to any of the granite on the land which they covered. It appeared, however, that underlying all of the soil on this land lot was a foundation of granite capable of being quarried, and the auditor therefore held that it was the intention of the grantors to except or reserve only that granite which was exposed at the time the deeds were made. We cannot agree with this construction. It is true that it appeared that in quarrying granite it was necessary to remove the covering soil, and that it was impossible to mine it from beneath the ground like other minerals.

and therefore that, if the right of the owner of the soil were subordinated to those of the owner of the granite, the result would be practically to deprive the former of all that he was supposed to get under his deed. "Where one grants the surface of land and reserves the minerals, or grants the surface to one and the minerals to another, an implied right to support of the surface passes with the grant of the surface. This does not mean that all of the mineral does not belong to the mineral owner, but that he cannot get it out without leaving a sufficient support, natural or artificial, for the surface." 18 Am. & Eng. Enc. L. (2d Ed.) 556, 557. See, also, the opinion of Lord Campbell in Smart v. Morton, 85 E. C. L. 30. It would seem, then, that in the case of granite, where it is impossible to remove the mineral without disturbing the surface soil and completely destroying the benefits accruing to the owner of the surface, if the ownership of the mineral is in one person, and that of the surface in another, the former could only exercise his rights in taking out such granite as was exposed from one cause or another, by the removal of the surface soil. But it must be borne in mind that no part of the granite passed to the grantees in the deeds now under construction. If the grantor in the first of these deeds had title to the granite, it remained in him, though he may not have had the right to take possession of his property. If he had title to the granite, he owned the entire granite interest in the lot, not merely that which was exposed at the time the deed was executed; and when for any cause other granite became exposed it was his right to quarry it. The auditor, in his report, states that he is confirmed in his opinion that the deed being construed excepted only the granite that was exposed at the time by reason of the verdict and decree in certain litigation over the title to this property in the year 1888, which constituted a part of the plaintiff's chain of title. We have carefully examined the verdict and decree referred to, and have been unable to arrive at the same conclusion in regard thereto as did the auditor. From the abstract of the record in that litigation appearing in the brief of evidence in the present case it appears that "the jury found as follows: The title to the property in dispute, to wit, the exposed granite on land lot 184 in the Sixteenth district of originally Henry, now De Kalb, county, Ga., shall and it is then and is hereby confirmed as follows." Then follows the finding of the jury as to the parties entitled to the possession; and it further appears that "on that verdict decree was entered in accordance therewith." The term "exposed granite" is used in the verdict, and presumably the decree settled the title, as between the parties to that litigation, to the "exposed granite"; but we see no reason to conclude, on this account, that a deed made in 1854, conveying described land, "with the exception of all the granite on said lot of land," conveyed to the grantee the land except only that granite which was exposed in 1854. If we are correct in the view that none of the granite on land lot 184 passed under the deed from White, administrator, to Wheeler, and if the Collinsville Granite Company now has title to all the granite, exposed or concealed, regardless of its right to remove that granite, it follows that its suit in 1902 for the exposed granite on the land should not be construed as an action for the granite which was exposed in 1854, but as an action for the recovery of the granite exposed at the time the suit was brought.

10. Complaint is made by the defendant that the court erred in overruling his exceptions of fact to the auditor's report, without submitting the issues of fact raised thereby to a jury. The case, in its inception, was one at law; but the amendments filed by the plaintiff to its petition, which were allowed and answered, invoked the equitable relief of injunction, accounting, and receiver, in aid of the common-law relief sought in the original petition. It is true that no injunction was granted or receiver appointed; but in lieu of an injunction and receiver the court required the defendant to give bond to indemnify the plaintiff against the alleged threatened injury which the equitable amendments sought to prevent. The cause of action was thus converted from a legal into an equitable one, and it was not necessary for the court to submit the exceptions of fact to the auditor's report to a jury unless they were approved, and whether they should be approved was in the discretion of the judge. Austin v. Southern Home Building & Loan Ass'n, 122 Ga. 439, 50 S. E. 382.

11. The auditor in his report held that there were but three controlling questions for his decision, viz.: (1) The construction to be given the deed from White, administrator, to Wheeler, and from Wheeler to Braswell; (2) what part of the property sued for was covered by those deeds; and (3) what granite was exposed on the 90 acres of land conveyed by the deed from Wheeler to Braswell. In view of the ruling that we have made on the first of these questions, it is apparent that the third is immaterial; for, if the deeds did not convey any of the granite on the land, it makes no difference, so far as this discussion is concerned, what granite was exposed when those deeds were made, or whether any was exposed. This question, therefore, will not be considered. There is no difficulty in determining what land was conveyed by the deed from White, administrator, to Wheeler. All of land lot 184, except the granite, the right of way of the Georgia Railroad, and the widow's dower, was embraced in that deed. The deed from Wheeler to Braswell conveyed "all that tract or parcel of land situate, ly-

ing, and being in the Sixteenth district of De Kalb county, it being part of lot of land number one hundred and eighty-four, containing ninety acres, more or less, and being the north half of said lot of land." As land lot 184 contained 202½ acres, it is apparent that a description of the north half of the lot as containing only 90 acres is contradictory, and it becomes necessary to determine whether the description by the number of acres or by the designation of the fractional part of the land lot is to prevail. The auditor held that the deed conveyed land bounded as follows: "The original land lot lines on the north, east, and west, and the made line running parallel to the original north land lot line, and dividing the land lot into two equal portions." We find no error in this ruling. "If recitals in a deed are inconsistent or repugnant, the first recital does not necessarily prevail over the latter; but the whole language of the deed is to be construed together, in order that the true construction may be ascertained. In such a case, the court will look into the surrounding facts, and will adopt that construction which is most definitely certain, and which will carry out the evident intention of the parties." 13 Cyc. 627. "In the description of land it is usual, after the description by metes and bounds or subdivisions, to add a clause stating that the land described contains so many acres; but, unless there is an express covenant that there is the quantity of land mentioned, the clause as to quantity is considered simply as a part of the description, and will be rejected if it is inconsistent with the actual area, when the same is capable of being ascertained by monuments and boundaries. The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description." 2 Devlin, Deeds (2d Ed.) § 1044. These authorities leave no doubt as to the correctness of the auditor's decision that the description by number of acres must give way to the more definite description, "being the north half of said lot of land."

12. In January, 1888, W. H. Braswell, the grantee in the deed from Wheeler, in order to secure a debt for borrowed money, executed to the Equitable Mortgage Company a deed to the 123 acres of land lot 184 claimed by the defendant, including the 90 acres which the grantor had acquired from Simeon Wheeler; the granite in the land not being excepted from the security deed. Contemporaneously with the execution of this deed, the mortgage company executed its bond to reconvey the property to the grantor upon the payment of the debt. The debt was not paid when due, and in 1897 the security deed was foreclosed, and the property sold at public outcry to one Preston. He sold it to the Equitable Securities Company, and that company sold it to Johnson, under whom the defendant holds, under a bond for title to the land, including the granite. The defendant introduced the deed from Braswell to the Equitable Mortgage Company. The plaintiff objected to the admissibility of this deed, except for certain limited purposes. The auditor held that the deed was admissible as one of the links in the defendant's chain of title, but was not admissible to show color of title from its date, upon which to base a prescription in favor of the defendant, because the possession of the property was not surrendered to the grantee when the deed was executed, but remained in the grantor. To this ruling of the auditor the defendant excepted. The ruling of the auditor was clearly right. This deed could not be color of title in the mortgage company, for it did not go into possession of the land under the deed. This deed could not be color of title in Braswell, for it purported to convey title out of, and not into, him, and, besides, he could not hold under color of title from himself.

13. There was no error on the part of the auditor in admitting in evidence certain deeds offered by the plaintiff from parties claiming to be the heirs at law of James F. Seavey to Lemuel P. Grant. Each of these deeds was objected to by the defendant upon the ground "that the suit was for exposed granite on 123 acres of land lot 184, and the description of the deed is 'all of the interest of the heirs in land lot 184,' it being contended that the description is vague and the deed conveys nothing," and upon the further ground that "the description of the interest sought to be conveyed is different from the subject-matter of the suit at bar." There was no merit in either of these objections. The plaintiff had already introduced, as part of its chain of title, a deed from Alexander Pharr to James F. Seavey, and sought by these deeds to show title out of Seavey, through his heirs at law, into Grant, as another link in its chain. The deeds clearly described the lot of land to which they referred, and they conveyed all of the interest of the grantors therein. This was sufficient, so far as the admissibility of the deed in evidence was concerned. Whether the grantors were the heirs at law of James F. Seavey or not, and, if so, what their respective interests in the land were, could be shown by other evidence. When one conveys all of his interest in described land, his interest therein, whatever it may be, passes, and the deed is admissible in evidence for the purpose of showing this. What his interest in the land was at the time the deed was executed may be shown by other evidence; the value of the deed as evidence upon a question of title depending upon proof of such interest.

14, 15. Certain deeds purporting to convey definitely defined interests in this lot of land, such as "one-fourth interest" and "one-sixteenth interest," were objected to by the defendant upon the ground that the description

was "so vague and indefinite as to be void," which objection the auditor properly overruled, as there was not even the semblance of merit in it. We do not see how the description of a fractional interest in land could have been more accurate. Another objection to the admissibility of these deeds was that they purported to convey described interests in the land, while the defendant was sued only for the exposed granite in the land. As the greater includes the less, the plaintiff could show title to the granite by showing an unrestricted title to the land which contained it.

16. There are a number of exceptions, some of law and some of fact, filed by the respective parties in this case, which cannot be considered for the reasons stated in the sixteenth headnote, which needs no discussion or elaboration. All of the defendant's exceptions of fact fall within the rule there laid down, save, perhaps, one wherein it was alleged that there was no evidence to support a certain finding of the auditor, and this one was properly disapproved, because there was such evidence. The plaintiff's exceptions of fact were few, and most of them presented questions made in its exceptions of law, which are dealt with in this opinion. The others are disposed of in the headnote mentioned above.

18, 19. The plaintiff introduced a certified copy of the entire record in an equitable action brought by Thomas J. Wesley, as administrator of Lemuel P. Grant, under whom the plaintiff claimed, against various parties, in which equitable proceeding the plaintiff claimed that his intestate owned an undivided one-half interest in the exposed granite on this lot of land; that certain of the defendants claimed to own different interests in this granite, while others set up claims as lessees thereof; that there was pending litigation between some of the parties in reference to the property, etc. The petitioner prayed that the interests of the different parties in the property be ascertained and settled, that pending the proceeding the other litigation referred to be enjoined, and all the defendants be enjoined from quarrying granite upon this lot. By consent of all the parties to the case, a receiver for the property was appointed and authorized to collect the rents, etc., and the case was referred to an auditor. The auditor made his report, the findings therein being made by the consent and agreement of all the parties. He found how the title was to be decreed to be vested, finding different specific fractional interests therein in favor of various parties. It was adjudged that the property could not be divided in kind, and should be sold by the receiver. Upon consent of all the parties, the findings of the auditor were confirmed, and the title was decreed to be as set out in his report, and the property was ordered sold by the receiver and the proceeds divided. The property was thus sold, and the receiver filed his report and was discharged. After introducing this record, the plaintiff offered in evidence a deed made by the receiver to the plaintiff in pursuance of this sale. The defendant objected to the admission of this deed upon various grounds, which were overruled by the auditor, and the deed admitted in evidence as part of the plaintiff's chain of title. This ruling of the auditor was alleged to be erroneous in one of the defendant's exceptions of law. One of the objections to the admissibility of the deed was that the description therein was vague, indefinite, and uncertain. We have been unable to find a copy of this deed in the record, and so do not know what the description was. We will say, however, that if, as we suppose, the property conveyed was described as the exposed granite on this particular land lot, the description would seem to be sufficiently definite and certain. Another objection was that a receiver cannot sell land held adversely, but must first obtain possession; and still another was because Wesley bid off the land at the receiver's sale, and transferred his bid to the Collinsville Granite Company, the plaintiff in the present case, and that he, being the administrator of Grant, had no authority to bid at a sale of his intestate's property. The auditor was right in holding that the question of the right of Wesley to bid at a judicial sale of property wherein his intestate's estate owned an interest could be raised only by heirs at law or creditors of such intestate, and that the deed was not void, and could not be collaterally attacked on this ground by the defendant. At the time this deed was offered in evidence it did not appear that the receiver was not in possession of the property at the time that he sold it. Presumably he was. It may have appeared, from evidence subsequently introduced by the defendant, that the receiver was not in possession of all of the property; but, even if this had appeared when the deed was offered, it would not have been sufficient to exclude it from evidence. For, as all the parties to the consent decree under which the receiver was directed to sell the property were bound by the sale, whether the receiver had possession of the whole of the property or not, the purchaser at such sale acquired whatever interest, if any, they respectively had in the property, and the receiver's deed was admissible for the purpose of showing this. For the reason just given, there was no merit in the objection that this deed was not admissible, because the defendant in the present case was not a party to the litigation which resulted in the consent decree under which the property was sold by the receiver. The defendant, of course, was not bound by such sale, and the deed was not offered in evidence for the purpose of showing that he was, but merely for the purpose of showing that the plaintiff had acquired whatever title the parties to this consent decree had.

20–22. The rulings announced in the twentieth, twenty-first, and twenty-second headnotes need no discussion.

23. The plaintiff offered in evidence an affidavit made by W. H. Braswell, Sr., under whom the defendant claimed on August 4, 1888, wherein he deposed that he was the owner of "part of land lot No. 184 in the sixteenth district of De Kalb county, except the rock or granite"; that 90 acres of the same he purchased from Simeon Wheeler; "that it was sold to Wheeler as part of the estate of John Boyd, deceased, by D. T. White, administrator, and the remainder, about 32 acres, the widow's dower, deponent bought himself, also, as part of John Boyd's estate at administrator's sale, all of which he has owned and been in possession of for more than 25 years, without let or hindrance from any person or persons, and during that time no one has exercised or appeared to exercise any possession of the rock or granite on the lot of land until the time of Mr. Collins, within the last few years." The defendant objected to this affidavit on the ground that Braswell was dead, and "that the affidavit was used in another litigation, to wit, the lawsuit in De Kalb county filed in 1888, which objection the auditor overruled, and admitted said affidavit in evidence." It is apparent that there was no merit in the exception to this ruling of the auditor. The affidavit was evidently offered for the purpose of showing that, while Braswell was in possession of the land in question, he admitted that he did not own the granite interest therein, and had never exercised any possession over the same. Clearly the affidavit was admissible for this purpose, whether the affiant was dead or not, and whether the defendant was or was not a party to the litigation in which the affidavit was used.

24, 25. A rather singular exception of the defendant was "that the auditor erred as matter of law in the following findings and rulings, to wit: 'In addition to the evidence as set out in the brief, the auditor, at the request of both parties, visited the property and walked over and inspected the same. This personal inspection had considerable influence on the mind of the auditor in arriving at the conclusion and recommendation he hereinafter makes. He represents to the court that, in his opinion, much of the evidence and practically all of the objections to the introduction thereof play a very unimportant part in a proper adjudication of the question submitted.'" We do not see how a party can object to the impression made on the mind of an auditor by a personal inspection of the property in dispute, when such party requested the auditor to make such inspection. The statement of the auditor, after this inspection, in his report, that "in his opinion much of the evidence and practically all of the objections to the introduction thereof play a very unimportant part in a proper adjudication of the question submitted," certainly was not a finding by the auditor for or against either party. It was no finding at all, but a mere statement of a reason for findings which he did make. If any of his findings were wrong, because contrary to the evidence submitted, they could have been excepted to on this ground. If he erred in excluding or admitting evidence offered, the way to test the correctness of such ruling was by proper exception thereto. We do not see how any practical result would have been accomplished, even if the court had seriously entertained and sustained this novel exception, as the setting aside of this statement of the auditor would not have changed a single real finding that he made.

26. The auditor's finding as to the particular portion of Pine Mountain which was recoverable by the plaintiff as exposed granite was excepted to by the defendant as being without evidence to support it. There was considerable evidence upon the subject, and the finding cannot be said to be without evidence to support it. The sufficiency of the evidence to support this finding was a question for the court below in passing upon the exception, and the judge did not abuse his discretion in overruling this ground of the exception. Another ground of this exception was that one of the boundary lines as designated in the finding of the auditor was indefinite, uncertain, and impossible to locate; but which boundary line was thus referred to was not indicated, and this was a sufficient reason for not sustaining the exception on this ground. The exception should have clearly pointed out the boundary line which needed revision.

27. Two of the exceptions of the plaintiff, the Collinsville Granite Company, were framed upon the theory that the deed from Boyd's administrator to Wheeler and the deed from the latter to Braswell conveyed only the arable and cultivatable land, and that therefore the auditor erred in not finding certain designated portions of the land which the evidence showed, and the auditor found, were not suitable for cultivation, but upon which the granite was not exposed, to be the property of the plaintiff. This was an erroneous theory. The suit was only for the recovery of the "exposed granite," and, as we have seen, these deeds conveyed everything except the granite, and whether any particular portion of the surface soil, such as that upon a steep mountain side, was arable and cultivatable or not, these deeds embraced and conveyed it, and the owner of the granite would have no right, without the consent of the surface owner, to remove the soil and the vegetation growing therein, for the purpose of getting at and quarrying the granite, but would have to wait until such time as the underlying granite should become exposed. In one of these exceptions, a finding of the auditor in reference to the portion of Pine Mountain recover-

able by the plaintiff is alleged to have been erroneous, because the auditor had previously found that under the deed from Wheeler to Braswell it was the arable and cultivatable land which passed to the grantee, and the evidence showed that no part of this mountain was arable and cultivatable. If the auditor had expressly found that this deed conveyed only land which was suitable for cultivation, his finding, for reasons which we have already stated, would have been erroneous; but we think it is clear from his report that he did not intend to so find. He construed the deed from Boyd's administrator to Wheeler and the deed from Wheeler to Braswell as follows: "In construing these deeds, as matter of law, the auditor holds that all the arable and cultivatable land passed to the grantees therein mentioned, but that the exposed granite on this lot of land was reserved to the grantors, their heirs, and assigns. He holds that this reservation is good, and that the same is not inconsistent with the terms of the grant in each deed; but in so holding he expressly rules that the true intention and meaning of the parties was to reserve only such granite as was exposed at that time." Clearly, construing this finding in its entirety, it confined the exception in each deed to the granite which was exposed at the time the deed was executed, and used the terms "arable and cultivatable" as descriptive of land where the granite was not then exposed. So this finding of the auditor was not inconsistent with his subsequent finding that the portion of Pine Mountain which he found was "still covered with earth and soil on which trees are now growing" was not recoverable by the plaintiff.

28. Error is assigned in the bill of exceptions of the plaintiff upon the decree of the court, upon the ground that the amount of the recovery in favor of the plaintiff for mesne profits embraced therein is less than the evidence before the auditor authorized. It is obvious that there is no merit in such an assignment of error. The decree followed the finding of the auditor upon the facts disclosed by the evidence, the exception to which finding was disapproved by the court, and the decree cannot be changed without first changing the finding upon which it was based. One might as well undertake to set aside or change a judgment rendered upon the verdict of a jury upon the ground that it was contrary to the evidence, without first setting aside the verdict, as to undertake to set aside or alter a judgment or decree rendered upon an auditor's report upon the ground that such judgment or decree is contrary to the evidence which was before the auditor.

29. The decree enjoined the plaintiff "from interfering with granite awarded the defendant," and this is excepted to and assigned as error, "for the reason that there was no evidence to show that plaintiff was threatening to" so interfere, or that the damage arising from such interference would be irreparable, or that the plaintiff was insolvent, and for the further reason that "the nature of the interference referred to was not described and the terms thereof were too general." The decree provided that the defendant "be and is hereby enjoined from quarrying stone upon any of the property described in the auditor's report and awarded by said report and this finding to the plaintiff, and that the plaintiff be enjoined from interfering with granite awarded defendant." The court simply placed the parties upon equal terms, it enjoined each from trespassing upon the property of the other, and the plaintiff who invoked this relief against the defendant is in no position to complain that the court, when granting it, also granted like relief to the defendant.

The decision in this case has been necessarily limited to and controlled by the exceptions which were properly made to the report of the auditor. From the rulings above announced it follows that upon the bill of exceptions filed by R. O. Phillips, the defendant in the court below, the judgment is affirmed; and upon the bill of exceptions filed by the Collinsville Granite Company, the plaintiff below, the judgment is reversed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness, and LUMPKIN, J., not presiding.

(72 S. C. 189)

FORREST v. McBEE.

(Supreme Court of South Carolina. July 20, 1905.)

MALICIOUS PROSECUTION—LEVY OF ATTACHMENT.

Where a complaint alleges that plaintiff executed an agricultural lien in favor of defendant, and that after the same was satisfied the defendant, wrongfully and with intent to injure plaintiff, seized the crop under an agricultural warrant, it does not state a cause of action for malicious prosecution, though defendant would be liable for the damages caused by such illegal seizure.

Appeal from Common Pleas Circuit Court of Greenville County; Gage, Judge.

Action by Anderson Forrest against S. L. McBee. From order of nonsuit, plaintiff appeals. Reversed.

Blythe & Blythe, for appellant. McCullough & McSwain, for respondent.

GARY, A. J. This is an appeal from an order of nonsuit. The complaint alleges that the plaintiff executed an agricultural lien on his crops in favor of the defendant; that although the said lien was satisfied, the defendant nevertheless "wrongfully, willfully, and maliciously, and with intent to injure the plaintiff, and to take his crop under a lien which had already been paid, made an affidavit before a magistrate falsely setting forth that plaintiff was still justly indebted to him in the sum of $86.15 on account of supplies furnished plaintiff by defendant for

the year 1903"; that the defendant willfully, wrongfully, and unlawfully induced the said magistrate to issue an agricultural warrant for the seizure of said crops, and a certain person was appointed to execute the said warrant; that the person so appointed went upon the premises, delivered a copy of the affidavit and warrant to the plaintiff, and immediately took possession of all the cotton still ungathered in plaintiff's field and a large quantity of hay and other provender in plaintiff's barn, in which were also all of his agricultural implements, and securely nailed up the same; that plaintiff filed an affidavit after the crop was seized, stating that the indebtedness secured by the lien had been paid; that the issue raised by the affidavit was heard by the magistrate, who "rendered his judgment dismissing the warrant and proceeding, and dissolving the attachment, upon the grounds that no bond had been given in accordance with the statute, and that there was nothing due upon the lien at the time the warrant was issued"; that the defendant appealed from said judgment, but the appeal was dismissed, and the judgment of the magistrate made the judgment of the circuit court; that by reason of said seizure he sustained special damages, which are set out in the complaint, and prayed judgment for $1,000. At the close of the plaintiff's testimony, the defendant made a motion for a nonsuit on the following grounds: "(1) That the plaintiff has failed to introduce evidence tending to show malice on the part of the defendant in this case in instituting the proceedings in the magistrate's court. (2) He has failed to show that the defendant in this case acted without probable cause in instituting these proceedings in the magistrate's court. (3) That it appears upon the face of the proceedings that the alleged prosecution for the foreclosure of an agricultural lien was void, and therefore no prosecution, and no action will now lie for malicious prosecution of a proceeding which is a nullity." His honor, the presiding judge, granted the nonsuit on the third ground. It was not granted because there was a failure of testimony tending to sustain the material allegations of the complaint, but on the ground that the allegations of the complaint were not sufficient to constitute a cause of action for malicious prosecution.

The motion for nonsuit on the ground sustained was in effect a demurrer to the complaint. Rosemand v. Ry., 66 S. C. 91, 44 S. E. 574. The rule in such cases is thus stated in Austin v. Mfg. Co., 67 S. C. 122, 129, 45 S. E. 135, 137: "The only instances in which the court will sustain a nonsuit, when the allegations are sustained by the testimony, are in cases where the complaint is subject to a demurrer, as in Rosemand v. R. R., 66 S. C. 91, 44 S. E. 574. In Boyd v. Brent, 1 Tread. Const. 101, it was decided that, if the declaration does not contain any cause of action, the proper way of taking advantage of it is to demur; but where a nonsuit had been ordered, the court refused to set it aside on grounds of convenience, as it was clear that the plaintiff could not recover. In Pettis v. Harris, 2 Brev. 388, the court ruled that a nonsuit may be ordered, though the cause be at issue before the jury and there is evidence offered pertinent to the issue, if it be clear there is no sufficient legal cause of action stated in the declaration. See, also, Lindsey v. Jamison, 4 McCord, 93." A nonsuit on the ground that the allegations of the complaint were not sufficient to constitute a cause of action for malicious prosecution was not proper, if they were sufficient to constitute any other cause of action. Welborn v. Dixon, 70 S. C. 108, 49 S. E. 233. The failure to file the undertaking required by the statute rendered the proceedings null and void. Wagener v. Booker, 31 S. C. 375, 9 S. E. 1055. In that case the court said: "Under the act the undertaking must be filed before the warrant is issued. It precedes the warrant, and is the foundation for its issue. It is, therefore, jurisdictional, and in its absence the warrant is illegal and void." As the proceedings were null and void, they could not be made the basis of an action for malicious prosecution. 19 Enc. of Law, 654; 4 Cyc. 834, 835; Braveboy v. Cockfield, 2 McMul. 270, 39 Am. Dec. 123; Whaley v. Lawton, 57 S. C. 256, 35 S. E. 558.

While this is the case, it does not by any means follow that the defendant is not liable for the illegal seizure of the plaintiff's property. Even when the proceedings are set aside for mere irregularity, the party at whose instance they are instituted is liable when they result in injury to the rights of another. In the case of Foster v. Gault, 2 McMul. 335, 338, the court uses this language: "There is a wide distinction between those who issue, or procure to be issued, an irregular process. The magistrate might sometimes be liable, the party procuring the process to be issued would in general be liable, but the ministerial officer, whose duty it is to execute it, is justifiable, unless the process be void, and not merely voidable." The principle is thus stated in McCool v. McCluny, Harp. 486, 488, by Colcock, J., in delivering the opinion of the court: "I lay it down as a general rule that where the act is illegal, and the injury proceeds directly from the act, trespass is the proper action; for, although there is no actual force, yet in all illegal acts there is implied force, and all illegal acts are contra pacem. Here the arrest was illegal. The process was irregular and void. The party is therefore entitled to his remedy. Against whom shall he proceed? Not against the officer, because he could not inquire into the regularity of the process. On its face it appeared to be in usual form. He must, then, proceed to the source from whence the process proceeded, which is the plaintiff who caused the ca. sa. to issue. It is objected that he was not per-

sonally present. The act, therefore, as to him, was not immediate; but the answer is the execution is the instrument which inflicts injury, and the officer is the medium through which it passes. The defendant gave the impetus, and he is constructively present." For a stronger reason the party is liable who procures the issuing of process which is not only void upon its face, but accompanied with malice. The seizure of the plaintiff's property under the void process was a conversion. See concurring opinion in Holliday v. Poston, 60 S. C. 103, 38 S. E. 449; Prater v. Wilson, 55 S. C. 468, 33 S. E. 561; and Ry. Co. v. Sarratt, 58 S. C. 98, 36 S. E. 504. The foregoing authorities clearly show that the ground upon which the nonsuit was granted is untenable.

The defendant gave notice that he would ask that the nonsuit be sustained upon the two additional grounds which were overruled by the presiding judge. Even if the warrant was issued without malice and without probable cause, the defendant would nevertheless be liable for the conversion of the plaintiff's property, if the testimony sustains the allegations of the complaint. If the conversion was accompanied with malice, the damages would be thereby enhanced. Welborn v. Dixon, 70 S. C. 108, 49 S. E. 233.

It is the judgment of this court that the order of nonsuit be set aside, and the case remanded to the circuit court for a new trial.

(72 S. C. 205)

DAVENPORT v. CHARLESTON & W. C. RY.

(Supreme Court of South Carolina. July 25, 1905.)

LIABILITY OF MASTER—TORT OF SERVANT.

Where a trainman throws bricks at a dwelling house near the track from a moving freight train, the railroad company is not liable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1230.]

Appeal from Common Pleas Circuit Court of Laurens County; Watts, Judge.

Action by Martha Davenport against the Charleston & Western Carolina Railway. From order overruling demurrer, defendant appeals. Reversed.

S. J. Simpson and Cooper & Simpson, for appellant. F. P. McGowan and R. E. Rabb, for respondent.

JONES, J. In my view the appellant's exceptions should be sustained. In the case of Rucker v. Smoke, 37 S. C. 377, 380, 16 S. E. 40, 41, 34 Am. St. Rep. 758, the court very clearly states the rule which governs the liability of a principal for the acts of his servants in this language: "When one person invests another with authority to act as his agent for a specified purpose, all the acts done by the agent in pursuance or within the scope of his agency are, and should be regarded as, really the acts of the principal. If, therefore, the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him." Accordingly, in Skipper v. Mfg. Co., 58 S. C. 143, 36 S. E. 509, the complaint was held to state a cause of action against the defendant, in alleging that its engineer, while in charge of and running defendant's dummy engine, maliciously blew the whistle in close proximity to plaintiff's mule, thereby causing it to run away and overturn plaintiff's buggy, throwing her out, to her damage. In that case the engineer had control of the engine, and the blowing of the whistle was a part of its operation, so that he was acting within the scope of his agency. In the case of Polatty v. Railway Co., 67 S. C. 391, 45 S. E. 932, 100 Am. St. Rep. 750, a nonsuit was denied because the evidence tended to show a case in which the defendant's engineer, in charge of its engine, threw coal at a trespasser upon the tender or platform adjoining, for the purpose of ejecting him, thereby causing him to fall and be injured. Here the tortious act of the engineer was done in protecting in an improper manner the property of his principal placed in his charge from a trespasser, and so was clearly within the apparent scope of his agency.

The present complaint cannot be made to fall within the rule stated. It is true the complaint states that the tortious act complained of was done by the servants of the defendant "while in the employment of the defendant and in the discharge of their duties on said train"; but the other facts alleged in the complaint must be considered in determining the meaning of these words, in so far as they may be construed as alleging facts, rather than conclusions of law. The fact that the defendant's servants were in its employment at the time of committing the acts complained of has no tendency to show that the acts were within the apparent scope of their agency, and it may be conceded that, on the occasion of the injury complained of, the said servants were in the general discharge of their duties on the train, and still the complaint would fall short of stating that the particular acts complained of were performed in pursuance or in the discharge of some duty which would make the throwing of a brick at another within the scope of that duty. Facts should be stated in the complaint from which the court could reasonably infer that the particular tortious act was performed within the scope of the employment of the agency. The plaintiff was not a passenger, so as to be under the protection of the defendant's servants, nor a trespasser, so as to call upon the servants to protect the principal's property. The only agency alleged is that the defendant's servants were in control of defendant's freight train. It is not suggested in the complaint that the train was freight-

ed with brick, and that the alleged injury happened while the servants were unloading; but, on the contrary, it appears that the train was on its journey, and that the brick or stone was deliberately thrown, being aimed at the plaintiff's dwelling. It is inconceivable that it could be within the scope of such an agency, the control and operation of a freight train, to rock plaintiff's dwelling house as the train passed along, when she was in no wise interfering with the train's operation. If it was intended to allege a case in which the defendant company ordered its servants to throw stones at plaintiff's dwelling, the allegations should have been framed with that view. In the case of Cobb v. Railway Co., 37 S. C. 198, 15 S. E. 878, this court granted a new trial because the circuit court instructed the jury that, if the shouting of the train hands caused the runaway of the plaintiff's horse, to his injury, the defendant company was liable. These train hands were in the employment of the company and on the train in the discharge of their duties; but the particular act of shouting or making a noise had no conceivable reference to the management or operation of the train or the performance of any of their duties as train hands.

For these reasons, I think the judgment of the circuit court should be reversed.

(73 S. C. 1)

PACKARD & FIELD v. BYRD.

(Supreme Court of South Carolina. July 28, 1905.)

SALE — RECOVERY OF PRICE — RESTRAINT OF TRADE.

Where defendant contracted to purchase shoes, with the understanding that he should have exclusive sale of plaintiffs' goods in the town where defendant lived, which agreement was void, as in restraint of trade, under Civ. Code 1902, § 2845, the purchaser is liable for the price of a bill of goods subsequently sold under the original agreement, where the seller could establish the sale without reliance on the illegal portion of the original contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 683, 705.]

Appeal from Common Pleas Circuit Court of Greenwood County; Gary, Judge.

Action by Packard & Field against G. A. Byrd. Judgment for defendant, and plaintiffs appeal. Reversed.

D. A. G. Outs and E. S. F. Giles, for appellants. Sheppards & Grier, for respondent.

JONES, J. This action was brought for the purpose of collecting an account for $140 for a bill of shoes purchased from plaintiffs by defendants, between the 24th day of October and the 22d day of November, 1902, and resulted in judgment for the defendant, from which is this appeal. The answer denied the partnership of plaintiffs, and denied that he was indebted as alleged in the complaint, but admitted that he had purchased the articles of merchandise referred to in the complaint and had refused to pay for the same. Further answering, and by way of counterclaim, defendant alleged an agreement and its breach, to defendant's damage. We quote the answer in so far as it refers to the alleged agreement, as the effect of said agreement upon plaintiffs' right of recovery is the principal question involved in this appeal: "(c) That heretofore, on the ——— day of June, 1902, the said plaintiffs and this defendant, in consideration of defendant's purchasing of said plaintiffs a certain bill of shoes and handling in his business as a merchant at Greenwood, S. C., plaintiffs' line of shoes, that defendant should have the exclusive sale of plaintiffs' goods at Greenwood, S. C., and should be the only person or firm to handle said line of shoes at said point as long as he wished to do so and would handle the same, and said plaintiffs then gave to this defendant the exclusive sale of these goods at Greenwood, S. C., for such time as he would handle the same, and the exclusive right to handle the same. (d) That defendant, acting upon the faith of this agreement, purchased and paid for said bill of shoes, and thereafter purchased and paid for other bills of shoes upon the faith of said agreement so entered into with the plaintiffs, and upon the faith of said agreement purchased the said bill of shoes mentioned in paragraph 3 of the complaint herein."

The testimony is not set out in detail, but the "case" states as follows: "The testimony of the plaintiffs tended to establish the allegations of the complaint and the indebtedness of the defendant in the sum of $140, and, further, that there had been considerable transactions by and between the parties from time to time, and that all bills and accounts had been paid promptly by the said defendant, except the one mentioned in the complaint. When the defendant offered testimony going to establish the allegations of his counterclaim, plaintiffs' attorneys objected on the ground that the agreement, set out herein, was illegal and void, as against public policy and in conflict with the provisions of section 2845 of the statutes [Civ. Code 1902], which objection was sustained, and all testimony tending to establish said counterclaim ruled out. The defendant introduced testimony tending to show that the account sued on was for the purchase of shoes from the plaintiffs under a verbal agreement made between plaintiffs and defendant, whereby it was agreed that defendant should have the exclusive sale of plaintiffs' line of shoes at Greenwood, and that no one else should be allowed to handle said line at said point, and the plaintiffs would not sell or send any one else at Greenwood the said line of shoes, and that under this agreement the said bill of shoes was sold and delivered to the defendant by the plaintiffs; the defendant agreeing to buy his shoes in this line from the plaintiffs from time to time as

needed in his business as a merchant at Greenwood. The plaintiffs introduced testimony tending to controvert this testimony on behalf of the defendant, and that, about the same time the defendant, Byrd, purchased the first bill of shoes from plaintiffs, they sold a bill of same line of shoes to Hall Bros., a firm doing business at Anderson, S. C.; that the order of Hall Bros. was accepted by the plaintiffs to be shipped to Anderson, and a part of the order was shipped out to them at Anderson, S. C., in cartoons, with the name of 'Hall Bros., Anderson, S. C.,' stamped on the boxes; that about the 1st of November, 1902, Hall Bros. opened a branch store in Greenwood, S. C., to which branch store they removed a lot of these shoes, and ordered the plaintiffs to ship the balance of the order, which was being manufactured for them for Anderson, S. C., to their branch store at Greenwood, which plaintiffs did; that Hall Bros. sold these shoes in Greenwood for less than Byrd was selling."

The main question arises upon exception to the following instructions to the jury: "I charge you, as a matter of law, that if, at the time the sale was made, it was a consideration of the contract of purchase made with the defendant to have exclusive sale of the articles in this market here, that that contract, under those circumstances, would be null and void, and could not be enforced in a court of law. Not because, gentlemen of the jury, that amount of money would not be due him, but it is on this principle: that, when the law says a certain transaction is void, the court closes its door to the litigant who undertakes to enforce a contract that is not in accordance with the law. * * * So I charge you further, as a matter of law, that if you find as a matter of fact that it was a part of the consideration of this contract that the defendant was to have the exclusive control and monopoly of the sale of the articles furnished him, and they were imported from out of the state, and that was a part of his contract of purchase, that that contract was against the public policy of this state, and the plaintiffs could not come into court and ask its aid to enforce a contract which he has made that is against the laws of the state. The court would shut its doors to the enforcement of such a contract." The objection urged against this charge is that the contract for the sale and purchase of the bill of shoes described in the complaint was not void, but only the attempted grant of the exclusive right to sell in Greenwood.

We are not to consider whether the agreement of June, 1902, was against public policy and void under section 2845, vol. 1, Civ. Code 1902, which is directed against agreements, etc., in restraint of trade. The circuit court so charged, and no exception involves that question. The question before us is whether, if such an agreement is void, it should operate to defeat plaintiff's recovery for the shoes sold and delivered. The charge of the court was undoubtedly in accord with the general rule that no court will lend its aid to enforce a claim based upon an illegal or immoral contract. McConnell v. Kitchens, 20 S. C. 430, 47 Am. Rep. 845; Gist v. Telegraph Co., 45 S. C. 363, 23 S. E. 143, 55 Am. St. Rep. 763. But there are certain well-established exceptions to this general rule, and in 9 Cyc. 550, these exceptions are grouped under five heads: "(1) Where public policy requires the intervention of the court; (2) where the parties are not in pari delicto; (3) where the law which makes the agreement unlawful was intended for the special protection of the party seeking relief; (4) where the illegal purpose has not been consummated; and (5) where the party complaining can exhibit his case without relying upon the illegal transaction." Plaintiff's case falls within the fifth exception. The counterclaim which the defendant sought to set up was based upon an executory agreement made in June, 1902, which the court declared to be illegal, and therefore, under the general rule stated, could not be enforced. But the plaintiffs' action is not based upon such agreement, nor, in establishing plaintiffs' right to recover, was it at all necessary to give evidence of or enforce any illegal agreement. Indeed, by the pleadings, after proof of the partnership of plaintiffs, their right to recover upon the cause of action stated stood practically admitted. Plaintiffs' right to recover rested upon the agreement, implied by law, to pay the price of goods belonging to plaintiffs which were sold and delivered to defendant at his request.

Involved, also, in this fifth exception to the general rule is the question whether the contract sought to be enforced is separable from the illegal agreement. In Wooten v. Walters (N. C.) 14 S. E. 735, Merrimon, C. J., gives a definition to entire and separable contracts in the following language, which is made the text in 7 Ency. Law, 95: "A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. * * * A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be." The entirety or separability of a contract depends primarily upon the intention of the parties, rather than upon the divisibility of the subject, although the latter aids in determining the intention. Where the consideration or promise is single, there is no difficulty in pronouncing the contract indivisible, and in declaring the whole void if there be illegality in the consideration or promise, as, for example, in Wood v. McClaurin, 2

Brev. 377, and Massey v. Wallace, 32 S. C. 149, 10 S. E. 937. But if in this case we treat the agreement of June, 1902, and the contract of purchase and sale of October, 1902, as practically one agreement, neither the consideration nor the promise is single. The plaintiffs agreed (1) to sell and deliver to defendant a particular bill of shoes at certain prices, payable at a certain time; (2) to refrain from selling plaintiffs' line of shoes to any one else in Greenwood, S. C., as long as defendant would buy and handle the same. And defendant agreed (1) to pay for the particular bill of shoes sold and delivered at the prices named, when due; (2) to handle plaintiffs' line of shoes in his business as merchant at Greenwood, S. C., and buy his shoes in this line from plaintiffs from time to time as needed. "Where the agreement consists of several promises based on several considerations, the fact that one or more of the considerations are illegal will not avoid all the promises, if those which are made on legal considerations are severable from the others." 9 Cyc. 569. "Where there are several promises, so that those which are legal can be separated from those which are illegal, the legal promises may be enforced. A lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same consideration." Clark on Contracts, 474. The bill of shoes bought in June, 1902, under the agreement, was delivered and paid for, and several other bills of shoes were delivered and paid for between June and October, 1902. Each bill of shoes was separate and distinct, with stipulated prices, and payable at a stipulated time, and there was no evidence that the price of the shoes was in any degree enhanced by reason of the other agreements, so that there is no difficulty in apportioning the exact amount which defendant promised to pay for the shoes. The parties, by their course of dealings with each other, give some evidence of their intention that payment for each bill of shoes sold and delivered was not conditioned or dependent upon the performance by plaintiffs of their agreement to give defendant the exclusive right to handle plaintiffs' line of shoes in Greenwood, S. C. We think that the contract sought to be enforced in this action is separable from the illegal agreement.

Perhaps the strongest case that may be cited contrary to the view herein announced is Arnott v. Pittson & Elmira Coal Co., 68 N. Y. 558, 23 Am. Rep. 190. But in that case the court made no attempt to separate the good consideration from that which was illegal, probably because in New York the court will attempt separation only in those cases in which the party seeking to enforce the contract is not the wrongdoer. Saratoga County Bank v. King, 44 N. Y. 87; 9 Cyc. 566. The case of McMullen v. Hoffman (U. S.) 19 Sup. Ct. 839, 43 L. Ed. 1117, cited by respondent, does not militate against the view herein announced. That case illustrates the general rule that no court will lend its assistance in any way towards carrying out the provisions of an illegal agreement, where an action is brought in which it is necessary to prove the illegal contract in order to maintain the action. The plaintiff in that case sought an accounting of partnership profits, based upon a written partnership agreement, but the defendant pleaded and established that the partnership agreement was but a part of an illegal agreement, partly resting in parol, to secretly combine their interests, and to put in bids upon public works, the bids to be known to each other, and the highest to be fictitious, and made only for the purpose of making an appearance of competition. The court held that the contract was an entire one, and that the legal part could not be separated from the illegal part, and that to permit a recovery in that case would, in substance, be to enforce an illegal contract. In this case no attempt is made to enforce an illegal contract, nor is any right or claim asserted which is inseparable from the illegal agreement. The case of Trentman v. Wahrenburg (Ind. App.) 65 N. E. 1057, is in point as sustaining the view announced by this court.

The charge of the court was erroneous, in that it left the jury no alternative but to find for defendant, that an illegal agreement in restraint of trade constituted no part of the consideration of the sale and purchase of the goods in question. This conclusion practically disposes of the appeal, and renders further consideration of the exceptions unnecessary.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(72 S. C. 237)

MARTIN v. ROYSTER GUANO CO.

(Supreme Court of South Carolina. July 18, 1905.)

1. INJURY TO EMPLOYÉ—COMPLAINT.
In an action for injuries to an employé, the complaint alleged that defendant so negligently interfered with and dug into a pile of acid, and so negligently failed to notify plaintiff of the danger, that it fell over on him. *Held* to refer to danger arising from the unsafe condition of the pile.

2. TRIAL—NONSUIT—GROUNDS.
Where there is an entire failure of evidence to support the material allegations of the complaint, an order of nonsuit, based in part on erroneous grounds, will be affirmed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4210.]

3. MASTER AND SERVANT — ASSUMPTION OF RISK.
Any danger which is reasonably to be anticipated as the natural consequence of the work is assumed by an employé.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 550.]

4. SAME—KNOWLEDGE OF DANGER.
Where the danger of a fall of a large pile of acid is manifest to the employé, the master

is not liable for failure of the boss to give notice of the danger to the employé moving the same.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 310, 316½.]

Appeal from Common Pleas Circuit Court of Richland County; Gary, Judge.

Action by Benjamin Martin against the Royster Guano Company. Plaintiff appeals from order of nonsuit. Affirmed.

P. T. Youmans and De Pass & De Pass, for appellant. Melton & Belser, for respondent.

GARY, A. J. This is an appeal from an order of nonsuit. The first paragraph of the complaint alleges that at the time thereinafter mentioned the defendant was a corporation engaged in the manufacture of fertilizers. The second and third paragraphs are as follows:

"(2) That on or about the 18th day of February, 1902, the plaintiff was in the employ of said defendant as a laborer, and as such was engaged in rolling a wheelbarrow filled with an acid or fertilizer compound from a large and high pile of the acid compound to another part of said factory, under the immediate direction and supervision of one of the agents of said defendant, specially charged therewith, commonly called by plaintiff and his fellow workmen the 'boss.'

"(3) That, while plaintiff was so employed, the defendant, by its agents and servants, not regarding their duty in that respect, so carelessly and negligently interfered with, cut, and dug in and upon said large pile of acid or fertilizer compound, and so negligently and carelessly failed to notify plaintiff of the danger thereof, that the same fell over and upon said plaintiff, without any fault or negligence upon his part, whereby he received great bodily injury. * * *"

The defendant's answer contained a general denial, and set up as a defense the assumption of risk by the plaintiff. At the close of the plaintiff's testimony the defendant made a motion for a nonsuit on the following grounds:

"(1) That there is no evidence tending to show any negligence or breach of duty on the part of the defendant. There are neither allegations of, nor evidence tending to prove, negligence or breach of duty as to (a) providing or maintaining safe and suitable machinery or appliances; (b) employment of incompetent fellow servants; (c) providing a sufficient force for the performance of the work required; (d) providing and maintaining safe places to work; (e) inspection and repair of materials, appliances, and place; (f) or any other duty which the defendant was required by law to perform. The only specifications of negligence set forth in the complaint are: (a) That the defendant, by its agents and servants, negligently and carelessly interfered with, cut, and dug in and upon a large pile of fertilizer compound; and (b) that the defendant failed to notify the plaintiff as to the danger thereof.

"As to the first of these specifications, there is an entire failure of evidence tending to show that the large pile of fertilizer compound was negligently or carelessly interfered with, cut, or dug in and upon by any one whomsoever; but, if so, certainly not by any one for whose act the defendant is responsible for injury to the plaintiff, no direct act of the defendant itself, nor of a vice principal, nor of a superior servant, nor of any one else for whose act the defendant is responsible.

"As to the second specification of negligence, viz., failure to warn the plaintiff of the alleged danger, it will be observed here that there is neither allegation nor evidence tending to prove that the plaintiff was either youthful or inexperienced, and the proof is to the contrary. In order to impose upon the master the duty of warning a servant in a case like this, it must be made to appear (a) that the master knew, or by exercise of ordinary care ought to have known, of the danger; (b) that the servant was ignorant of the danger; (c) that the master knew, or ought to have known, that the servant was ignorant of the danger. There is absolutely no testimony tending to prove these facts.

"(2) That the evidence conclusively establishes that the proximate cause or causes of the injury were either the acts of fellow servants of the plaintiff, or the acts of the plaintiff and his fellow servants combined, and concurring, for neither of which the defendant is liable.

"(3) That if any negligence has been proved on the part of the defendant, there is no evidence tending to show that such negligence was a proximate cause of the injury to the plaintiff.

"(4) That the evidence conclusively establishes that the risk and danger, if any, from which the injuries resulted, were assumed by the plaintiff, and the evidence is capable of no other inference."

1. His honor, the presiding judge, granted the nonsuit on the foregoing grounds, as well as on the ground that the words "danger thereof," in the third paragraph, had reference to the danger of cutting, digging, and interfering with the pile of acid, while the plaintiff contended that they were intended to refer to the danger arising from the unsafe condition of the said pile. The presiding judge said: "The real cause of action is that, having dug out an excavation in the acid pile, it caused the pile to become dangerous to its employés engaged in moving the same, and while it was in this dangerous and unsafe condition negligently ordered plaintiff to remove a portion of the acid without having notified party of its condition. If you had set out that cause of action, I do not know but what your proof is such I could have submitted that to the jury under that

allegation and proof." Before the order of nonsuit was signed, the plaintiff's attorneys made a motion to amend the complaint, so as to make the allegations thereof conform to the testimony. The motion was refused on the ground that it would make a different cause of action. Under the liberal spirit of the Code, we think the circuit judge erred in his construction of the complaint. The court will therefore consider the question whether there was any testimony tending to establish negligence on the part of the defendant in the light of the allegations, which the appellant contends are set out in the complaint.

2. One of the exceptions assigns error on the part of the circuit judge in granting the order of nonsuit on grounds other than those set out in the defendant's motion. It is true, this court will not consider grounds of nonsuit which were not relied upon in the circuit court. Lewis v. Hinson, 64 S. C. 571, 43 S. E. 15. But that is not the question before this court. The circuit judge did consider the said grounds; and, although he erred in partly basing the order of nonsuit upon them, this does not constitute reversible error, if there was an entire failure of testimony tending to support the material allegations of the complaint. Harmon v. Telegraph Co., 65 S. C. 490, 43 S. E. 959.

3. There was testimony to the effect that the defendant, at the time of the injury, was causing the various ingredients of one of its compounds to be brought together in one of the buildings of its plant. One of these ingredients was in a large pile, and the defendant employed a number of servants, called, respectively, "pickers" and "wheelbarrowmen," to remove it therefrom to the smithereen, where it was mixed with the other ingredients. The pickers would cut into the pile, commencing at the bottom, and undermine it, so as to cause it to fall, whereupon the wheelbarrowmen would shovel it into their wheelbarrows and transport it to the smithereen. The plaintiff, a man 38 years of age, was a wheelbarrowman, and had been working for the defendant in that capacity for about six weeks. On the day of the injury the pickers had dug into the pile so that a part of it overhung at a height from seven to ten feet, when the plaintiff in his turn pushed his wheelbarrow under the part that was overhanging. Facing the excavated place, he loaded his wheelbarrow, and, turning his back, was about to push it away, when the overhanging part fell and struck him. A man by the name of Decker was in charge of the work, directing the pickers as well as the wheelbarrowmen in their several duties. He was known as the "boss" by those working under his direction. He gave orders as to what was to be done, and also gave notice to the wheelbarrowmen when any danger was apprehended in the discharge of their duties. The plaintiff was carrying out the orders of Decker when the pile fell. The complaint specifies two acts of negligence: (1) That the defendant failed to provide a safe place where the servants might perform the duties of their employment; (2) that the defendant failed to give notice to the plaintiff of the dangerous condition of the pile of acid at the time of the injury.

We will first consider whether there was any testimony whatever tending to establish the allegation that the defendant was negligent in providing a safe place to work. The place where the servants were called upon to pursue their labor was not, in the first instance, rendered dangerous by the pile of acid. The danger arose during the progress of the work, and was a consequence naturally and reasonably to be anticipated from the nature of the employment. The danger was merely incidental to the performance of the duties for which the servants were employed, and there was therefore an assumption of risk on their part. The exceptions raising this question are overruled.

4. The next question that will be considered is whether there was any testimony tending to prove negligence in failing to give notice to the plaintiff of the dangerous condition of the pile of acid at the time of the injury. The cases of Couch v. Railroad, 22 S. C. 558, Owings v. Oil Mill, 55 S. C. 483, 33 S. E. 511, McDaniel v. Railroad, 70 S. C. 95, 49 S. E. 2, and Brabham v. Telegraph Co., 71 S. C. 53, 50 S. E. 716, show that the plaintiff and the "boss," Decker, were fellow servants. The principle is thus clearly stated in the case last mentioned: "In determining who are fellow servants, the test or rule in this state is not whether the servants are of different grade, rank, or authority, one of them having power to control and direct the services of another; but the test is in the character of the act being performed by the offending servant—whether it was the performance of some duty the master owed to the injured servant, the performance of which duty the master had intrusted to the offending servant." In the case under consideration, there was no duty resting upon the defendant to give notice to the plaintiff, as the danger was not hidden or unusual, and the plaintiff had knowledge thereof. The exceptions raising this question are overruled.

The appellant also contends that the circuit judge erred in refusing the motion for an order allowing an amendment to the complaint, so as to make the allegations thereof conform to the testimony. This court has considered the questions presented by the exceptions as if the amendment had been permitted. The appellant, therefore, has not suffered prejudice by such refusal.

The appellant likewise assigns error on the part of the circuit judge in refusing to allow the introduction of certain testimony. Under the views hereinbefore expressed, the testimony which the plaintiff sought to introduce was immaterial.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 116)

HAGINS v. ÆTNA LIFE INS. CO.

(Supreme Court of South Carolina. July 28, 1905.)

1. ACCIDENT INSURANCE—PAYMENT OF PREMIUMS—ORDERS—NOTICE OF NONPAYMENT.
Where an accident policy provided for payments for separate consecutive periods of two, three, and five months, each payment to apply only to its corresponding insurance period and that no claim for injuries sustained during any period for which the respective premium had not been actually paid in full should be valid, the premiums to be paid by orders of insured on his employer from the earnings for the period, in case of failure of the insured to earn enough in one period to pay the premium due, the insured is not entitled to notice of nonpayment before the policy is avoided.

2. DEPOSITIONS—FAILURE TO SEAL.
Where a deposition was sent to the clerk of a court without any formal sealing by the officer, and nothing to indicate that the envelope contained anything more than an ordinary letter or communication, it was inadmissible in evidence.

3. INSURANCE—PREMIUMS—PAYMENT BY ORDERS.
Where payments of an accident policy were to be by orders drawn on the employer of the insured, but such orders were to be accepted as payment only when paid in full, the drawee could state, in an action on the policy, if there was anything on his books to the credit of the drawer, without producing the books.

4. APPEAL—REVIEW—OBJECTIONS WAIVED.
An objection to evidence not made below will not be considered on appeal.

5. TRIAL — HEARSAY EVIDENCE — MOTION TO STRIKE.
Where hearsay evidence is admitted, the remedy is by motion to strike.

6. BEST AND SECONDARY EVIDENCE.
Where an accident insurance policy provided for payments by orders of the insured on his employer, evidence by the employer that such an order was not paid because there was a less sum to the credit of the insured than the amount of the premium, and that the insurance company would not accept partial payments on an installment, was admissible.

Appeal from Common Pleas Circuit Court of Cherokee County; Frank B. Gary, Special Judge.

Action by Lucy Hagins against the Ætna Life Insurance Company. From judgment for defendant, plaintiff appeals. Reversed.

G. W. Speer, for appellant. Carlisle & Carlisle, for respondent.

WOODS, J. The defendant issued an accident insurance policy to J. R. Hagins, a fireman on the Southern Railway. The date of the policy was August 20, 1903, and to provide for payment of the premiums the defendant took orders from Hagins on the Southern Railway Company for $5 for each of the months of September, October, November, and December, to be paid out of his monthly earnings. The policy contains this provision: "The payments specified in said order are premiums for separate and consecutive periods of two, two, three, and five months, and each shall apply only to its corresponding insurance period. No claim for injuries sustained during any period for which its respective premium has not been actually paid in full shall be valid under this policy, except in case of just claim for injuries sustained before the end of the week or month from the wages of which the first premium is to be deducted, as provided in said order." There are similar stipulations in the application for insurance and in the order on the railroad company for monthly payment of the premiums. Hagins was accidentally killed October 28, 1903, and his wife, the beneficiary, brought this action on the policy. The defense was that, though the order for monthly payments from wages was filed with the railroad company and payment demanded, the company refused to pay the installment of $5 for the month of September; Hagins having earned for that month only $2.60, and for this reason, under the provision of the policy above quoted, the insurance was at an end, and the company not liable. The verdict was for the defendant. The exceptions charge error in the admission of testimony, in instructing the jury, and in refusing a new trial.

1. The circuit judge, after reading the stipulation of the policy which was in controversy and which we have quoted above, charged the jury: "If you find that this is the agreement, that provides that if any of those insurance periods are not paid according to the terms that the policy lapses. That is what it provides, if you find that this is the agreement." The plaintiff's position as to this instruction, that the term "injuries" used in this provision of the policy does not refer to injuries resulting in death, and that, the accident having produced death, the insurance company is liable to the beneficiary at all events without respect to this stipulation, is untenable, because the contract by its terms expressly embraces death resulting solely from injuries.

The circuit judge charged at plaintiff's request: "Where a party gives an order for the premium and the same is returned not paid, good faith requires the insurance company to notify the party that his order has not been paid before it can insist on a forfeiture for nonpayment," but with the modification, "unless there is some stipulation in the agreement that does away with the necessity for that notification." The plaintiff submits the request should have been charged without modification. We think the circuit judge was right in his view of the law. Evidence was admitted tending to prove that for the month of September the insured only earned $2.60, and for that reason the railroad company refused to pay his order of $5 premium for the first insurance period of two months. Nothing can be clearer than that by each of the three papers which covered the entire negotiation and contract it was agreed the insurance for each period was to depend on the actual payment of the orders on the railroad company out of the earnings of the insured for the months speci-

fied. The case is thus distinguished from Stepp v. Association, 37 S. C. 417, 16 S. E. 134, and Dargan v. Assurance Society, 71 S. C. 359, 51 S. E. 125; and if a note had been given for the premium under such a stipulation, and not paid, the policy would have failed, Thompson v. Insurance Co., 104 U. S. 257, 26 L. Ed. 765. The general rule, however, is that when a check or order is taken for the premium, even where it is agreed the policy shall not be effective until it is paid, it is the duty of the insurer to use due diligence to collect it. Whether it is his duty to give notice of nonpayment and return the order or check depends upon the circumstances and the relation of the parties. Here the orders were on credits which the insured expected to have with his employer, but which he well knew never would exist except for wages actually earned by his labor. If he neglected to perform the labor for the month mentioned in the order, he could not fail to know that the order was worthless. Even if he had credit for labor performed for some period other than that embraced in the order, this would not have been available, because the railroad company had no right to apply his wages except as he directed, and, if it had done so, it would have had no defense against his demand for the wages for any month except that mentioned in the order. To hold that, though the insured failed to earn the wages upon which he gave the order, yet it was necessary that the insurance company should give him notice of his failure and the consequent nonpayment of his order, would be to strike down the business in which the defendant is engaged and deprive those employed in the lower grades of railroad service of the opportunity to insure. They constantly change from place to place, and it would be an impracticable business enterprise for an insurance company to insure them on the credit of wages to be earned, if upon every failure to earn the wages the company should be required at its peril to find them, notify them of that which they already knew, and return the order. The plaintiff was therefore not entitled to the unqualified instruction that the defendant could not avail itself of the defense of nonpayment of the order without proof of notice to insured of nonpayment. This view is supported by a number of well-considered cases. 1 Cyc. 242; Bane v. Travellers' Ins. Co. (Ky.) 4 S. W. 787; McMahon v. Travellers' Ins. Co. (Iowa) 42 N. W. 179; Insurance Co. v. Walker (Ark.) 53 S. W. 675; Assurance Corporation v. Rochelle (Tex. Civ. App.) 35 S. W. 869; Reed v. Ins. Co. (Ga.) 43 S. E. 433; Landis v. Insurance Co. (Ind. App.) 33 N. E. 989.

The cases relied on by appellant are not in conflict with this conclusion. In Benefit Association v. Jackson (Ill.) 2 N. E. 414, it was held the evidence showed the order was actually accepted as payment, and that it was refused for lack of funds by mistake of the paymaster of the railroad. In Eury v. Insurance Co. (Tenn.) 14 S. W. 929, 10 L. R. A. 534, the stipulations in the policy, application, and order here present do not appear, and the decision was placed on the peculiar circumstances under which the policy was taken and the failure of the insurance company to show that there was nothing due insured applicable to the order. It was held in Lyon v. Insurance Co. (Mich.) 54 Am. Rep. 354, that, the wages being earned and failure to pay the order being due to mistake of the railroad company, the insured was entitled to notice of nonpayment. The evidence in the case now under consideration tends to show that the orders were placed by the insurance company in the hands of the railroad company, which undertook for a commission to collect them from the wages specified if earned. This, we think, established the relationship of agency between the insurance company and the railroad company, and the insurance company could not escape liability on the ground that its agent had by mistake failed to apply to the insurance order the wages in its hands applicable to that purpose. But under this contract the plaintiff could not recover, unless the wages covered by the order given for the insurance period within which the insured was killed had been earned, or the order had been otherwise actually paid, or the company had waived this requirement of the contract. It was not incumbent on the insurance company, under the conditions of the contract and the relations of the parties, to give notice that the order for the period within which the insured was killed had not been paid, if the wages to cover it had not been earned. As we understand the exceptions and argument, the question whether the failure to provide for payment of the first order would entirely annul the policy and prevent recovery under it, even if the accidental death occurred during the second or any other period, payment of the order for such period being duly provided, is not made by the appeal, and as to this question we express no opinion.

2. The deposition of Walter C. Faxon, a witness on behalf of defendant, was admitted over the objection of the plaintiff that the envelope in which it was contained was not indorsed as required by the statute. There was not only an entire absence of any formal sealing by the officer, but there was nothing whatever to indicate that the envelope contained anything more than an ordinary letter or other communication to the clerk of the court. It was held in Riser v. Railway Co., 67 S. C. 428, 46 S. E. 47, that "when the certificate of the notary public taking the deposition shows that it was retained by him until it was placed in the post office properly addressed, and that he personally placed it in the post office, it makes no material difference whether he prepared the certificate before or after placing the deposition in the envelope." But the case of

Travers v. Jennings, 39 S. C. 410, 17 S. E. 849, was not overruled, and there a deposition was rejected for lack of evidence of some formal sealing by the notary accompanying his signature on the envelope. Here the same conditions exist, and under the authority of the case just cited the deposition should have been rejected.

3. When the deposition of George S. Derrick, paymaster of the Southern Railway Company, was offered, plaintiff objected to the following question: "Will you kindly state the amount due Mr. Hagins for the month of September, 1903, as appearing from the official records in your office?" It clearly appears from the record that the objection was on the ground that the question was incompetent and irrelevant, because, as plaintiff contended, the order was accepted as payment of the premium, and proof that wages had not been earned sufficient to pay it would be immaterial. As we have already endeavored to show, the contract does not bear the construction that the orders were taken as payment.

4. The objection that the books of the railroad company should have been produced as the best evidence is made for the first time in this court, and it cannot therefore be considered. Springs v. R. R. Co., 46 S. C. 104, 24 S. E. 166; Electric Co. v. Blacksburg, etc., Co., 46 S. C. 75, 24 S. E. 43.

5. If the answer to the question be regarded incompetent as hearsay, this would not avail appellant, as no motion was made to strike it out.

6. The plaintiff next insists it was error to allow the same witness to testify that "the $2.60 was not paid for the reason that the life insurance company will not accept partial payments on an installment due," on the ground that the order given by the insured was the best evidence. It is true the writing made by the parties, which constituted the contract, was the best evidence of what the insurance company had a right to do or refuse to do; but we can see no objection to the witness testifying to what it actually did or refused to do.

7. No objection was made on the trial to the evidence referred to as incompetent in the tenth exception, and therefore that exception cannot be considered.

The seventh exception is sustained, and all the others are overruled.

The judgment of this court is that the judgment of the circuit court be reversed.

(72 S. C. 194)

STATE v. ROCHESTER.

(Supreme Court of South Carolina. July 22, 1905.)

1. HOMICIDE—PRESUMPTION OF MALICE.

Where the facts and circumstances attending a homicide are disclosed in the evidence, so as to draw a conclusion of malice or want of malice as one of fact, a presumption of malice from the killing does not arise.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 268.]

2. SAME—INSTRUCTIONS.

Where the facts of a homicide were in evidence, so that no presumption of malice would arise from the fact of the killing, an instruction that such a presumption arose was ground for reversal; the principle being made applicable to the facts in the case.

3. SAME—MURDER—INSTRUCTIONS.

An instruction that, if defendant intentionally killed the deceased, actuated by a desire to kill him, it was murder, was erroneous, and the error was not corrected by a subsequent charge as to manslaughter.

4. SAME—DUTY TO RETREAT.

Where a person on his own premises is attacked by one on a highway, he must retreat before killing his adversary, if there is a probability of his escape without loss of life or serious bodily harm.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 168–171.]

5. SAME—EVIDENCE.

On trial for murder, evidence of a warning given defendant that it would be dangerous for him to go to the house of deceased is admissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 350.]

6. SAME—EVIDENCE.

Evidence that defendant, on trial for murder, had been requested to work at a point of his farm distant from where deceased would be likely to pass on the highway, is incompetent, where the reason for such request was not given by the speaker.

Appeal from General Sessions Circuit Court of Oconee County; Joseph A. McCullough, Special Judge.

Indictment against Earle Rochester for murder of Walter Mills. From sentence, defendant appeals. Reversed.

The following are the exceptions:

"(1) Because the presiding judge erred in charging the jury as follows: 'A great deal has been said and written as explanatory of malice and to illustrate malice, and men may have different conceptions of what that legal term means. After all, what is malice? It is the intentional taking of human life.' It is respectfully submitted that the presiding judge erred in giving this definition of malice, and that the same was calculated to mislead the jury, because: (a) Proof of an actual intent to kill does not of itself show the existence of malice, for an intentional killing may be excusable, as where it is done in self-defense, or it may be only manslaughter, as where the killing is done in the heat of passion caused by sufficient provocation. (b) Intent to kill is only evidence of malice, and the existence of the intent to kill is material as bearing on the degree of the crime. (c) A killing with malice is where the act is done without legal excuse, extenuation, or justification; for, if there be any legal excuse, extenuation, or justification, the act is not malicious, and the homicide is not murder, though it be done with a settled purpose to kill, but it will be, according to circumstances, either manslaughter or justifiable or excusable homicide. (d) Malice is the chief characteristic—the grand criterion—by which murder is to be distinguished from other species of homicide, and in no case does the

intentional taking of human life constitute murder unless it is done with malice; that is, with a mind regardless of social duty and deliberately bent on mischief, with a wickedness of disposition, hardness of heart, cruelty, or recklessness of consequences.

"(2) Because the presiding judge erred in charging the jury: 'Now, Mr. Foreman and gentlemen of the jury, if you believe beyond a reasonable doubt that the defendant intentionally killed Walter Mills, that the purpose which actuated the act—that the purpose which actuated the pulling of the trigger—was, "I mean to kill him because I want to kill him," if that be the purpose, and that be the motive, it makes no difference what may have been the surrounding circumstances, that is murder.' It is submitted that his honor erred in thus charging, and the same was calculated to mislead the jury, because: (a) Intent is thereby made identical with malice. (b) Malice is a deliberate and well-formed purpose to take life without justification or excuse. (c) Intent is not synonymous with malice, because if the intent be to kill in self-defense it is not unlawful. (d) Motive or purpose were made equivalent to malice, whereas motive and purpose are evidence from which malice may be inferred, and the absence of evidence suggesting a motive or purpose may be considered in favor of the accused. (e) The right to take life intentionally in self-defense, because the accused wants to protect himself, was ignored in the failure to state the important limitation or qualification to the effect that the intentional taking of life must be without justification or excuse. (f) It does make a difference as to what may be the surrounding circumstances of a killing, for, if it be inferred from the surrounding circumstances that the accused took the life of his adversary to save his own life, or to save himself from serious bodily harm, the killing is excusable.

"(3) Because the charge of his honor upon defendant's ninth request to charge was erroneous and misleading to the jury. The request and charge are as follows: '"A person in the rightful possession of lands may lawfully approach any person wrongfully upon the same, and may order the person trespassing to quit the land, and, in the event of refusal so to do, may use such force as may be necessary to eject such trespasser; and if the person in possession is resisted by force in the attempt to eject such trespasser, he may legally defend himself and repel force by force, using such force as the fierceness of the attack may render necessary to defend himself. When a person is on his own premises he may stand his own ground. He is not obliged to retreat, but may stand his own ground and repel force by force, and not retreat, but may pursue his adversary until he find himself out of danger; and if, in the conflict between them, it becomes necessary to kill his adversary, such killing is excusable, and the defendant should be acquitted." Well, with reference to the ninth request, I can't tell you when, how, or under what circumstances one should retreat in order to avoid taking human life. Of course, a man on his own premises has a greater right there than anybody else; but there might be circumstances which would require him to avail himself of every reasonable way of escape to avoid taking human life on his own premises. It is a question for you to say, from all the circumstances in the case, whether or not the defendant acted as a man of ordinary firmness and reason would have acted.' Whereas, his honor should have charged the jury (a) that when a man is attacked on his own premises he may stand his ground, he is not obliged to retreat, but may stand his ground and repel force by force and not retreat, for the law recognizes this difference between being attacked on one's own premises and somewhere else, and the charge was erroneous in not recognizing this difference; (b) in charging that there might be circumstances which would require him to avail himself of every reasonable way of escape to avoid taking human life on his own premises, without laying down some rule or principle that would serve as a guide in determining what circumstances, if any, would require a man to retreat when attacked on his own premises; (c) leaving it for the jury to say what circumstances would require a man to retreat on his own premises, without giving the jury any rule or principle, thus limiting or qualifying the 'law of the castle,' and thereby leaving the jury to determine both the law and the facts constituting such exception or limitation, if any there be.

"(4) Because his honor erred in ruling that the witness John Hoops could not testify that on the Sunday afternoon preceding the Thursday on which the killing occurred that he (Hoops) warned defendant, Earle Rochester, not to go over there, meaning to Walter Mills' house; witness having told about the meeting on that Sunday afternoon between Mills and Rochester at the latter's residence, the way in which Mills approached and left the house, the manner of his leaving, and what was said, the seeing of Walter Mills and other men at his house and yard by Hoops and Rochester while in the latter's garden a few minutes after Mills had left Rochester, to all of which the witness had testified, for the reasons (a) that, the witness having testified as to part of conversation, it was competent and relevant for him to give the whole conversation; (b) it was competent and relevant as tending to show an apprehension of great danger on the part of the defendant, and therefore his good faith in acting as he did at the time of the fatal encounter, and to negative the idea of malice on the part of the defendant.

"(5) Because his honor erred in excluding the answer of Mrs. Annie R. Rochester to the question, 'When did you tell him to go

up there?' meaning to the west end of his field, where defendant was at work, when she testified she saw Walter Mills come down the hill, cross the bridge, and come on through the bottom towards the end of the field where defendant was then working; Mills having thus returned in a short time after witness saw him leave Rochester in the bottom, and heard Mills say he would return in a short time and fix him (Rochester). It is respectfully submitted that, the witness having testified without objection as follows: 'I told him (Rochester) to come to this end, on the upper side of the place, * * * because I didn't want any trouble with him (Mills)'—it was competent and relevant for witness to answer said question. It was competent and relevant to show such substantially contemporaneous facts and circumstances as were calculated to explain or elucidate the entire transaction, also as tending to show the state of mind of defendant immediately before and at the time of the fatal encounter; time being a material element, and it being sought by said testimony to explain the entire transaction and the conduct of the parties immediately before and at the time of the fatal encounter."

Jaynes & Shelor and Stribling & Herndon, for appellant. J. E. Boggs and the Assistant Attorney General, for the State.

GARY, A. J. Upon the trial of the defendant for murder, the jury rendered a verdict of guilty, and he appealed upon exceptions which will be set out in the report of the case. His honor, the presiding judge, charged the jury as follows: "The state charges the killing was murder; that is to say, that it was done with malice aforethought, either expressed or implied. Now, what does that mean? (A great deal has been said and written as explanatory of malice and to illustrate malice, and men may have different conceptions of what that legal term means. After all, what is malice? It is the intentional taking of human life.) And in the investigation of this question, therefore, you can see you must perform the somewhat delicate and difficult task in trying to interpret the intention which actuated the act. (Now, Mr. Foreman and gentlemen of the jury, if you believe beyond a reasonable doubt that the defendant intentionally killed Walter Mills, that the purpose which actuated the act—that the purpose which actuated the pulling of the trigger—was 'I mean to kill him because I want to kill him,' if that be the purpose, and that be the motive, it makes no difference what may have been the surrounding circumstances, that is murder.") That portion of the charge embraced within the first parenthesis is made the basis of the first exception, and that part in the second parenthesis of the second exception.

1. In the case of State v. Coleman, 6 S. C. 185, the circuit judge charged that "all homicide is presumed to be malicious and amounting to murder, until the contrary appears from circumstances of alleviation, excuse, or justification, and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him." In disposing of the exception assigning error in this charge, this court said: "The authorities undoubtedly support the proposition that the law presumes malice from the mere fact of homicide. 4 Black. Com. 201; State v. Toohey, MSS. But this presumption is not applicable where the facts and circumstances attending the homicide are disclosed in evidence, so as to draw a conclusion of malice or want of malice as one of fact from the evidence. Presumptions of this class are intended as substitutes in the absence of direct proofs, and are in their nature indirect and constructive. The best evidence of the state of mind attending any act is what was said and done by the person whose motive is sought for. * * * If the evidence did not warrant the conclusion of malice, the jury should have so found, uninfluenced by any presumptions from the naked facts of the homicide. * * * Where the circumstances preceding and attending an act of this character are full, as in the present case, the prisoner is entitled to the benefit of any doubt that may arise, and cannot be deprived of such benefit by any presumption of guilt arising by operation of law from the naked fact of the homicide. A charge may be erroneous, although the propositions of which it is composed may severally be conformable to recognized authority, if in its scope and bearing in the case it was likely to lead to a misconception of the law." The rule is thus stated in State v. Hopkins, 15 S. C. 153, 156: "There is no doubt whatever of the isolated proposition that the law presumes malice from the mere fact of homicide, but there are cases as made by the proof to which the rule is inapplicable. When all of the circumstances of the case are fully proved, there is no room for presumption. The question becomes one of fact for the jury, under the general principle that he who affirms must prove, and that every man is presumed innocent until the contrary appears. We cannot distinguish this case from that of State v. Coleman, 6 S. C. 185." These cases are cited with approval in State v. Ariel, 38 S. C. 221, 16 S. E. 779. It will thus be seen that the charge was inapplicable to the facts of the case under consideration; the witnesses having testified as to the facts and circumstances surrounding the homicide.

2. It might be that the court would regard the charge as merely illustrative of malice, and that the error was corrected in the subsequent charge as to the different degrees of homicide (under the cases of State v. Murrell, 33 S. C. 83, 11 S. E. 682, and State v.

McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661), but for the fact that the principle was emphasized and made applicable to the facts in this case in the other portion of said charge. The first exception is sustained.

3. The principle announced in that part of the charge set out in the second exception was intended to have direct application to the facts of the case under consideration. The defendant may have intended to kill the deceased "because he wanted to kill him," and yet it would not be murder if he took his life under sudden heat and passion and upon a sufficient legal provocation. The only manner in which the jury could determine the intention of the defendant in committing the homicide was by taking into consideration the facts attending the killing. When, therefore, the presiding judge said to the jury that "it makes no difference what may have been the surrounding circumstances, that is murder," they were bound to find the defendant guilty of that crime if they were satisfied that the defendant "meant to kill the deceased because he wanted to kill him." It is true the presiding judge afterwards charged the law applicable to manslaughter, but the charge as to murder was just as explicit. The jury had no greater right to disregard the charge as to murder than that relative to manslaughter, and it is impossible to tell which may have influenced them in rendering their verdict. This exception is sustained.

4. Third exception: Immediately after the language in the exception modifying the request, the presiding judge also charged as follows: "And I charge you, where the public has used a road 20 years or more adversely through the premises of another person, that the public would acquire a right of way along that road, and one traveling along that road could not be considered a trespasser to adjoining property owners; or, if a man traveling through your premises in a path has the rights of a licensee, you would not have the right to treat him as a trespasser. I charge you that, subject to that explanation I have given you, and what I have said in my general charge." There was testimony tending to show that at the time of the difficulty the defendant was on his own premises, and the deceased on a road used by the public, where he was killed. The question is whether there was error in the charge that there might be circumstances which would require a defendant to avail himself of every means of escape to avoid taking human life on his own premises. As applied to the facts of this case, the question is whether the defendant may not have been bound to retreat before killing the deceased, if the defendant was on his own premises and the deceased on the public road at the time of the fatal difficulty. Some courts have held that one assaulted in a public street is not bound to retreat before taking measures to defend himself, because he is where he has a lawful right to be. State v. Bartlett (Mo.) 71 S. W. 148, 59 L. R. A. 756. But this doctrine is not based upon sound principles, and it never has been recognized in this state. If the defendant was attacked while on his own premises by the deceased, who was at that time on the public highway, or where he had a right to be, then the defendant was bound to retreat before taking the life of his adversary, if there was a probability of his being able to escape without losing his life or suffering grievous bodily harm. The reason is that under such circumstances he would not have had the right to eject his adversary from the place where he had a right to be. The presiding judge recognized this distinction, and his modification of the request was free from error.

5. The fourth exception arose during the examination of John Hoops, a witness for the defendant, as follows: "Q. What did you tell him about going over there? A. I didn't say anything then. I told him to let's go by Joe Seaborn's wheat, that it was looking mighty fine. And we walked around down there and back to the bridge, and when we got to the bridge I said: 'Go home with me.' And he said: 'No; I am going home. I told Walter I would go and look at his cow.' And I turned to him and said: 'Earle —' Objected to by Mr. Boggs: I don't think that has anything to do with the case. It is a conversation he had there, and it is not a part of the res gestæ. By the court: I don't think it is competent, Mr. Jaynes, for the witness to detail any conversation. By Mr. Jaynes: I think it is competent for him to prove substantive facts, what he did, and what occurred after seeing Walter Mills, and his manner. I think it would be competent for him to say he warned Mr. Rochester not to go over there. By Mr. Boggs: I don't think it is competent. It is hearsay. By the court: I don't think it is competent. Mr. Jaynes excepts." It thus appears that the witness was not allowed to testify, and the court does not know what would have been his testimony. When objection cannot be urged against a question intended to elicit incompetent testimony, the court cannot know whether it is admissible until it hears the testimony. If it is incompetent, it can then be ruled out. It seems, from the argument of counsel, when objection was made, that the object of the testimony was to warn the defendant that it would be dangerous for him to go to the home of the deceased. Such testimony was calculated to influence the conduct of the defendant, and make him more apprehensive, and would be competent. State v. Smith, 12 Rich. Law, 430; State v. Thrailkill, 71 S. C. 136, 50 S. E. 551; State v. Dean, 72 S. C. 74, 51 S. E. 524.

6. Fifth exception: It does not appear from the testimony that the witness told the defendant why she wanted him to work on

the upper side of the place. The testimony was therefore immaterial, and the refusal to allow the witness to answer the question propounded was not reversible error.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(72 S. C. 223)

HARMAN v. SOUTHERN RY.

(Supreme Court of South Carolina. July 18, 1905.)

1. RAILROADS—DEED OF RIGHT OF WAY—CONSTRUCTION.

A deed granting to a railroad company the right of way of sufficient width for its tracks, not to exceed 100 feet on each side, with a right to use the earth, stone, and timber within the tract for the construction or extension of the road, conveys such rights as the railroad company would be presumed to have acquired under its charter granting it the right of eminent domain.

2. VENDOR AND PURCHASER — UNRECORDED DEED—CONSTRUCTIVE NOTICE.

A subsequent purchaser of a tract of land, the owner of which had given a deed to a railroad for right of way, had constructive notice of the right of way of the railroad company, though the deed had not been recorded, from the maintenance and operation of the railroad over the land.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Vendor and Purchaser, § 489.]

3. ADVERSE POSSESSION—RAILROAD RIGHT OF WAY.

Where a railroad company has an easement for right of way over certain land, the owner of the land may use it for any purposes subject to the easement, and by such use for the statutory period in a manner incompatible with its use for railroad purposes a party may obtain title to a part of the right of way by adverse possession.

Appeal from Common Pleas Circuit Court of Richland County; Watts, Judge.

Action by Frederick Harman against the Southern Railway. From judgment for defendant, plaintiff appeals. Affirmed.

The following are plaintiff's exceptions:

"(1) Because his honor erred in charging the jury as follows: 'Now, I charge you as a matter of law that the defendant here, a corporation duly incorporated under the laws of this state, if it is the Greenville & Columbia Railroad, then under the act of the Legislature of 1845, I believe it is, it gave to that railroad an easement, right of way, over the land of anybody it ran through for 100 feet on each side from the center, for railroad purposes alone'—thereby giving the jury to understand that if the Greenville & Columbia Railroad Company, under which the defendant company claimed, built or ran its railroad through the tract of land described in the complaint, it thereby acquired under the act of 1845 (11 St. at Large, p. 348) a right of way over said land for 100 feet on each side from the center of its road; whereas, he should have charged them that this would have been the case only in the absence of any written contract with the owner of the land. Act 1845 (11 St. at Large, p. 352) § 11.

"(2) Because his honor erred in charging the jury as follows: 'So, if you believe that the Greenville & Columbia or Columbia & Greenville Railroad ran through the land which Harman now claims that he is the owner of, and that they built that road under the charter of 1845, or if they got the easement or right of way from the owners of the land at that time—Harman does not claim it was his then, as the deed he has introduced shows he got the land about 1880 or 1881; but if it is the same land, and if the owners of it in 1845 gave to the Greenville & Columbia Railroad the right of way over there, and the Southern absorbed the Greenville & Columbia Railroad, and are now the owners of that railroad, and operating that railroad, I charge you as a matter of law, while the title to the land may be in Harman, it is subject to the easement of the Southern Railroad. That is, the Southern has the right to 100 feet from the center of the track for railroad purposes'—thereby giving the jury to understand that if the Greenville & Columbia Railroad Company acquired a right of way over said land by contract with the then owner, such right of way measured 100 feet on each side of the road from the center thereof, without regard to the terms of the contract, and without regard to whether it had been recorded, or whether the plaintiff, Harman, was chargeable with any knowledge or notice thereof; whereas, he should have charged them that in case of a written contract with the owner the extent of the right of way would in the first instance be controlled by the terms of the contract, but that no such contract would be valid against a subsequent purchaser for value without notice, unless recorded.

"(3) Because his honor erred in charging defendant's first request to charge, as follows: 'Under the pleadings in this case, the plaintiff is required to show that he has such title in the land upon which the fence in question is located, and right to the possession thereof, as would make the acts alleged in the complaint, a trespass thereon. To do so, he must show that he has title in fee or such an estate as would give him exclusive right to the use thereof as against any rightful claim or title of the defendant,'—thereby giving the jury to understand that plaintiff could not recover, unless his right to the use of the land on which the trespass was alleged to have been committed was exclusive of any right of the defendant to the concurrent use of the same; whereas, he should have charged the jury that, even if the land on which the trespass was alleged to have been committed lay within the limits of the defendant's right of way, yet the owner of such land was also entitled to use it for any purpose not incompatible with defendant's easement thereon, and that, if the

alleged trespass amounted to an interference with this right of the owner, it would, if established by the evidence, entitle him to recover.

"(4) Because his honor erred in charging defendant's second request to charge, as follows: 'Under the deed of conveyance of right of way from L. E. Folk to Greenville & Columbia Railroad Company, introduced in evidence, I charge you that said company, and its successor or successors, have the right to the use of 100 feet on each side of the railroad track through the lands referred to in said deed of conveyance, free from any and all obstructions inconsistent with the use of same for railroad purposes, unless the same be put there with the consent of said railway company, or its successor or successors'—thereby giving the jury to understand that, under the said deed of conveyance from L. E. Folk, the Greenville & Columbia Railroad Company, and its successor or successors, had a right of way measuring 100 feet on either side of the railroad track, absolutely and without regard to whether a lesser width might not have been sufficient, and also without regard to whether the said deed had been recorded, or whether the plaintiff was chargeable with knowledge or notice thereof; whereas, he should have charged them that under said deed said company and its successor or successors had acquired a right of way of such width only, not exceeding 100 feet, as might be sufficient for the purposes therein stated, but that even then such deed would not be valid against the plaintiff, if they believed from the evidence that he was a subsequent purchaser of the land for value without knowledge or notice of such deed of conveyance.

"(5) For that his honor erred in charging the jury defendant's fourth request, as follows: 'The theory upon which title by adverse possession rests is that such possession for the required time affords a legal presumption that a title has been made, but has been lost; but where the party against whom title is asserted by adverse possession never had the power to make a title, there is no room for such presumption. Now, as a railroad company has no power to sell or alien any part of its roadbed, track, or right of way, it cannot be presumed that it had done what it never had the right to do. Therefore title by adverse possession cannot be acquired to such roadbed, track, or right of way, or part thereof'—the error consisting in his honor's charging the jury that title to any part of the defendant's right of way could not be acquired by adverse possession.

"(6) Excepts because his honor erred in charging defendant's ninth request as follows: 'The plaintiff cannot acquire title by adverse possession to the right of way actually covered by the track of the defendant, or to any land or lands necessary to the operation or maintenance of its railroad under its charter'—the error consisting in charging that title by adverse possession to any part of the right of way or land necessary to defendant's railroad could not be acquired by plaintiff."

Andrew Crawford and J. S. Muller, for appellant. B. L. Abney and H. M. Thomson, for respondent.

GARY, A. J. The facts are thus set out in the argument of the appellant's attorneys:

"This action was commenced September 14, 1903, by the service of the summons and complaint on the defendant. The complaint alleges (paragraph 1) the corporate capacity of the defendant; (paragraph 2) plaintiff's ownership and possession of the tract of land described in the complaint; (paragraph 3) defendant's ownership and operation of the railroad known as the Columbia & Greenville Railroad, running through said tract of land; (paragraph 4) the unlawful and willful entry of defendant on said tract of land, and its unlawful and willful cutting down, digging up, and destruction of plaintiff's pasture fence. Defendant's answer admits the allegations of paragraph 1 and paragraph 3 of the complaint, but denies the allegations of paragraph 2 and paragraph 4.

"Plaintiff introduced evidence tending to show his title to and ownership of the land described in the complaint under two deeds of conveyance thereof from J. B. Fellers, judge of probate, dated in 1880 and 1881, and purporting to have been made in pursuance of a decree of court for the sale of the real estate of L. E. Folk, deceased; that he had a pasture on the land, the railroad running through the pasture on a trestle, and the pasture fence of the plaintiff running under the trestle between the uprights of the trestle; that on or about June 20, 1903, the pasture fence was torn down by defendant for about 25 or 30 feet, on each side of the track.

"Defendant introduced the following evidence, to wit:

"(1) Deed of conveyance, without probate and without certificate of record indorsed thereon, from L. E. Folk, under whom the plaintiff claimed, to the Greenville & Columbia Railroad Company, as follows:

" 'The State of South Carolina.

" 'Whereas, the Greenville & Columbia Railroad Company are about locating their road; and whereas, its passage over the land of the undersigned may greatly benefit them: Therefore, know all men by these presents, that the undersigned, in consideration of the premises, have given, granted, and released, and by these presents do give, grant, and release, to the said Greenville & Columbia Railroad Company the right of way of sufficient width for the track, cuts, and embankments of the said road, as also for turnouts and all other extensions and enlargements, or repair

of the same from time to time, not to exceed 100 feet on each side, with the right to use the earth, stone, and timber within the said tract for the construction, extension, or repair of the same road. In witness whereof, the undersigned have subscribed their names and affixed their seal as of and on the 17th day of August, A. D. 1848.

" 'L. E. Folk. [L. S.]

" 'Signed, sealed and delivered in the presence of Wm. Spencer Brown.'

"(2) A number of other deeds, establishing a complete chain of title from the Greenville & Columbia Railroad Company to Southern Railway Company; and it was agreed by counsel that said Southern Railway Company is successor to all the rights, privileges, and franchises of Greenville & Columbia Railroad Company and Columbia & Greenville Railroad Company, including the right of way and other rights conveyed by the said deed from L. E. Folk to the Greenville & Columbia Railroad Company, of date August 17, 1848.

"(3) The charter of the Greenville & Columbia Railroad Company (11 St. at Large, pp. 348-356).

"The eleventh section of this charter (Act 1845; 11 St. at Large, p. 352) reads as follows: 'That in the absence of any written contract between the said company and the owner or owners of land, through which the said railroad may be constructed, in relation to said land, it shall be presumed that the land upon which the said railroad may be constructed, together with one hundred feet on each side of the center of said road, has been granted to the said company by the owner or owners thereof, and the said company shall have good right and title to the same,' etc.

"In reply, the plaintiff, Harman, testified that he never had any knowledge or notice of the deed from L. E. Folk to the Greenville & Columbia Railroad Company concerning the right of way. It also appeared in evidence, in reply, that this deed had never been recorded."

The jury rendered a verdict in favor of the defendant, and the plaintiff appealed upon exceptions, which will be incorporated in the report of the case.

1. Our construction of the deed is that it was the intention of the grantor to convey such rights, to the full extent, as the railroad company would be presumed to have acquired under the statute, in the absence of a written contract between the company and the owner of the land through which the railroad was constructed. The plaintiff cannot be regarded as a purchaser for valuable consideration without notice of the railroad company's right of way, because he had actual notice that the railroad was being operated through said land at the time of his purchase, and he had constructive notice, or is presumed to have known, that the company's right of way, in the absence of a written contract, extended 100 feet on each side of the center of its track. In any event, he had knowledge of such facts as were sufficient to put him on inquiry, which, if pursued with due diligence, would have led to knowledge of the company's rights, and this is the equivalent of notice.

2. The request set out in the third exception must be considered in connection with that portion where his honor, the presiding judge, charged that, "if Harman is the owner of the land, he had a right to use it for pasture purposes, or for any purpose he saw fit and proper, subject to the right of the railroad to operate its road through there"; also, that "they have no right to go in there and destroy any property of Mr. Harman, they have no right to remove any property in there, unless strictly for the purpose of repairing and maintaining and operating that roadbed." When the request which was charged is considered in connection with the other portions of the charge, it will be seen that it is free from the error assigned.

These views dispose of all the exceptions, except the fifth and sixth, which raise the question whether the plaintiff could claim a part of the defendant's right of way by adverse possession. The doctrine is thus stated in Railway Company v. Beaudrot, 63 S. C. 266, 41 S. E. 299, and affirmed in Hill v. Railway, 67 S. C. 548, 552, 46 S. E. 486, 487, to wit: "It appears in the 'case' that the defendant had erected, within the alleged right of way, a substantial fence inclosing what defendant claimed exclusive of any right therein by plaintiff. Such an assertion of right to exclusive occupancy of the land is not compatible with the right of easement belonging to the plaintiff. If such adverse holding should run for the statutory period, the easement would be defeated. We do not say that the mere use or occupation of land within the right of way acquired by a railroad company is such adverse use as would give currency to the statute of limitations, unless the use is inconsistent with the easement; but we do say that the inclosing of land within the right of way, under a claim of exclusive right to use and occupation, and a refusal to remove the inclosure after demand therefor, is some evidence of the assertion of a claim, incompatible with plaintiff's alleged easement, which, under the issues raised, ought to have been submitted to the jury." In the case of Matthews v. Railway, 67 S. C. 499, 508, 46 S. E. 335, 338, 65 L. R. A. 286, the court had under consideration the question whether the public could acquire a prescriptive right to travel over the right of way of a railroad corporation, and decided that it could not. The following language in that case shows that it was not intended to affect the doctrine announced in Railway Co. v. Beaudrot, 63 S. C. 266, 41 S. E. 299, viz.: "It should be observed, the conclusion that the public cannot acquire a way on a railroad right of way by prescrip-

tion, which is founded on the presumption of a deed, does not imply that title to portions of the right of way may not be acquired by adverse possession, which is founded on possession hostile to the true owner. Neither adverse possession nor the doctrine of equitable estoppel, referred to in Crocker v. Collins, 37 S. C. 333, 15 S. E. 951, 34 Am. St. Rep. 752, is involved in this case." The principle settled in Railway Company v. Beaudrot, supra, cannot be applied in this case, for the reason that there was no testimony from which it could be inferred that the plaintiff had acquired a title to the defendant's right of way by adverse possession.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 208)

DU BOSE v. KELL et al.

(Supreme Court of South Carolina. July 28, 1905.)

PLEADING—SEPARATE CAUSES OF ACTION.

In an action by an administratrix, the complaint alleged ownership by decedent of the described land at her death, leaving plaintiff and certain defendants heirs; the imbecility of the deceased; the control by one of the defendants over her, and his fraudulent procurement of a deed of all the property; the purchase by such defendant of the interests of certain of the heirs; his execution of a deed to certain of the other defendants who were nonresidents, purporting to convey the entire land, but in reality conveying one-third interest only; possession since the death of the original owner; the receipt of rents and profits; and the commission of waste. The relief sought was the annulling of the deed, the appointment of a receiver, partition, and an accounting. *Held* to state but a single cause of action, and that a motion to make the complaint more definite and certain by stating the causes of action separately was properly denied.

Appeal from Common Pleas Circuit Court of Chester County; Watts, Judge.

Action by Sarah F. Du Bose in her own right and as administratrix of Susan C. Kell against John A. Kell and others. From refusal of motion to make complaint more definite, defendants appeal. Affirmed.

The plaintiff, complaining of the defendant, alleges:

"(1) That heretofore, to wit, on or about the 24th day of December, 1902, Susan C. Kell, late of the county of Chester and state of South Carolina, departed this life, seised in fee and possessed of the following described lands and tenements, to wit: (1) All that certain tract, parcel, or plantation of land lying, being, and situate in the county and state aforesaid, known as the 'Old Kell Home Place,' containing 1,300 acres, more or less, and bounded as follows: * * * (2) All that certain parcel, tract, or plantation of land, situate, lying, and being in the county and state aforesaid, known as the 'Rocky Creek Place,' and located * * *. (3) All that certain parcel, piece, or tract of land lying, being, and situate in the county and state aforesaid, known as the 'Parish Place,' containing 100 acres, more or less, and bounded * * *; and leaving as her heirs at law the plaintiff, Sarah F. Du Bose, and the defendants Susan A. Boylston and Eunice R. Cloud.

"(2) That the said Susan C. Kell was the wife of B. E. Kell, the elder, also late of said county and state, who predeceased his wife and departed this life on the 8th day of August, 1902, leaving of force his last will and testament, which was duly admitted to probate by the probate court for Chester county, on the 20th day of September, 1902, and by which will he devised all his property, real and personal, unto his wife, the said Susan C. Kell, for life, and after her death to his nephew, Dr. B. E. Kell, also late of said county and state, and appointed his said nephew, Dr. B. E. Kell, executor of his said will.

"(3) That at the time of the marriage of the said B. E. Kell and the said Susan, and up to the time of his death, the said B. E. Kell had no property of his own, and no business or occupation which produced any income, but lived with his said wife and upon her property, devoting his entire time to the management and care thereof.

"(4) That at the time of her death, and for many years previous thereto, and also previous to and at the time of the death of her said husband, the said Susan C. Kell was in weak bodily health, had lost her mind, was blind and an imbecile, and was attended during this time by the said Dr. B. E. Kell, her said husband's nephew, as her physician; and during the last few years of her life she was placed by the said Dr. B. E. Kell and her said husband under the control and in the care of relatives and friends, who kept her under restraint and away from her home, under the directions of her said husband and the said Dr. B. E. Kell.

"(5) That upon information and belief plaintiff alleges that the said Susan C. Kell left her will of force, by which she devised the whole of her estate, both real and personal, to her husband, the said B. E. Kell, but that said will was never probated or put on record; and, if the same exists, plaintiff avers it is inoperative and ineffectual to pass any estate or interest in the said lands hereinabove described to the said B. E. Kell, her husband, by reason of the fact that the said B. E. Kell predeceased the said Susan C. Kell, the testatrix, and the devises and legacies therein named lapsed.

"(6) That after the death of the said B. E. Kell the said Dr. B. E. Kell, who was the nephew of the said B. E. Kell, the elder, and his executor, and had for a number of years, and ever since he was a boy, resided in the family of the said B. E. Kell, took possession of all of the property, real and personal, of the said Susan C. Kell, and managed and controlled it, ostensibly for her benefit and in her behalf.

"(7) That upon information and belief

plaintiff alleges that shortly after the death of his said uncle, and while the said Dr. B. E. Kell was in possession and control of all of the property, real and personal, of the said Susan C. Kell, and while the said Susan C. Kell was an imbecile and in weak bodily health, and confined at the house of one W. C. Brown, away from her home and where she had been placed for that purpose by the said Dr. B. E. Kell and his said uncle, the said Dr. B. E. Kell being at the time the physician of the said Susan C. Kell, and well knowing her to be incapable of attending to any business or understanding the same, fraudulently obtained from the said Susan C. Kell a deed conveying to himself all the property, real and personal, which the said Susan C. Kell owned or was entitled to, which said alleged deed has never been put on record, but is referred to by the said Dr. B. E. Kell as dated October 27, 1902; and, if the same exists, this plaintiff alleges it to have been obtained while the grantor was under duress, while she was an imbecile and incapable of legally executing the same, and that the same is without consideration, fraudulent, null, and void, and should be set aside.

"(8) That upon information and belief plaintiff alleges that after the death of the said Susan C. Kell the said Dr. B. E. Kell continued in possession of the said lands of the said Susan C. Kell, hereinbefore described, and that shortly before his death, to wit, on or about the 9th day of September, 1903, the said Dr. B. E. Kell purchased the interest of the said Susan A. Boylston and of the said Eunice R. Cloud, as heirs at law of the said Susan C. Kell in and to the said lands hereinabove described, their said interests being one-third (⅓) undivided interest therein, each taking conveyance of the said interest of Susan A. Boylston to himself, and of the interest of the said Eunice R. Cloud to his sister, the defendant C. Cloud Kell, but that none of said deeds have been put on record.

"(9) Upon information and belief plaintiff alleges that the said Dr. B. E. Kell died on October 30, 1903, and that shortly before his death he executed a conveyance, upon the consideration of love and affection, by which he attempted to convey all of said lands to his brothers and sisters, the defendants John A. Kell, W. R. Kell, S. H. Kell, D. H. Kell, T. G. Kell, C. Cloud Kell, and Eunice Sarah Kell, which said deed was not recorded until November 20, 1903, and which deed, if valid, is effectual to pass only the one-third interest in the said lands conveyed, as this plaintiff is informed, by the said Susan A. Boylston to the said Dr. B. E. Kell.

"(10) That plaintiff in her own right, and the said defendants John A. Kell, W. R. Kell, S. H. Kell, D. H. Kell, T. G. Kell, C. Cloud Kell, and Eunice Sarah Kell, are tenants in common of the aforesaid premises; the shares of each therein being as follows: Plaintiff is entitled to one-third (⅓) undivided interest therein in fee, and the defendant C. Cloud Kell to eight twenty-firsts (8/21) interest therein, and each of the following defendants to one twenty-first (1/21) undivided interest therein, to wit, John A. Kell, W. R. Kell, S. H. Kell, D. H. Kell, T. G. Kell, and Eunice Sarah Kell.

"(11) That the plaintiff and the said defendants John A. Kell, W. R. Kell, S. H. Kell, D. H. Kell, T. G. Kell, C. Cloud Kell, and Eunice Sarah Kell, own no other lands in common in this state, so far as plaintiff is informed and believes and is advised, but this plaintiff alleges that the said Susan C. Kell owned a life estate only in the following described lands and tenements situate, lying, and being in the said county and state, to wit: * * *; which said lands, plaintiff alleges, upon the death of the said Susan C. Kell passed to this plaintiff and her sisters, the defendants Susan A. Boylston and Eunice R. Cloud, as tenants in common, and as such they are each entitled to one-third (⅓) undivided interest thereof in fee, and that the plaintiff and the said Susan A. Boylston and Eunice R. Cloud own no other lands in common in this state, so far as plaintiff is informed or believes.

"(12) That on the 19th day of September, 1903, plaintiff was duly appointed administratrix of the estate of the said Susan C. Kell, and that all claims against the said estate that have been presented to this plaintiff have been paid, and there are now outstanding against the said estate no debts, so far as this plaintiff is informed.

"(13) Upon information and belief plaintiff alleges that shortly after the death of the said Susan C. Kell the said Dr. B. E. Kell, being in possession and control of all of the said lands hereinabove described, and of the stock, farming utensils and implements, provender, and stock of grain, etc., thereon, and belonging to the said estate, rented the said home place, together with the stock, provisions, farming implements, and machinery thereon, to one Wm. A. Gladden, for the year 1903, at and for the rental of one-half of all the crops raised upon the said lands; and that the said Dr. B. E. Kell also rented out the remainder of the lands which the said Susan C. Kell owned, including the said Fishing Creek Place, the rental upon which said Fishing Creek Place amounted to, as this plaintiff is informed and believes, six bales of cotton; and that the defendants the brothers and sisters of the said Dr. B. E. Kell collected and received and appropriated to their own use the entire rents from the said lands; and plaintiff avers that they should account and pay over to this plaintiff her proper share or proportion thereof.

"(14) Upon information and belief plaintiff alleges that all of the defendants the brothers and sisters of the said Dr. B. E. Kell, deceased, are nonresidents of this state, and all reside in the state of North Carolina, except the defendant W. R. Kell, who resides

in the state of Mississippi, and that the said defendants own no other property in this state other than their interest in the said estate of the said Susan C. Kell, and that despite the notice in writing given by this plaintiff to the tenants upon the said lands not to pay over the said rents for the year 1903 to the said defendants, the said defendants, or their agents, came down with their wagons from North Carolina, and seized and carried away all of the rents for the year 1903, and took them out of this state, and, if permitted to make away with the rents for the present year, which are fast accruing, this plaintiff will suffer irreparable loss and injury.

"(15) Upon information and belief plaintiff alleges that for a number of years there has not been upon the said Home Place of the said lands hereinabove described more than enough woodland and timber for the ordinary purposes and keeping of said plantation, and that despite this fact the said defendants the brothers and sisters of the said Dr. B. E. Kell have suffered a tenant upon the said place to erect and run a sawmill, and to cut and saw up a considerable quantity of the said timber, and the same, or a large portion thereof, to sell and dispose of, and to commit waste upon the said Home Place.

"(16) Upon information and belief, that a reasonable and fair rental value of the said Home Place is about 35 bales of cotton, weighing 500 pounds each, per annum, but that the said defendants the brothers and sisters of the said Dr. B. E. Kell, now deceased, have rented the said Home Place to the said Wm. A. Gladden for the year 1904 for only 20 bales of cotton, and that the said lands are not being rented for their full value, whereby this plaintiff is suffering irreparable injury.

"Wherefore plaintiff prays (1) that a receiver be appointed to take charge of the said lands, and to preserve and manage the same, pending the final determination of this action, and to preserve the same from waste, to collect the rents accruing therefrom, pay the taxes thereon, to procure tenants for the same for the ensuing year, and that in the meantime the said Wm. A. Gladden and the other tenants upon the said lands be enjoined and restrained from committing any waste thereon, and from paying over the rents for the present year to the defendants, or any of them, or to any person other than the said receiver so to be appointed; (2) that the deed alleged to have been made by the said Susan C. Kell to the said Dr. B. E. Kell be declared null and void, and that the same be delivered up to be canceled; (3) that the said defendants John A. Kell, W. R. Kell, S. H. Kell, D. H. Kell, T. G. Kell, C. Cloud Kell, and Eunice Sarah Kell do account to this plaintiff, and pay over to her one-third of all of the rents arising from the said lands for the year 1903, and of such portion of the rents for 1904 as the said defendants may have received; (4) that the said lands be partitioned between the plaintiff in her own right and the several defendants in the proportions as hereinbefore alleged, or, in case that should be found impracticable, that the said lands be sold under the order of this court, and the proceeds thereof be divided between the plaintiff and the several defendants as the interests of said parties shall be determined; (5) for such other and further relief as plaintiff may be entitled to, and for the costs of this action."

From order refusing motion to make complaint more definite and certain by stating causes of action separately, defendants appeal.

J. H. Marion, Glenn & McFadden, and Caldwell & Gaston, for appellants. Halcot P. Green and Henry & McLure, for respondent.

WOODS, J. The defendants made a motion to require the complaint to be made more definite and certain "by setting out each cause of action contained in said complaint separately, duly and distinctly denoted and numbered as such, and each containing a plain and concise statement of the facts constituting such cause of action, without redundancy or unnecessary repetition." The appeal is from an order refusing the motion on the ground that only one cause of action was stated in the complaint. There is no room for doubt as to the correctness of the view of the circuit judge. In brief, the complaint alleges: Mrs. Kell's ownership of the land described; her death, leaving as her heirs the plaintiff, the defendants Mrs. Boylston and Miss Cloud; the imbecility of Mrs. Kell; the control of Dr. B. E. Kell over her, and his fraudulent procurement of a deed from her, conveying to him all her property; the purchase after Mrs. Kell's death of the interests of Mrs. Boylston and Miss Cloud by Dr. Kell; the execution by Dr. Kell of a deed, in consideration of love and affection, to certain of the defendants, his brothers and sisters, who are nonresidents, purporting to convey the entire land, but in reality only conveying the one-third interest acquired by him from Mrs. Boylston and Miss Cloud; the possession by the defendants of the land since the death of Dr. Kell; the receipt of the rents and profits; and the commission of waste by them. The relief sought is the annulling of the deed from Mrs. Kell to Dr. B. E. Kell, the appointment of a receiver, partition, and account for rents and profits and waste.

The facts alleged, if proved, will establish but one primary right of the plaintiff, namely, ownership of an interest in the land as tenants in common with the defendants. They will establish but one primary wrong of the defendants, namely, the withholding of the plaintiff's interest in the land from her by means of an alleged fraudulent deed.

The right of the plaintiff to have her primary right of ownership of an interest in the land cleared from the obstruction of a fraudulent deed, the right to partition, the right to rents and profits and to compensation for waste, are all subordinate rights, included in the primary right of ownership. The primary wrong of the defendants is the obstruction of the plaintiff's right to enjoy the ownership of her interest in the land; and the fraudulent deed, the withholding of her share of the rents and profits, and the waste committed by them are only methods employed in accomplishing the primary wrong, and are included in it. Pomeroy's Code Remedies, § 455; Threatt v. Brewer Mining Co., 49 S. C. 95, 26 S. E. 970; Smith v. Smith, 50 S. C. 65, 27 S. E. 545.

The judgment of this court is that the judgment of the circuit court be affirmed.

(72 S. C. 251)

GENERAL ELECTRIC CO. v. SOUTHERN RY.

(Supreme Court of South Carolina. July 28, 1905.)

CARRIERS — DELIVERY OF FREIGHT — PRODUCTION OF BILL OF LADING.

Where freight was shipped under a bill of lading with a draft attached drawn by the shipper, and the bill of lading was "to the order of" the shipper, "notify" a third party, the carrier has no right to deliver the freight to such party without his surrender of the bill of lading, but could only deliver the same on the production of such bill properly indorsed.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 310, 311.]

Appeal from Common Pleas Circuit Court of Richland County; Purdy, Judge.

Action by the General Electric Company against the Southern Railway. From judgment for plaintiff, defendant appeals. Affirmed.

E. M. Thomson and R. H. Welch, for appellant. Barron & Ray, for respondent.

POPE, C. J. This is an action by the plaintiff, a corporation under the laws of the state of New York, against the defendant, a corporation under the laws of Virginia, but domesticated in South Carolina, for the recovery of the sum of $230.57. The contest grew out of a motor, of the value of $230.57, transported from Schenectady, N. Y., to Columbia, S. C. The bill of lading was to the order of the General Electric Company, notify Cotton States Electric & Machine Company. This bill of lading, together with a draft attached thereto, was drawn by the General Electric Company upon the Cotton States Electric & Machine Company. The draft was for $77.23, and was received at the Carolina National Bank at Columbia, S. C., for collection, June 29, 1903, and was held by said bank until July 13, 1903, when it and the bill of lading to which it was attached was returned by said bank to the General Electric Company, the plaintiff here. On the 29th of September, 1903, the plaintiff, through its attorneys, Barron & Ray, presenting the bill of lading to the defendant, demanded the motor in question; but the defendant stated that it could not comply with such demand, because it had already delivered such property to the Cotton States Electric Machine Company without the delivery or presentation of the bill of lading; the latter promising afterwards to deliver said bill of lading, which promise was never fulfilled. The defendant also tendered the sum of $77.23 to the plaintiff, which it claimed should be a full settlement betwixt them, but the plaintiff declined to receive it. The plaintiff thereupon brought this action, which came on for trial before Judge Purdy and a jury. The plaintiff denied the defendant's right to introduce the contract between the plaintiff and the Cotton States Electric & Machine Company in regard to this motor. Upon objection, the judge refused to admit such contract in the testimony. The defendant also sought to introduce a declaration of one Laxton, as the agent of said plaintiff, the only evidence of such agency being the alleged agent's declaration. The judge refused to admit such declaration of the alleged agent, there being no other testimony as to such agency but his own statement. There was also some controversy at the trial of the following part of the defendant's answer: "That on that day (meaning the 13th of July, 1903), the Cotton States Electric & Machine Company called on this defendant's agent and deposited the amount of said draft with this defendant, and received said machinery. That said machinery was shipped to said Cotton States Electric & Machine Company on a conditional sale, and said plaintiff intended that it should be delivered on the payment of the amount of said draft, and such delivery has caused no loss or damage to them, as their rights to the property are still good under the said conditional sale. That the only adjustment and payment of the claim presented by the plaintiff which defendant is required to make is to pay over to the plaintiff the said sum of $77.23, which defendant then and there offered to do, which offer plaintiff refused." After the charge of the judge to the jury, it found a verdict in favor of the plaintiff for $230.50, and after entry thereon an appeal has been taken to this court.

The first ground of appeal relates to the striking from defendant's answer that clause which set up that on the 13th of July, 1903, the Cotton States Electric & Machine Company called on the defendant, depositing $77.23, and received said machinery. All this is fully set forth in the extract we have already made. The machinery when received by the defendant, and it well knowing that the same was subject to the bill of lading in the plaintiff's hands, could not be

delivered with safety by the defendant to the Cotton States Electric & Machine Company. The character impressed by law is distinct and unvarying. Any effort to surrender a shipment at variance with the bill of lading is at the peril of the defendant. He must be prepared to pay the full value of the shipment or take upon himself the burden of proving himself justified in so doing. A case in our own books, to wit, Bank v. Railway Co., 25 S. C. 216, abundantly illustrates the character and legal effect of a bill of lading drawn to order. At page 222 of that case, Mr. Justice McIver said: "That such a bill of lading, though not negotiable, in the fullest sense of that term, like a bill of exchange, or, to speak more accurately, although its negotiability is not attended with all of the consequences resulting from the negotiability of a bill of exchange, yet that it is negotiable in so far that by indorsement the right to the possession of the goods mentioned in it passes, is well settled by repeated adjudications of courts of the highest authority and is generally, if not universally, conceded by the elementary writers. Conard v. Atlantic Insurance Company, 1 Pet. 386 [7 L. Ed. 189]; The Thames, 14 Wall. 98 [20 L. Ed. 804]; Dows v. National Exchange Bank, 91 U. S. 618 [23 L. Ed. 214]; Shaw v. Railroad Company, 101 U. S. 557 [25 L. Ed. 892]; and Hieskell v. Farmers' & Mechanics' National Bank, 89 Pa. 155, 33 Am. Rep. 745; McCants v. Wells, 4 S. C. 381." Under these circumstances, it was the duty of the defendant to await the production of the bill of lading, and let the indorsement thereon govern the delivery of the shipment. When it is remembered that the defendant received in cash only one-third of the value of the shipment, with no provision for the two-thirds credit portion, it will be very apparent why the case of Witt et al. v. East Tennessee & W. N. C. R. Co. et al. (Tenn.) 41 S. W. 1064, is not applicable to this case, for there the money was fully paid, while here two-thirds of the value of the shipment was unpaid and unprovided for. We think the circuit judge made no mistake, and this first exception is therefore overruled.

Second. We do not think the circuit judge erred in ruling that the contract made by and between the General Electric Company and the Cotton States Electric & Machine Company was irrelevant. When the latter refused to accept the papers transmitted to the Carolina National Bank, and those papers were returned by said bank to the plaintiff, there was an end to the purchaser's rights under the contract, and any proof of what those business relations were or might have been, had no connection with the plaintiff and defendant. The defendant was already advertised that the plaintiff retain full control over such shipment through the bill of lading to plaintiff's order. This ground of appeal is overruled.

As to the third ground of appeal, relating as it does to the competency of the witness, Mr. Beck's statement, that one Laxton was plaintiff's agent by Laxton's declaration alone, we see no error committed by the circuit judge. It is well-known law that a witness cannot establish his representative capacity by his own declaration alone, and, as this is all the defendant offers here, it must fail. The third exception is overruled.

Fourth ground of appeal. It is claimed the court erred in charging the jury as follows: "'If you find that motor or property in question was shipped under this bill of lading, then the Southern Railway, if the Southern Railway received it under that bill of lading, had no right, except upon the surrender of the bill of lading duly indorsed, to deliver the property, unless ordered by the plaintiff. The Southern Railway, defendant, if it connected itself with that bill of lading by receiving and agreeing to transport that property under it, or by receiving and transporting it under it, couldn't dispose of the property except on the order of the plaintiff in this case; and if it didn't have such order, and took the property and disposed of it, or failed to deliver it on the order, the company would make itself liable for its value'—because, under the facts of this case, the defendant was not liable for the amount of the first installment due for said motor according to the terms of said contract, and as represented by the amount of the draft attached to the bill of lading, and because the defendant, under the facts of the case and the intention of the parties, did have the right to deliver the motor upon payment of the first installment, $77.23, as provided in said contract, without the production of the bill of lading." Under the cases already cited herein, the defendant, if liable at all, is liable for the full value of the shipment, and, as the property shipped was proved to be worth $230, the charge of the judge was right. This ground of appeal is therefore overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 256)

MACHEN v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. July 31, 1905.)

1. APPEAL—HARMLESS ERROR—EVIDENCE.
Any error, in an action for delay in the delivery of a telegram, in admitting a declaration of the sending agent, some time after, that he had promptly transmitted it, is cured by other competent undisputed evidence to the same effect.

2. OPINION EVIDENCE.
On the issue as to delay in the delivery of a telegram, a witness may give his opinion as to whether he could have crossed a creek earlier than he did, on a statement of the fact on which his opinion was based.

3. TELEGRAM—DELAY IN DELIVERY—MENTAL ANGUISH.
In support of an allegation of mental anguish caused by failure to deliver a telegram, the addressee of the message can testify that, on the death of his father, he wished to be with his family.

4. TRIAL—NONSUIT.
In an action to recover damages caused by alleged negligence and willfulness in delivery of a telegram, it is proper to refuse a nonsuit on the whole case, if there was evidence of negligence, though there was none of willfulness.

5. SAME.
Under the act of 1898, allowing acts of negligence and willful tort to be commingled in one statement, if no evidence has been submitted on the case based on the willfulness, then the whole case consists of a cause of action based on the mere negligence, and a nonsuit may be granted on the cause of action based on the willful tort, when without evidence to sustain it.

6. TELEGRAM—DELAY—PUNITIVE DAMAGES.
In an action for delay in delivering a telegram, where the evidence showed a long delay, coupled with absence of evidence of any real attempt to deliver it, the question of punitive damages for the willfulness of defendant should be submitted to the jury.

Appeal from Common Pleas Circuit Court of Laurens County; Gary, Judge.

Action by J. S. Machen against the Western Union Telegraph Company. From judgment for plaintiff, defendant appeals. Affirmed.

Evans & Finley and Cothran, Dean & Cothran, for appellant. Simpson & Cooper, for respondent.

JONES, J. This action was brought for damages for negligent and willful misconduct in failing to deliver a telegram announcing the death of plaintiff's father. The message was delivered to defendant company at Honea Path, S. C., on August 14th, at about 4 p. m., and was transmitted to Laurens through one or more relay offices, reaching Laurens at about 5:30 p. m. The plaintiff resided in the town of Laurens, and had been conducting a milling business there for three years. When the message was delivered to the messenger boy, he carried it to Bentnella Hotel, in said town, and left it with the proprietor, who receipted for it and pigeonholed it, thinking it was addressed to a Mr. Meacham, a traveling salesman, who usually stopped at said hotel. Plaintiff received the message five days later. About 9 o'clock p. m., on August 14th, plaintiff, having learned of the death of his father from another source, immediately started by private conveyance for his father's home at Princeton, about 18 miles distant from Laurens. On his way it was necessary to cross Rabun creek, and on reaching that stream he found he could not cross, it having been swollen by heavy rains late that evening. He was thus compelled to camp on the bank of the creek until midnight, when he attempted to cross, but on reaching the bridge and finding the water dangerous beyond, he camped on the bridge the balance of the night, exposed to the weather. He reached his father's home the next morning in time to attend the funeral. The jury rendered a verdict for $225, and defendant appeals.

1. The first exception alleges error in allowing the witness, H. L. Machen, to testify as to a conversation with Mr. Wiles, the agent of the company at Honea Path, as follows: "Q. Did he (Mr. Wiles) say he had received it (the message) from Mr. West? A. Yes, sir. Q. And that he sent it promptly? A. Yes, sir." The error assigned is that the testimony was irrelevant, and, being a mere declaration of the operator, could not bind the company. The testimony was relevant, as the delivery of the message was one of the issues made by the pleadings. Touching the admissibility of the declarations of agents, the general rule is that such declarations are not admissible unless they are made, not only while acting within the scope of their authority, but also as a part of the res gestæ. 1 Elliott, Evidence, 378; 1 Greenleaf, Evidence, § 113; Piedmont Mfg. Co. v. Railroad Co., 19 S. C. 373; Petrie v. Railroad Co., 27 S. C. 67, 2 S. E. 837; Garrick v. Railroad Co., 53 S. C. 451, 31 S. E. 334, 69 Am. St. Rep. 874; Crawford v. Railroad Co., 56 S. C. 145, 34 S. E. 80; Gosa v. Railroad Co., 67 S. C. 362, 45 S. E. 810. Under this rule, the declarations in question, being a mere narrative of a past occurrence, although in reference to the receipt of a telegram, which was a matter within the scope of his agency, were not admissible. This, however, does not constitute reversible error, inasmuch as the fact of the receipt of the telegram and its prompt transmission from Honea Path to Laurens was established by other competent and undisputed evidence. Garrick v. Railroad Co., supra.

2. The second exception imputes error in allowing plaintiff to testify as follows: "Q. Could you have gotten there without encountering this difficulty? A. I think so." The error assigned being that the testimony was a matter of opinion about a matter beyond the knowledge of the witness. The purpose of the testimony was to show that, if the message had been promptly delivered, he would have been able to cross Rabun

creek on his way to his father's before the creek became impassable. This opinion was based on the fact that the mail rider had crossed the stream that afternoon, and that late that afternoon heavy rains caused the stream to be swollen. The testimony falls within the rule of the cases that hold that a nonexpert witness may give his opinion after stating the facts upon which it is based. Easler v. Railroad Co., 59 S. C. 316, 37 S. E. 938; Burnett v. Railroad Co., 62 S. C. 292, 40 S. E. 679.

3. The third exception assigns error in permitting plaintiff, in answer to a question why he wanted to be at his father's house the night of August 14th, to state that it was natural on account of his affection for his father, and his brother and sister, and as a last respect to his father. It is objected that the testimony was irrelevant, and too remote as a basis for damages. The testimony was relevant to the allegations of the complaint as to mental anguish suffered by reason of the failure to promptly deliver the telegram which deprived him of reaching his father's house and being with the family the night of August 14th. Furthermore, the complaint alleged a willful breach of duty on the part of defendant, and in this case testimony having even a remote causal connection between the wrongful act and the injury sustained is competent. Pickens v. Railroad Co., 54 S. C. 498, 32 S. E. 567; Marsh v. Telegraph Co., 65 S. C. 436, 43 S. E. 953.

4. The fourth exception alleges error in refusing to grant a nonsuit upon the whole action, there being no evidence either of negligence or willfulness. The cases are numerous to the point that where the complaint alleges damages as the result of negligence, and as the result of willful misconduct, a nonsuit cannot be granted as to the whole case, if there be any testimony tending to show damages as the result of either negligence or willfulness. Griffin v. Railway Co., 65 S. C. 123, 43 S. E. 445; Young v. Telegraph Co., 65 S. C. 99, 43 S. E. 448; Bolin v. Railway Co., 65 S. C. 222, 43 S. E. 665; Poulnot v. Telegraph Co., 69 S. C. 550, 48 S. E. 622; Arial v. Telegraph Co., 70 S. C. 424, 50 S. E. 6. This is true, no matter what may be the proper construction of the act of 1898, frequently called the "Jumbling Act," whether it be construed as allowing a cause of action based on negligence and a cause of action based on willful tort to be commingled in the same statement, but nevertheless to remain as distinct causes of action; or whether it be construed as permitting acts of negligence and acts of willful tort to be alleged as separate and distinct elements of damages, but as a single cause of action. In all the cases cited above, the motion for nonsuit was directed to the whole case, and the point decided was that nonsuit was improper, if there be any evidence tending to support a verdict for damages, either for negligence or willful misconduct. In this case there was some evidence of negligence in the delivery of the telegram, as it did not reach plaintiff's hands until the 19th day of August, five days after it reached Laurens. A delay in the transmission and delivery of a message raises a presumption of negligence against the company. Poulnot v. Telegraph Co., 69 S. C. 550, 48 S. E. 622; Hellams v. Telegraph Co., 70 S. C. 83, 49 S. E. 12. There was, furthermore, some evidence tending to show actual damages from loss of time and exposure to the weather all night on the bank of Rabun creek, as well as mental anguish due to the delay in reaching his father's house and family, as the result of said negligence. Whether there was any evidence of willfulness we will consider under the next head.

5. The fifth exception assigns error in refusing nonsuit as to punitive damages, as there was no evidence of willfulness, and the sixth exception imputes error in refusing to instruct the jury, as requested by the defendant, that there was no testimony upon which a verdict for punitive damages could be based. These exceptions involve the question alluded to above with reference to the construction of the act of 1898, allowing acts of negligence and acts of willful tort to be commingled in one statement. If, when so commingled, they constitute but one cause of action, then it must follow that nonsuit could not be granted in so far as the complaint alleged a willful tort, as that would be but a part of such single action; but, on the other hand, if, notwithstanding the commingled acts of negligence and acts of willfulness under said act, two distinct causes of action are embraced in the complaint, then manifestly it would be proper to grant a nonsuit as to the cause of action based on a willful tort, if there be no evidence of willfulness, and for the same reason it would be error not to instruct the jury, when requested, that a verdict for punitive damages could not be rendered, if there be no evidence of willfulness. Some confusion has arisen in our cases because of difference of view as to the proper meaning of the act of 1898, and we think this a proper occasion for settling the question, as it is important to have a clear and settled rule on the subject. In the cases of Griffin v. Railway, Young v. Telegraph Co. and Bolin v. Railway, supra, Mr. Justice Gary, writing the opinion, expressed as a reason for the decision that acts of negligence and acts of willful tort commingled, as permitted under the act of 1898, constitute elements of damage in a single cause of action. As already stated, this view was not essential to the decision of these cases, as the decision in each case safely rested on the principle that a motion for a nonsuit as to the entire cause could not prevail, if there was testimony either as to negligence or willfulness. On the other hand, in the case of Stembridge v. Railway, 65 S. C. 444, 43 S. E. 968, a motion was made for

a nonsuit on so much of the complaint as alleged a willful tort, and, in responding to an exception made to the circuit court's refusal of motion, this court said: "There is no doubt that the complaint stated two causes of action, one for negligence and the other for willful tort, the former depending upon inadvertence, and the latter upon willfulness, and therefore, if there was no evidence whatever tending to show wantonness or willfulness, a nonsuit as to that cause of action should have been granted." In that case, Mr. Justice Gary concurred in the result only, because of his view of the act of 1898, as expressed in Griffin v. Railway, Young v. Telegraph Co. and Bolin v. Railway, supra. In Proctor v. Railway, 64 S. C. 491, 42 S. E. 427, this court refused to allow the complaint alleging a willful tort to be amended so as to allege a cause of action based on mere negligence, on the ground that the Code does not authorize an insertion of a new cause of action by way of amendment. In construing the act of 1898, the court said: "The statute also permits a jumbling together in one statement of all acts of negligence and other wrongs, which include acts of willful wrong, but the statute does not expressly or by implication undertake to declare that the action based upon mere negligence is not wholly distinct from an action based upon a willful tort." The decision in that case cannot well be supported if the proposed amendment did not allege a new and distinct cause of action, and was only a part of a single cause of action, under the act of 1898. Following the case of Proctor v. Railway, this court, in Steedman v. Railway, 66 S. C. 542, 544, 45 S. E. 84, 85, said: "The effect of the act of 1898 is to require that when the same act is described as negligent and willful, the pleading shall be treated and considered as if these two inconsistent statements had been made separately in setting out two distinct causes of action." Numerous decisions, beginning with Pickens v. Railway, 54 S. C. 498, 32 S. E. 567, have emphasized the difference between a cause of action based upon inadvertence or mere negligence and a cause of action based upon a willful tort. They are so inconsistent in nature, in the measure of damages applicable, and in the defenses available, as to be incapable of being blended into a single cause of action. When the statute says the plaintiff shall be "entitled to submit his whole case to the jury," etc., it means that such case as he has made out by his evidence shall be submitted to the jury, whether it be a case for actual damages based upon negligence, or a case for punitive damages based upon a willful tort. If no evidence has been submitted on the case based upon willfulness, then the whole case necessarily consists of the cause of action based upon mere negligence. Even if the proper construction of the statute has not been settled by authority, and is still a matter of doubt, then, on grounds of expediency and the proper administration of justice, there is good reason for holding that nonsuit may be granted as to the cause of action based upon a willful tort when there is no evidence to sustain it.

Now, with reference to the specific question in this case. In the case of Stembridge v. Southern Ry., supra, the court stated that, when the evidence lies close to the dividing line between negligence which is gross and misconduct which is wanton and willful, it is generally best for the trial court to leave it to the jury to draw the proper inference, and that a nonsuit would be proper as to a cause of action only when it is clear that no possible view of the testimony would warrant the jury in drawing an inference supporting such cause of action. In the case of Young v. Telegraph Co., supra, the court held that testimony as to a delay of 14 hours in the delivery of a telegram showing necessity of prompt delivery, coupled with testimony tending to show that no effort was made to deliver the message within that time, made it proper to submit the case to the jury to determine whether there was reckless disregard of plaintiff's rights. Likewise it may be said in this case that the long delay in delivering the death message in question, coupled with the absence of evidence showing any real effort to deliver the message, required submission to the jury as to the matter of punitive damages. The operator at Laurens testified that he received the message, addressed and sealed an envelope, in which he placed it, and delivered same to his messenger boy for delivery, and that the message was taken to the Bentnella Hotel and left there by the messenger with the proprietor. The messenger boy was not examined, and no witness testified that any search or inquiry had been made for J. S. Machen, who had for years been residing and doing a public milling business in the town of Laurens. This was some evidence of misconduct so gross as to pass beyond mere negligence into a reckless and wanton disregard of defendant's duty to plaintiff. It therefore follows that the exceptions must be overruled.

The judgment of the circuit court is affirmed.

GARY, A. J., concurs in the result.

(72 S. C. 244)

SHORES v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. July 28, 1905.)

1. RAILROADS—OBSTRUCTING CULVERT—LIABILITY OF LESSEE.

Where the lessee of a railroad built an addition to a stone culvert erected by its predecessor, which gave way, damming up the waters of a creek, thereby destroying plaintiff's crops, the lessee was liable therefor.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 802.]

2. SAME—ACTION FOR DAMAGES—EVIDENCE.
In an action to recover for injuries caused by obstruction of a railroad culvert, evidence of the effect of the waters on other persons than defendant was admissible.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 249.]

3. APPEAL—OBJECTIONS—WAIVER.
An admission of erroneous evidence without objection is no ground for reversal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1258–1280.]

4. RAILROADS—OBSTRUCTING CULVERT.
In an action for injuries caused by obstruction of railroad culvert, if plaintiff's damages could have been relieved by ditches, it was competent to show that it was expensive and difficult.

5. SAME—LIABILITIES OF LESSOR AND LESSEE.
A railroad company is liable in damages for injuries caused by defects in an embankment built by it, but not for injuries caused by a change made by its lessee in removing an obstruction in a culvert.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 802.]

6. TRIAL—CHARGE ON FACTS.
In an action for injuries caused by the obstruction of a culvert, an instruction that, if the lessor railroad company had created it, the lessee was not responsible, unless it maintained it after demand to abate it, and if the lessee held it as the person who originally constructed it, without any request to remove it, without any increase in the flow of water, it was not responsible, is not erroneous as a charge on the facts.

7. NEW TRIAL—EVIDENCE.
Refusal of a new trial is not error, where there was evidence to sustain the verdict.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 142, 143.]

Appeal from Common Pleas Circuit Court of Spartanburg County; Buchanan, Judge.

Action by W. L. Shores against the Southern Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

C. P. Sanders, for appellant. Horace L. Bomar, for respondent.

POPE, C. J. This is an action for damages brought by plaintiff against the defendant. The complaint stated the cause of action as follows:

"(3) That the plaintiff is seised in fee and possessed of a tract of land in said county and state, about one and one-half miles west of the town of Fairforest, on Foster's Meeting House Branch, containing 191 acres, more or less, 15 or 20 acres of which are valuable bottom lands on said branch and are situated about 300 yards below the point where defendant's line of railroad crosses said Meeting House Branch.

"(4) That some time during or about the month of June, 1901, through the carelessness, negligence, and unskillfulness of the defendant in not constructing and keeping proper culvert facilities for allowing the water in said Foster's Meeting House Branch, where the right of way of defendant's railroad crosses it, to flow through the fill under the defendant's track, the water in said stream, swollen by rains, became dammed by defendant's fill and culvert, making a great pond of water, which finally caused said fill to give way, washing said lands of plaintiff, covering them with mud, sand, timber, and other débris from said fill, all of which was and is to plaintiff's damage in the sum of $500."

The answer of defendant was as follows:

"(1) It admits the allegations contained in paragraphs 1 and 2 of the complaint, together with so much of paragraph 4 as alleges that a fill on defendant's line of road at or near Foster's Meeting House Branch was washed away along about the time mentioned in said paragraph.

"(2) Answering paragraph 3 of the complaint, defendant says it has no knowledge or information sufficient to form a belief as to the allegations therein contained. It therefore demands strict proof thereof.

"(3) It denies each and every other allegation of the complaint, and says that, if any damage came to plaintiff by reason of the fill washing out, it was caused by extraordinary floods and freshets and unprecedented rainfall, for which this defendant is in no wise responsible."

"The case came on for trial before Judge Buchanan and a jury. After testimony of the plaintiff and its witnesses, the defendant moved for a nonsuit, and this being refused, it introduced its testimony. After the charge of the judge the jury returned a verdict for plaintiff. A motion was then made for a new trial, which being refused, the defendant appealed on the following grounds:

"(1) That his honor erred in refusing the motion for a nonsuit, the error being, as it is respectfully submitted: (1) That as there was no testimony to sustain the allegations of the complaint, or to show any liability on the part of the defendant, the testimony clearly showing that the culvert and embankment in question had been constructed and built long before the defendant began to operate the railway, and there being no evidence of any demand upon the defendant to abate the alleged nuisance, and no refusal on its part so to abate, and no evidence that the defendant had in any way increased the alleged nuisance, the nonsuit ought to have been sustained. (2) Because there was no evidence showing that the culvert and embankment in question, in so far as the plaintiff was concerned, was negligently or improperly constructed.

"(2) Because his honor erred in permitting testimony as to the effects, on other and different lands above the railway, of this rainfall, and by water becoming backed on said lands by reason of the stopping of the mouth of the culvert in question; the error being, as it is respectfully submitted, that this was to allow in testimony damages done other and different lands, differently situated towards the defendant than plaintiff's land was, thereby aiding in confusing the issues in the minds of the jury, to the prejudice of the

defendant, and allowing the jury to consider damages to other lands in order to estimate the damages that may have been done to plaintiff's land.

"(3) In permitting evidence in reply as to the kind of crops which grew or were raised on other lands in other years—the error being, as it is respectfully submitted: (a) That this evidence was not in reply to any evidence introduced by the defendant, thereby letting matters come before the jury unexplained and uncontroverted by the defendant. (b) That such evidence was irrelevant as well as incompetent, it not being the proper way to prove the damages done the plaintiff's land. (c) Because such evidence of damages was purely speculative.

"(4) In permitting evidence in reply as to cost of ditching the land of plaintiff by witnesses who did not testify that they knew the land before the alleged injuries; such evidence not being in reply to anything introduced by defendant, and, besides, the same being matter of opinion and speculative, and not being either relevant or competent, there being no special damages alleged.

"(5) Because his honor erred in charging as follows at the request of the plaintiff: 'A wrongful obstruction of a water course by a railroad company makes the railroad company liable to landowners for all damages resulting therefrom'—the error being, as it is respectfully submitted, that such charge failed to define what was a wrongful obstruction of a water course, and besides tended to lead the jury to conclude that the defendant company would be liable, irrespective of the question, and also overlooked the question of reasonable and ordinary care in constructing or maintaining such culvert.

"(6) Because his honor erred in charging and instructing the jury as follows: 'The question is, was the construction of the culvert facilities, taking into account the location and topography of the country, the current of the stream, and all conditions there, not whether it was constructed as such things may be usually constructed, imperfectly, but the way it was constructed by the Southern Railway Company here, and if it was constructed negligently as alleged in the complaint, and if it was constructed as a man of ordinary care and prudence would have constructed it, or if they did not construct it, then it was a nuisance created by somebody else; but if they maintained it after demand had been made upon them to remove it, or if there was no demand made upon them to remove it, did they increase it by their want of care? For the plaintiff must show that the facilities originally constructed, whether originally constructed by the defendant, or, if not created by it, it must have increased it or maintained it, after request or demand to abate it had been made'—the error being, as it is respectfully submitted: (a) That this was a charge upon the facts, and instructed the jury that culverts may usually be constructed imperfectly. (b) That this was a charge upon the facts, and overruled and instructed the jury that this culvert was constructed by the Southern Railway Company. (c) That in so charging and instructing the jury his honor erred, in that he violated section 26, art. 5, of the Constitution of 1895, which prohibits judges from charging juries in respect to matters of fact. (d) That in so charging, his honor did not declare the law, as required by the Constitution, but, on the contrary, charged the jury in respect to matters of fact, contrary to the provisions of section 26, art. 5, of the Constitution, and expressed to them his opinion upon the evidence introduced in the case.

"(7) Because his honor erred in charging the following requests of the plaintiff, to wit: 'It is the duty of a railroad company to keep the culverts, fills, and other property in repair, and if it fails to keep same in proper repair and damage results to contiguous landowners, the railroad company is guilty of negligence and is liable for such damages'—the error being, as it is respectfully submitted, that this was a charge upon the facts of the case, contrary to the provisions of section 26, art. 5, of the Constitution, which prohibits judges from charging juries on the facts, in that it indicated to the jury what facts would constitute negligence, and instructed them that the failure of a railroad company to keep culverts and fills in proper repair was negligence, irrespective of the question of reasonable and ordinary care. It is further respectfully submitted that this charge was erroneous, in that it overlooked the question as to whether the defendant constructed the culvert and fill in question, or whether there had been any demand or notice upon the defendant to abate the alleged nuisance before suit was brought, or whether the defendant, if the culvert and fill was constructed before it began to operate the road, had increased the same, but, on the contrary, indicated to the jury that, irrespective of these questions, the defendant would be liable in any event, if the culvert and fill were not kept in proper repair; whereas, it is respectfully submitted that, if this culvert was built and constructed before the defendant began to operate the road, then it could not be liable unless there was some demand or notice upon the defendant to abate the alleged nuisance before suit brought, or unless there was evidence that it had increased it.

"(8) Because his honor erred in not granting the motion for a new trial, there being no evidence to sustain the verdict, and in any event, the evidence being so overwhelming in favor of the defendant, it was an abuse of discretion not to have so granted said motion."

We will now pass upon these grounds of appeal.

1. We hold that the circuit judge committed no error, as here pointed out in subdivi-

sions 1 and 2. The testimony offered by the plaintiff tended to show that, while the culvert of the railroad was constructed by the original owner of the same, its lessee, the defendant, had, three years before the accident, built an adjunct of brick to the stone culvert erected by its predecessor, which was the first to give way in May, 1901, and in its fall blocked up the mouth of the culvert, thus causing the damming up of the waters of Foster's Meeting House Branch; that although the defendant spent some time in the repairs of the roadbed at this point, yet it failed to remove the débris in the channel of its culvert, so that the water of the branch was dammed up three-quarters of a mile; and also that clay from its embankment was thrown into the channel of the stream, thus enabling the second rainfall to assume heavy proportions, flooding plaintiff's land with mud, water, and timber, destroying plaintiff's crops thereon, and rendering his bottom land (15 or 20 acres) uncultivatable. These facts being in testimony, there was no error in the circuit judge when he refused a nonsuit.

2. When the circuit judge admitted testimony as to the effects of the water being dammed up by the culvert on the land of others up the said branch, he did not err, as this was one method by which the effect of the damming of the waters of the branch was made palpable. This exception is overruled.

3. There was no objection made as to the introduction of this testimony. It was therefore not reversible error.

4. If the bottom lands of the plaintiff could have been relieved by ditching, and that would have caused a reduction of plaintiff's damages, it was competent to show that such ditching would cost a good sum of money, and also that it would have been difficult to remove the mud precipitated upon it by the breaking of the culvert. This exception is overruled.

5. It is well-settled law in this state, where a grantor has built a culvert and an embankment that any defect in either must be referred to the original owner, and where the same have been transferred by the original owner that the purchaser from such is not responsible for the defects of such culvert or embankment. The new owner or lessee must be requested or required to remove such obstructions before any liability attaches to the new owner or lessee. However, if the new owner or lessee shall change materially such culvert or embankment, and damage results therefrom, such new owner or lessee will itself become responsible. Gentry v. Railroad Company, 38 S. C. 284, 16 S. E. 893; Wallace v. Railroad Company, 37 S. C. 335, 16 S. E. 35; Townes v. City Council, 52 S. C. 396, 29 S. E. 851; Privett v. Railroad Company, 54 S. C. 98, 32 S. E. 75; De Laney v. Railroad Company, 58 S. C. 357, 36 S. E. 699, 79 Am. St. Rep. 843.

6. This also covers the sixth ground. It will be observed in reading the charge that the judge was exceedingly careful in laying down this law, for he said: "For, if a prior owner of the road had created it, the defendant is not responsible for it, unless it maintained it after a demand to abate it had been made. Or, if the defendant increased it, was it guilty of the wrongful and negligent act specified in the complaint? If it was not, in the absence of any request or any increase in it, it is not responsible for its condition, if maintained as originally constructed. If it just held it as the person who originally constructed it, if it held just as it was originally maintained, without any request to move it, or without any increase in it, it is not responsible." We see no charging upon the facts by the circuit judge, nor did he express his opinion. We overrule these two grounds of exception.

7. We see no objection to the charge of plaintiff's request. The judge's general charge took care of the defendant. This exception is overruled.

8. The circuit judge did not err in refusing to grant the motion for a new trial, for there was evidence to sustain the verdict. We do not see that the evidence is overwhelming in favor of the defendant, but we have no concern in a law case with the testimony. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

(72 S. C. 223)

STATE v. REEDER.

(Supreme Court of South Carolina. July 18, 1905.)

1. HOMICIDE—SELF-DEFENSE—EVIDENCE.
Where, on trial for murder, defendant pleads self-defense, he must establish it by a preponderance of evidence.
[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 509.]

2. CRIMINAL LAW—REASONABLE DOUBT.
The guilt of accused must be proven beyond a reasonable doubt.
[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1267.]

3. HOMICIDE — MANSLAUGHTER — INSTRUCTIONS.
An instruction that manslaughter is the unlawful killing of another without malice, express or implied, and that the person committing the act must not be in fault, is not erroneous, where the judge further charged, in other words, that the killing must be on sufficient provocation.
[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 649.]

4. SAME—INDICTMENT—TIME OF DEATH.
An indictment for murder, stating that the party killed deceased, who "then and there instantly died," is not defective, though the evidence showed that he died the next day after being wounded.
[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 255.]

5. CRIMINAL LAW — VERDICT—SEPARATE OFFENSES.
A verdict, on an indictment for murder containing two counts, on the first found de-

fendant guilty of murder, with recommendation to mercy, and on the second found him guilty of carrying a concealed weapon. *Held*, that judgment was properly rendered on the first count only.

Appeal from General Sessions Circuit Court of Newberry County; James Y. Culbreath, Special Judge.

Indictment against John Reeder for murder. From sentence, defendant appeals. Affirmed.

Johnstone & Cromer, for appellant. T. S. Sease and C. L. Blease, for the State.

POPE, C. J. This prosecution was tried at the August term of the court of general sessions of Newberry, in the year 1904. The defendant was found guilty of murder, with recommendation to mercy. After refusing the motion for a new trial, and also the motion in arrest of judgment, the defendant was sentenced to imprisonment for life in the penitentiary. The defendant appealed to this court on the following grounds:

"(1) The presiding judge erred in charging: 'Now, gentlemen of the jury, I have been requested by the state to charge you that it is the duty, wherever a party puts up a plea of self-defense it is the duty, of the defendant to make out his case by the preponderance of the testimony. Well, I charge you that, but at the same time I charge you that the state should prove its case beyond a reasonable doubt'—whereas, he should have made it clear that the state must make out its case beyond a reasonable doubt, taking a view of the whole of the testimony, including that offered in support of the plea of self-defense.

"(2) The presiding judge erred in charging, when the jury asked for specific instructions as to what constitutes manslaughter: 'Manslaughter is the killing of one person by another in sudden heat and passion, upon a legal provocation. Now, gentlemen of the jury, you must first determine in this case whether it is divested of malice, and then whether this party and the other party in sudden heat and passion got into a row, and one had a gun and the other had a gun, and that this party was not in fault. That is the defense. In other words, upon a sufficient legal provocation. If A. assaults B., giving him a severe blow, a great provocation, and B. strikes him with a weapon, and death ensues, it is manslaughter. In other words, Mr. foreman, if a man were to strike you, not with a deadly weapon, it is a sufficient provocation, and hot blood commences right then between you, and you are not in fault in bringing on the difficulty, why, that is manslaughter'—whereas, he should not have qualified and limited the legal definition of manslaughter by instructing the jury that the accused must have been without fault in bringing on the difficulty.

"(3) The presiding judge erred in overruling the motion in arrest of judgment on the following grounds: (a) Because the proof did not support the allegation that Howard Stevens was shot on the 18th of June and 'then and there instantly died'—the uncontradicted evidence being that he lingered until the 19th of June, and then died. (b) Because the jury rendered two distinct and separate verdicts, each signed by the foreman; whereas, the law provides for but one, and but one can support a judgment. (c) Because the jury found the defendant guilty of carrying a concealed weapon, though the indictment did not allege this offense.

"(4) The presiding judge erred in ignoring one verdict and pronouncing judgment against the defendant on the other; whereas, he should have held that judgment could not be pronounced, because there were two verdicts, and, taken as a whole, they were not responsive to the allegations of the indictment, and could not support a judgment."

We will now examine these grounds of appeal in their order.

1. An examination of the charge of the acting judge shows that he correctly charged the jury the law of this state governing self-defense. We think he made it plain that it was incumbent upon the state that, when the defendant puts in a special plea, he is only required to prove the same by a preponderance of the testimony, and at the same time that state is required to remove from the minds of the jury every reasonable doubt. We do not see how the defendant could have been prejudiced in this regard by the charge of his honor relating to self-defense. This exception is overruled.

2. The judge in his general charge had correctly laid down the definition of manslaughter to be "the killing of a human being by another in sudden heat and passion, without malice, upon sufficient legal provocation," but the jury came from their room, and the foreman of the jury said, "Some of the jurors want to know what constitutes manslaughter?" The court said: "Gentlemen of the jury, murder, as I charged you, is the killing of a human being with malice aforethought, either expressed or implied. Manslaughter is distinguished from murder in the absence of malice. Legal malice is where a party has ill will toward another—bad feeling, bad blood, something of that kind. Manslaughter is the killing of one person by another in sudden heat and passion, upon a legal provocation. Now, gentlemen of the jury, you must first determine in this case whether it is divested of malice, and then whether this party and the other party in sudden heat and passion got into a row, and one had a gun and the other had a gun, and that this party was not at fault. That is the defense. In other words, upon sufficient legal provocation. If A. assaults B., giving him a severe blow, a great provocation, and B. strikes him with a weapon, and death ensues, it is manslaughter. In other words, Mr. foreman, if a man were to strike you, not with a deadly weapon, it is a sufficient provocation, and

hot blood commences right then between you, and you are not at fault in bringing on the difficulty, why, that is manslaughter. I think I have made myself sufficiently plain. Manslaughter, as defined by our statute law, is this: Manslaughter, or the unlawful killing of another without malice, expressed or implied, shall be punished at hard labor in the penitentiary not exceeding 30 years, nor less than 2 years. If two persons, friendly towards each other, become enraged, draw pistols, and one shoots the other, gentlemen, that is manslaughter, if you come to the conclusion that there was no malice beforehand; but if a man comes forward in order to bring about a difficulty, and causes the row to arise, why, he is in fault, and he is guilty of murder. But the main ingredient in manslaughter is, it must be without malice. A. kills B. When he does this killing he has no malice in his heart— Of course, you are to consider the testimony, and from the testimony find whether he does have malice. I told you this morning that expressed malice is where a man lays in wait, or says he is going to kill his fellow man upon sight, and he carries that threat into execution. That is expressed malice. Implied malice is where a man, without any cause whatever, regardless of law and society, suddenly shoots down another man. The law implies malice. He has a depraved heart." It is true, as will be seen by the quotation just made, that the acting judge did not err in his definition of manslaughter. It is true that he did say that the party must not be in fault, but he went on and said, "in other words, upon sufficient legal provocation." All in all, we think there was no error here. This ground of appeal is therefore overruled.

3. (a) The indictment in its first count did say "that Howard Stevens then and there instantly died," while the evidence shows that Stevens died the next day after he was wounded. We do not think that this was a fatal error. It would have been better to have stated in the indictment the exact date of his death, to wit, the 19th day of June, 1904. He died within the year, and the day after he was wounded. The time is sufficiently definite as stated in this indictment. This subdivision is therefore overruled.

(b, c) The jury did find the defendant in their verdict as follows: First count: "We find the defendant, John Reeder, guilty of murder, with recommendation to mercy of court. H. H. Kinard, foreman." And also, second count: "Guilty of carrying concealed weapons. H. H. Kinard, foreman." The judgment of the court was confined to the first count. We do not see that this error is fatal, because the first count in the indictment charged murder, while the second of the same indictment relates to the carrying of a deadly weapon, and therefore the judgment of the court was confined to punishment for murder. This exception is overruled.

4. We think there was no error, as here charged, because the sentence pronounced by the court referred to murder alone. This exception is therefore overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(122 Ga. 817)

CROSS et al. v. COFFIN-FLETCHER PACKING CO.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. NEW TRIAL — BRIEF OF EVIDENCE — APPROVAL.

Where a motion for a new trial was filed during the November term, 1904, and an order was passed requiring the respondent to show cause, on a day named during the next term, why the motion should not be granted, and allowing the movants until the final hearing "to present for approval a brief of the evidence," the court had authority, on the day fixed in the order for the hearing of the motion, to approve and allow filed a brief of evidence then presented.

2. ATTACHMENT—ACTION ON BOND—DAMAGES —EVIDENCE.

On the trial of an action for damages claimed to have been sustained by reason of the levy of an attachment upon a stock of goods, it was error to allow an answer to an interrogatory to be read, stating merely in general terms that the plaintiff had suffered damage in a named sum because the goods levied on were kept in stock by reason of the levy. Such evidence was too general, stated merely a conclusion of the witness, and should not have been admitted over an objection made at the time upon this ground.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2286, 2305.]

3. SAME—INSTRUCTIONS.

There were inaccuracies in the charge which should be corrected on another trial.

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by the Coffin-Fletcher Packing Company against J. D. Cross, one Brown, and the Fidelity & Deposit Company. Judgment for plaintiff, and defendants bring error, and plaintiff assigns cross-error. Reversed on main bill, and affirmed on the cross-bill of exceptions.

The Coffin-Fletcher Packing Company brought suit against Cross, Brown, and the Fidelity & Deposit Company, on an attachment bond. The petition alleged that the attachment case had been finally decided in favor of the Coffin-Fletcher Packing Company, and that by reason of the attachment it had sustained damages as follows: $200, attorney's fees; $77.15, for releasing garnishments and collecting accounts due; $86.20, expenses and damages caused to goods by being held in stock by reason of the attachment and levy; $20, cost of bond given to dissolve garnishments in the attachment suit. At the November term, 1904, verdict was returned in favor of the plaintiff "for $250 principal and $30.61 interest." During that term a motion for a new trial was filed by the defendants. An order was passed re-

quiring the plaintiff to show cause, on the 15th day of January, 1905, which was during the January term, 1905, why the motion should not be granted. The order also provided that "the movants are granted until the final hearing of this motion, whether the case be had at this or a later term of this court, to present for approval a brief of the evidence in the cause, as well as to amend said motion or the grounds thereof." The motion for a new trial came on for a hearing on January 15, 1905, in term. No brief of evidence was filed by the movants during the November term, 1904, nor had any such brief been filed when the motion was called for hearing. The plaintiff moved to dismiss the motion for a new trial, because of the failure to file a brief of the evidence. This motion was overruled, and the brief of evidence was then presented, approved, and ordered filed. An order was then entered overruling the motion for a new trial. The defendants excepted to the order overruling the motion for a new trial; and the plaintiff, by cross-bill, excepted to the refusal to dismiss the motion for a new trial because of the failure of the movants to file a brief of the evidence before the hearing.

C. B. Reynolds and Felder & Rountree, for plaintiff in error. Walter T. Colquit and B. J. Conyers, for defendants in error.

COBB, J. 1. While Civ. Code 1895, § 5484, provides that ordinary motions for new trials must be made during the term at which the trial was had, and that, when the term continues longer than 30 days from the trial, "the application shall be filed within 30 days from the trial, together with a brief of the evidence," it is settled by numerous decisions, which need not be cited, that the judge may, by order passed when the motion for new trial is made, extend the time for filing the brief of evidence to any day in the future before the motion is finally heard and determined. The question raised by the motion to dismiss the motion for a new trial in the present case turns upon the construction to be given the words "present for approval a brief of the evidence in the cause." If this language is broad enough to include the right to file the brief of evidence, the court properly overruled the motion to dismiss. That the language is broad enough to accomplish this purpose was expressly decided in Johnson v. Grantham, 110 Ga. 281, 34 S. E. 851. While the language of the order in that case does not appear in the printed report, the original record shows that the language then used was: "Let the brief of evidence be presented for approval on or before the date aforesaid." This was a unanimous decision, and is controlling in the present case. See, also, Napier v. Heilker, 115 Ga. 168, 41 S. E. 689; Hightower v. George, 102 Ga. 549, 26 S. E. 729. After a careful examination of the numerous cases dealing with this subject, we find none which conflict with those just cited.

2. Complaint is made of the admission of answers to interrogatories, stating that the plaintiff suffered damages in a named sum by reason of the goods being held in stock because of the attachment; the objection being that it was not shown how and in what manner the damage was suffered, or the items thereof, and that it was not competent to prove damages in such general terms. We think the objection was well taken. It was not permissible for the witness to state merely in general terms the amount of damage sustained. He should have given the jury some facts and data from which to estimate the amount of the damage. The testimony objected to was nothing more than a conclusion of the witness as to what damages had been sustained by reason of the goods having been kept in stock after the levy of the attachment. It was the province of the jury to fix the damages from proved facts, and they were not to be controlled by mere conclusions of witnesses as to this matter. It is said, however, that the objection to the interrogatories was one merely of form, and fell within the spirit of the rule of court with reference to objections to interrogatories on the ground that they were leading. Civ. Code 1895, § 5668. The rule of court relates entirely to objections of the nature just indicated, and does not embrace, either in letter or spirit, an objection such as the one made in the present case. Besides, the objection was not one merely of form. It was of substance, and raised the objection that the testimony offered was not competent to prove the fact sought to be shown. It is further contended that it has been determined on demurrer that the item of damage referred to in the testimony objected to was legitimate, and that the allegation as to this item in the petition was as general as the testimony offered to support it. Unquestionably the defendants were concluded by the judgment on the demurrer as to the legality of this item of damage, if this question was made by the demurrer and determined adversely to the defendants. Ga. Northern Ry. Co. v. Hutchins, 119 Ga. 504, 46 S. E. 659. The demurrer is not in the record, and we do not know whether the question was raised and determined on demurrer or not; but, conceding that it was, the demurrer adjudicated nothing as to the nature of the proof necessary to establish the allegation. Pleading may be more general than proof. A general averment that the plaintiff had been damaged a named sum would be good against a general demurrer, but the proof should show wherein and how such damage was sustained. It is further contended that as the verdict was for only $280.15, and the evidence demanded a finding for $297.15, with the item to which the inadmissible testimony related omitted, the judgment ought not to be reversed. Suffice

to say with reference to this contention that the jury were not bound to take the amounts fixed by the witnesses as the damages sustained, but could reduce these amounts, if under all the facts and circumstances they were of the opinion this should be done. One of the items in the $297.15 was $200 attorney's fees. This amount the jury could have reduced, if they thought it unreasonable. Baker v. Richmond Works, 105 Ga. 225, 31 S. E. 426.

3. The other grounds of the motion for a new trial need not be discussed at length. The judge, in referring, in his charge to damages for which a recovery could be had, should have stated specifically that they must be damages which were sustained in consequence of the suing out of the attachment. There were some other slight inaccuracies in the charge, but these will no doubt be corrected on another trial. It would be in accordance with the better practice, and on another trial an instruction to that effect should be given, for the jury to return a verdict in an aggregate sum, without itemizing the amount found or stating the processes by which they arrived at it. The plaintiff having put in evidence its answer in the attachment case, it was the right of counsel for the defendants to comment to the jury on the answer and draw from it any legitimate conclusions which would illustrate the issues involved in the case on trial; but it was not error for the court to prevent counsel from discussing parts of the answer which could not possibly throw any light on the issues then involved.

Judgment reversed on main bill, and affirmed on cross-bill of exceptions. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 794)

SHARPE v. MATHEWS.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. DEED — WHAT CONSTITUTES — TESTAMENTARY CHARACTER.

A paper in the form of a deed, attested as a deed and delivered to the party named as grantee, and in the granting, as well as in the habendum and tenendum, clause, purporting to convey the title in præsenti, is not to be construed as testamentary in its character because it recites that the premises are to "remain the right and property" of the grantor "for and during her natural life"; the purpose and effect of this recital being to reserve a life estate in the grantor.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 208–217.]

2. TENANT BY SUFFERANCE.

One who enters into the possession of land under a deed, claiming in good faith the land as his own, cannot be summarily evicted from the premises as a tenant at sufferance.

(Syllabus by the Court.)

Error from Superior Court, Montgomery County; D. M. Roberts, Judge.

Action by Betsey A. Mathews against Daniel L. Mathews. On the death of plaintiff, W. H. Sharpe, administrator, was substituted. Judgment for defendant, and plaintiff brings error. Affirmed.

J. H. Martin and Warren Grice, for plaintiff in error. Garrard & Meldrim and J. B. Geiger, for defendant in error.

EVANS, J. On the 2d day of January, 1902, Betsey A. Mathews sued out a warrant to dispossess Daniel L. Mathews as a tenant at sufferance. He filed a counter affidavit, in which he denied that he was a tenant at sufferance or otherwise. On March 9, 1903, Betsey A. Mathews died, and on April 26th of the following year W. H. Sharpe, who had been duly appointed administrator upon her estate, was made a party plaintiff in her stead. On the trial of the case the plaintiff introduced the following documentary evidence: A deed from Neil A. Mathews and others to William C. Mathews, dated June 30, 1896, conveying to him the premises in question, and a transfer of this deed by William C. Mathews to Betsey A. Mathews, bearing the same date. Also, a paper executed by Betsey A. Mathews, of which the following is a copy: "State of Georgia, Montgomery county. This indenture, made the 6th day of July, in the year of our Lord one thousand eight hundred and ninety-six, between Betsey A. Mathews, of the county of Montgomery, of the one part, and Daniel L. Mathews, of the county of Montgomery, of the other part, witnesseth: That the said Betsey A. Mathews, for and in the consideration of the sum of five hundred dollars in hand paid at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents does grant, bargain, sell, alien, convey, and confirm unto the said Daniel L. Mathews, his heirs and assigns," the tract of land conveyed to her by William C. Mathews, mentioned above. "Said tract of land is to remain the right and property of Betsey A. Mathews for and during her natural life, and to become the property of the said Daniel L. Mathews, in fee simple, immediately upon the death of the said Betsey A. Mathews. In the event the said Betsey A. Mathews should survive said Daniel L. Mathews, then immediately upon the death of said Betsey A. Mathews said property is to become the property in fee simple of the heirs of said Daniel L. Mathews. As an additional consideration for said tract of land are the love and affection said Betsey A. Mathews bears for her son, the said Daniel L. Mathews, and the maintenance and support of said Betsey A. Mathews by the said Daniel L. Mathews for and during the remainder of her natural life. To have and to hold the said bargained premises, with all and singular the rights, members, and appurtenances thereto appertaining, to the only proper use,

benefit, and behoof of him, the said Daniel L. Mathews, his heirs, executors, administrators, and assigns, in fee simple. And the said Betsey A. Mathews the said bargained premises unto the said Daniel L. Mathews, his heirs, executors, administrators, and assigns, and against the said Betsey A. Mathews, her heirs, executors, and administrators, and against all and every other person or persons, shall and will warrant and forever defend, by virtue of these presents. In witness whereof, the said Betsey A. Mathews has hereunto set her hand and affixed her seal and delivered these presents, the day and year first above written." This paper was attested by two witnesses. The scrivener, as a witness, stated that he drafted it at the instance of Betsey A. Mathews, that she asked him to "draw the deed, and that the deed was written at his house." The attesting witnesses testified that they did not see any money paid at the time of the execution of the deed. Certain other witnesses were introduced, and testified that Betsey A. Mathews, about two years before her death, left the house of Daniel L. Mathews and took up her residence with a daughter, and that he did not thereafter contribute to her support. Daniel L. Mathews, who was sworn as a witness in behalf of the plaintiff, testified that he did not pay the $500 recited in the deed, nor did he pay his mother, Betsey A. Mathews, anything at all; that he did pay the physician's bill for attending her during her last illness, and her burial expenses, as well as certain amounts for medicine; that he had paid taxes on the land and had furnished his mother with certain supplies while she was living with her daughter; and that he had done nothing to justify his mother in leaving his home. He further testified that he went into possession of the land under the paper executed and delivered to him by Betsey A. Mathews, entering in good faith and holding the possession and claiming the land under that instrument. After introducing this evidence, the plaintiff announced closed, and on motion of the defendant the court granted a nonsuit. Error is assigned upon the judgment of nonsuit.

1. The correctness of the ruling made by the trial judge upon the motion for a nonsuit depends in a large measure upon the construction to be put upon the instrument executed by Betsey A. Mathews and delivered to Daniel L. Mathews. The plaintiff in error insists that the paper is testamentary in its character, and that it is void because attested by only two witnesses. On the other hand, the defendant in error insists that the paper is a deed. In all essential respects it is similar to the instrument construed in Griffith v. Douglas, 120 Ga. 582, 48 S. E. 129, in which case it was held that where a paper is in the form of a warranty deed, and is attested as a deed and delivered to the party named as grantee, it should be treated, not as a will, but as a deed, notwithstanding it contains words to the effect that the enjoyment of the estate thereby conveyed is to be postponed until the death of the grantor. The paper now under consideration was executed in the form of a deed, was delivered to the grantee, and was produced by him on the trial in response to a notice to produce. The habendum and the tenendum clause, "to have and to hold," was appropriate to a conveyance passing a fee-simple estate. The provision that the land was to remain the right and property of the grantor for and during her natural life occurred immediately after the description of the property, and indicated the intent of the grantor to convey the fee, with a reservation of a life estate in the grantor. The provision that, if the grantor should survive the grantee, the land should, upon the death of the grantor, become the property in fee simple of the heirs of Daniel L. Mathews, simply indicated the intention of the grantor to convey an inheritable estate. Had this provision been omitted from the instrument, its legal effect would have been the same. The paper was a deed, and not a will, and conveyed the title to the grantee, with a reservation of a life estate in the grantor. See authorities cited in Griffith v. Douglas, supra.

2. Did the evidence show that the defendant was a tenant at sufferance? His contention was that the deed conveyed the title to him and gave him an immediate right to the enjoyment of the premises. He evidently construed the reservation of a life estate as amounting to no more than a charge upon the land for the support of his mother, the grantor, during her natural life. This was an erroneous construction of the deed, but it illustrates the nature and character of the defendant's possession. He testified that he entered into possession of the land, claiming it as owner under the deed from his mother. He did not hold under her as a tenant, nor recognize that she had any interest in the premises. The relation of landlord and tenant did not, therefore, exist, and the summary proceeding authorized by Civ. Code 1895, § 4813, was not available. Watson v. Toliver, 103 Ga. 123, 29 S. E. 614. "To create the relation of landlord and tenant between parties, a formal letting is not required. The relation may arise by implication, and, as a general rule, it is sufficient to create the relation, if it appears to have been the intention of one to enter or occupy the premises in subordination to the title of the other; but the relation will never be implied when the acts and conduct of the parties are inconsistent with its existence. * * * A tenant is generally defined as one who occupies the land or premises of another in subordination to that other's title, and with his assent, express or implied." 18 Am. & Eng. Enc. Law (2d Ed.) 164, 165. When title is shown in the plaintiff and oc-

cupation by the defendant, an obligation to pay rent is generally implied; but if the entry was not under the plaintiff, or if the possession is adverse to him, no such implication arises. Civ. Code 1895, § 3116. The defendant cannot properly be regarded as a tenant at sufferance. According to the definition stated in 2 Bl. Com. 150, "an estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all." This definition was recognized and acted upon by this court in Godfrey v. Walker, 42 Ga. 562, 575. See Willis v. Harrell, 118 Ga. 906, 45 S. E. 794. "A tenancy at sufferance arises when a man comes into possession lawfully, but holds over wrongfully after the determination of his interest, differing in this respect from a tenancy at will, where the holding is by the landlord's permission." 1 Taylor's Land. & Ten. (9th Ed.) § 64. That is to say, such a tenancy is created where one enters into possession under a lawful demise, and his retention of possession after the expiration of his term is by the mere laches or neglect of the owner to take possession of the premises—where the entry is lawful, but the holding over is wrongful. There is no evidence that would authorize the conclusion that the grantor put upon the deed a construction different from that placed upon it by the defendant. The only evidence touching the nature of his possession was the testimony of the defendant himself, which discloses that his possession was not that of a tenant, but that he occupied the premises under a bona fide claim of title thereto. Under these circumstances he could not be summarily evicted as a tenant holding over, and the judgment awarding a nonsuit should not be disturbed.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 870)

ARRINGTON v. CRONIN.

(Supreme Court of Georgia. Aug. 5, 1905.)

NEW TRIAL—DISMISSAL OF MOTION.

Under the facts appearing in the record, the court erred in dismissing the motion for new trial.

(Syllabus by the Court.)

Error from Superior Court, Ware County; T. A. Parker, Judge.

Action by J. Cronin against H. T. Arrington. Judgment for plaintiff. From an order denying a new trial, defendant brings error. Reversed.

J. L. Sweat, for plaintiff in error. Toomer & Reynolds, for defendant in error.

FISH, P. J. At the April term, 1904, of Ware superior court, Mrs. H. T. Arrington filed a motion for a new trial in a case in which J. Cronin had obtained a verdict against her during that term. At the time the motion was filed, an order was granted that it be heard in vacation on May 21, 1904. This order provided "that movant have until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation; and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the clerk's office before the date of the hearing, said brief of evidence may be filed in the clerk's office at any time within 10 days after the motion is heard and determined." Movant filed a brief of evidence and charge of the court in the clerk's office on April 29, 1904. On May 20, 1904, a consent order was passed continuing the hearing of the motion until June 27, 1904. This order recited that "it is further ordered that movant have until said time to have the brief of evidence and charge of the court in said case approved and filed, and also to amend and otherwise perfect the said motion for new trial." On June 27, 1904, the following order was passed: "Plaintiff [respondent] not being ready, it is ordered by the court that the hearing of above-stated motion be continued until the 21st day of July, 1904, to be then heard at Baxley, Ga. It is further ordered that defendant's [movant's] right to have the brief of evidence and charge of the court and to amend said motion be preserved until the hearing." The motion not being heard, and no action taken thereon before October 1, 1904, the judge, upon the application of respondent's attorney, and in pursuance of the original term order, fixed the hearing of the motion for October 10, 1904, and provided that notice be served upon movant. The motion was not heard upon the last-mentioned date, nor any order granted in reference thereto. During the November term of the court the motion was called in its order for a hearing, and was, on motion of respondent, "dismissed because no brief of evidence [had] been approved in terms of the consent order of May 20, 1904." To the order dismissing the motion movant excepted.

We think the exception well taken. Granting that the consent order of May 20th was a limitation upon the original term order, and that under its terms the movant was required to have the brief of evidence approved on or before June 27th, we think it clear that the order passed on the date last mentioned preserved movant's right to have the brief of evidence approved until the final hearing. The order of June 27th clearly contemplated that some right of the movant in reference to the brief of evidence should be preserved until the hearing of the motion; for it provided "that defendant's right to have the brief of evidence * * * be preserved until the hearing." Evidently by inadvertence there was a word, or words, left out of the order here.

The use of the word "preserved" clearly and unmistakably indicated that the right of the movant in reference to the brief of evidence which this order contemplated was a right which had been secured to her by previous orders of the court. This right, whatever it was, was to be "preserved"; that is, kept intact or protected. The last previous order of the court had provided that the movant should have until June 27, 1904, the date which it fixed for the hearing, "to have the brief of evidence * * * in said case approved and filed," and this was clearly the right of the movant in reference to the brief of evidence, which was, under the order of June 27, 1904, to be "preserved" until the final hearing. A brief of evidence had been filed on April 29, 1904, and it needed nothing but the approval of the court. No question was made on the correctness of the brief of evidence, nor did the court refuse to approve it; but the motion for a new trial was dismissed upon the ground that the brief of evidence had not been approved conformably to the consent order of May 20th, when that order had been superseded by the order of June 27th.

We think his honor erred in the ruling excepted to, and the judgment is therefore reversed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 850)

SIMPSON v. GEORGIA SOUTHERN & F. RY. CO.

(Supreme Court of Georgia. Aug. 5, 1905.)

TRIAL—NONSUIT.

Under the evidence introduced by the plaintiff in this case, there was no error in granting a nonsuit. The case does not fall within Ashworth v. Southern Railway Co., 43 S. E. 36, 116 Ga. 635, 59 L. R. A. 592.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by J. L. Simpson, by his next friend, against the Georgia Southern & Florida Railway Company. From a judgment of nonsuit, plaintiff brings error. Affirmed.

J. R. Cooper and M. W. Harris, for plaintiff in error. R. C. Jordan, Hall & Wimberly, and J. E. Hall, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

(123 Ga. 882)

GEORGIA R. & BANKING CO. v. NEWMEYER.

(Supreme Court of Georgia. Aug. 5, 1905.)

APPEAL—REVIEW—SECOND VERDICT.

No error of law was complained of, and, as there was at least some evidence which would have authorized a finding for the plaintiff, the Supreme Court will not disturb a judgment refusing to set aside a second verdict in favor of the plaintiff.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3865.]

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by E. J. Newmeyer against the Georgia Railroad & Banking Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. B. & Bryan Cumming and M. A. Candler, for plaintiff in error. Arnold & Arnold and L. B. Norton, for defendant in error.

COBB, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 821)

IDLETT v. CITY OF ATLANTA.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. MUNICIPAL CORPORATIONS—CARE OF SIDEWALKS.

It is the duty of a municipal corporation to keep its streets and sidewalks in a reasonably safe condition, so that persons can pass along them in the ordinary methods of travel in safety.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1612.]

2. SAME—DEFECTS—KNOWLEDGE.

If a defect in a sidewalk in a city has existed for such a length of time that by reasonable diligence in the performance of their duties the defect ought to have been known by the proper authorities, notice will be presumed, and proof of actual knowledge will not be necessary in order to render the municipality liable for injuries occasioned thereby.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1648.]

3. SAME—DUTIES OF TRAVELER.

Ordinary diligence on the part of a person passing along a sidewalk of a public street of a municipal corporation, and ordinary diligence on the part of the corporation in constructing and repairing the sidewalk, do not imply a like degree of vigilance in foreseeing danger and guarding against it.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1673, 1678.]

4. SAME—ACTION—DECLARATION.

The allegations of the declaration in this case did not show that the plaintiff could have avoided the injury to herself by the use of ordinary care, and that she failed to exercise such care, so as to authorize a dismissal of the case on demurrer.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Celia Idlett against the city of Atlanta. Judgment for defendant, and plaintiff brings error. Reversed.

Celia Idlett brought suit against the city of Atlanta to recover damages on account of a personal injury. She alleged as follows: In the sidewalk of one of its public streets there was a hole about 6 feet long

next to the inside of the walk, crescent shaped, and about 3 feet wide at the widest point, extending from about one-half to one-third of the way across the pavement. At or near the inner margin of the sidewalk the hole was about 2 feet deep, but it grew shallower as the center of the sidewalk was approached, and that part of the hole lying furthest from the fence was about 10 or 12 inches deep. At this point the street was built up of "made earth," and the brick pavement rested on it. The defective condition of the sidewalk had existed for about six months, and the defendant knew of it, or should have known of it by the exercise of ordinary care. Defendant negligently failed to exercise ordinary care to keep the street and sidewalk in a reasonably safe condition for travel in the ordinary mode by day and night. The leaving of a hole in a public sidewalk in a thickly settled part of the city was gross negligence. The defendant knew that the earth under the bricks was "made earth," and knew or ought to have known that the hole was surrounded by perpendicular walls consisting of "made earth" covered with brick, and that this had a tendency to cave in and fall. It was the duty of the city to fill up the hole and to repair the street, so that caving could not have taken place. The hole was near the plaintiff's house, and she knew of it. She arose early one morning and started along the street to attend to some business. "As petitioner approached said hole she bore to the right, leaving said hole 6 or 8 inches to the left. She was thinking about her business, and at the same time was in a sense conscious of the existence of the hole, and attempted to pass by the widest part of the said hole at least 5 to 10 inches to her left. At other points she was from 2 to 3 feet from the hole. The brick that gave way under petitioner's foot was opposite the widest part of the hole. Petitioner was thinking about her work, at the same time she was in some sense conscious of the hole, and walked, as she thought, a sufficient distance from the edge of the hole to pass by it. She was not especially thinking about the hole, but merely passed around it with her mind on her business, with the subconsciousness of the hole." She is an old negro woman and very ignorant. "It never once occurred to her that the hole would cave in, and she was exercising care at the time she got injured." The nature and extent of the injury was also alleged.

The defendant demurred to the declaration on the following grounds, in substance: First, under the allegations of the petition the defendant is not liable; second, it appears that the plaintiff was injured by her own lack of care; third, it appears that the plaintiff well knew of the defect of which she complained, and that in full daylight she walked into it, or so near it as to be injured, and hence she alone was responsible for the injury; and, fourth, it does not appear that the city knew, or could have known by the exercise of due care, of the defect. The demurrer was sustained, and the case dismissed, and the plaintiff excepted.

O. E. & M. C. Horton, for plaintiff in error. J. L. Mayson and W. P. Hill, for defendant in error.

LUMPKIN, J. (after stating the facts). 1-3. It is the duty of a city to keep its streets and sidewalks in a reasonably safe condition, so that persons can pass along them in the ordinary method of travel in safety. Bellamy v. Atlanta, 75 Ga. 167. If a defect in the sidewalk of a municipal corporation has existed for such length of time that by reasonable diligence in the performance of their duties the defect ought to have been known by the corporate authorities, notice will be presumed, and proof of actual knowledge will not be necessary in order to render the municipality liable for injuries occasioned thereby. Mayor, etc., of Atlanta v. Perdue, 53 Ga. 607; Chapman v. Macon, 55 Ga. 566; Dempsey v. Rome, 94 Ga. 420, 20 S. E. 335; City Council of Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389. Ordinary diligence on the part of a person passing along the sidewalk of a public street of a municipal corporation, and ordinary diligence on the part of the corporation in constructing and repairing the sidewalk, do not imply a like degree of vigilance in foreseeing danger and guarding against it. Wilson v. Atlanta, 63 Ga. 291; s. c., 59 Ga. 544, 27 Am. Rep. 396. Although a municipality may be negligent in permitting a defect to remain in a sidewalk, a traveler must exercise ordinary care under the circumstances. "The fact that a traveler voluntarily attempts to pass, with knowledge of the defect or obstruction, is not ordinarily conclusive evidence of a want of due care; but if he has, or ought to have, notice thereof, he must exercise such care as the circumstances demand, and if an ordinarily prudent person would not attempt to pass, under the circumstances, he will be guilty of contributory negligence." Elliott, Roads & Streets, § 636. In a note the author says: "Knowledge of the existence of the defect or obstruction is not decisive of the question of contributory fault, but is always an important element to be considered in determining that question, and, indeed, it not unfrequently turns the scale. If the existence of the defect or obstruction is known, and the danger is so great that a man of ordinary prudence would not encounter it, then one who voluntarily attempts to pass it where there is no reasonable necessity impelling him to make the attempt may be guilty of such contributory negligence as will bar a recovery." Id. p. 680. It is further said that "the question of contributory

negligence is generally for the jury to determine from the circumstances of the case. But where the facts are undisputed, and but one reasonable inference can be drawn from them, the question is one of law for the court, and the case may be taken from the jury." Id. § 637.

In Samples v. Atlanta, 95 Ga. 110, 22 S. E. 135, it was said: "Although a traveler may know that, because of the defective construction of a public bridge in a city, there is some danger in driving over it, still he may recover from the city for injuries sustained in so doing, if it clearly appears that the danger was not obviously of such a character that driving over the bridge would necessarily amount to a want of ordinary and reasonable care and diligence, and if it also appears that in driving over the bridge the plaintiff did in fact observe such care and diligence." In City of Atlanta v. Martin, 88 Ga. 21, 22, 13 S. E. 805, the plaintiff was walking on a sidewalk when the dirt gave way or crumbled off, and she fell into a ditch between the sidewalk and the street. She testified that "she had been at the place before, but did not know much of its condition; knew that it was not a paved street, and not a very good street, but did not know it was so dangerous, or she would not have gone there." She knew that there was a gully there, but did not know the ground was crumbling. "By coming there to church she knew that the gully was by the side of the sidewalk, but did not know the sidewalk was dangerously narrow; never noticed or thought of it." The injury occurred at night. A recovery was sustained. In Dempsey v. Rome, 94 Ga. 420, 20 S. E. 335, the plaintiff was injured at night by getting his foot caught in a hole which had existed for two weeks or longer in a plank crossing upon one of the streets of the city. The hole was about 10 or 15 inches long, 3 inches wide, and 2 or 3 inches deep. The plaintiff had observed it a week or two before he was injured, and at the time he stepped into it he "had his hands in his pants pockets, was walking very peart, and wasn't paying any attention." It was held to be a question for the jury whether under these circumstances he was negligent in not thinking of the defect, looking out for it, and taking care for his own safety. In Mayor, etc., of Jackson v. Boone, 93 Ga. 662, 20 S. E. 46, where the plaintiff leaned against a gate forming part of a railing protecting an excavation in and along the margin of a public sidewalk in a town, and the gate fell, it was held that "there was no error in declining to charge the jury that, if the plaintiff intentionally leaned upon the gate, he could not recover from the municipal corporation, or instructing the jury that it was a question for them whether or not, under all the circumstances, the plaintiff was making a proper and legitimate use of the gate in question."

Applying these principles to the case at bar, it was alleged that the defective condition of the sidewalk had existed for about six months, and the defendant knew of it, or by the exercise of ordinary care must have ascertained it. If the existence of a hole in a public street was sufficient to make the case one for submission to a jury on the question of negligence by the city authorities in having and leaving a crossing in that condition, as was held in the case of Dempsey v. Rome, supra, certainly the existence, for at least six months, of a hole extending from a third to half way across a public sidewalk, and averaging in depth from 2 feet to 10 inches, would be sufficient to authorize the submission of a similar issue to the jury.

4. The remaining grounds of the demurrer as argued make a single point, namely: Did the declaration show that the plaintiff could have avoided the injury to herself by the use of ordinary care, so as to prevent a recovery? Again we apply the principles in the cases above cited to the facts of the present case as alleged in the declaration. According to the allegations, the plaintiff was passing along a public sidewalk, which the municipal authorities had left in the same condition for six months or more, as one of its sidewalks for use by the public. Her mind was occupied with her business, but she was conscious of the existence of the hole, and endeavored to pass around it, and she thought she had walked a sufficient distance from the edge of the hole to pass it in safety. At the widest point of the hole she passed it at a distance of from 5 to 10 inches. She alleged that it never occurred to her that the earth would cave in, and that she was exercising care at the time of the injury. In the face of these allegations, which the demurrer admits, we are unable to hold as matter of law that the conduct of the plaintiff so clearly amounted to a want of ordinary care as to make the declaration demurrable. As said in the case of Wilson v. Atlanta, 63 Ga. 291, supra, while the city and the passer are both required to exercise ordinary diligence, the duty of keeping its streets and sidewalks in repair rests upon the city, and therefore ordinary diligence on its part and ordinary diligence on the part of one who passes along a sidewalk does not imply a like degree of vigilance in foreseeing danger and guarding against it. The argument, therefore, that if the city could have known of the danger of this defective sidewalk, the plaintiff also could have known of it, is not sound. On the face of the declaration there is nothing to show that the place where the plaintiff stepped was clearly and apparently dangerous, or that in passing along a public sidewalk to step so near to a hole was necessarily a want of ordinary care on her part. Nor can we say from the face of the declaration that an ordinarily prudent person

would not have approached so near to the hole.

This case, therefore, does not fall within the ruling made in City of Columbus v. Griggs, 113 Ga. 597, 38 S. E. 958, 84 Am. St. Rep. 257, where it affirmatively appeared from the evidence "that it was palpably and obviously dangerous to attempt to drive at night over that place in the street at which the injury occurred," and that Griggs, "with full and accurate knowledge of this fact, voluntarily, on a dark night, accompanied by another, who had like knowledge, in a buggy with the latter undertook to drive over that place," and that "they actually discussed it but a few moments before the catastrophe happened." Nor is the case controlled by that of Sheats v. Rome, 92 Ga. 535, 17 S. E. 922, where the municipality was negligent in causing a ditch 5 feet wide and 3 or 4 feet deep to be cut across a public sidewalk and left open for several weeks, but where the plaintiff, a female, was perfectly aware of the existence, width, and depth of the ditch, and either attempted to jump across it or stepped into the bottom of it on a rock, and tried to step out, and was thus injured. Clearly in such a case she had no cause of action. In the case of Kent v. Southern Bell Telephone Co., 120 Ga. 980, 48 S. E. 399, is discussed the risk which one assumes in attempting to cross over a ditch, and also the fact that he does not assume the danger occasioned by latent and unknown defects. In the present case the plaintiff, according to her allegations, was not seeking to cross over a ditch, excavation, or hole, but was passing along a public sidewalk, left open by the municipal authorities for public passage, and was seeking to go around or avoid the hole which the city had permitted to remain there. It cannot be said with certainty, from the declaration, that she failed to use ordinary care, and that, had she done so, the injury would not have occurred. Whatever may appear to be the facts when the evidence is introduced, the declaration should not have been dismissed on demurrer.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 873)

MALLARD v. CURRAN et al.

(Supreme Court of Georgia. Aug. 5, 1905.)

1. ADMINISTRATORS—SALE OF LAND—REFUSAL TO MAKE DEED—ENFORCEMENT.

A borrower of money executed a deed of trust to secure the payment of the debt, and subsequently died before the debt was paid. The holder of the loan deed consented for the administrator to sell the fee-simple title to the land at public outcry, and this consent was made public by the auctioneer at the time the land was exposed for sale. The administrator had previously been granted leave by the ordinary to sell the land. The property was put up and after considerable bidding was knocked off to the plaintiff at a sum stated. Afterwards, though the purchase price was tendered by the plaintiff, the tender being a continuous one, the administrator refused to make a deed to the land, but prepared to have it resold. *Held*, that the purchaser at the administrator's sale could maintain an action to require the administrator to make her a deed, and to compel the holder of the loan deed to cancel his evidence of indebtedness.

2. SAME—EXPENSES OF LITIGATION.

Under the allegations of the petition the expenses of the litigation were not recoverable.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by S. M. Mallard against Michael Curran and others. Judgment for defendants, and plaintiff brings error. Reversed.

The case made by the petition is substantially as follows: Mrs Annie Curran died intestate, the owner of described realty in the city of Atlanta. She had previously executed to named persons, as trustees of the Penn Mutual Life Insurance Company, a nonresident corporation having an office and agent in Atlanta, a trust deed to the property to secure a loan of $3,700. Upon the death of Mrs. Curran, Michael Curran was appointed her administrator; and at the September term, 1903, of the court of ordinary of Fulton county, he was granted leave to sell the property heretofore mentioned, and thereupon proceeded to advertise it for sale on the first Tuesday in October, 1903. The administrator, through his agent, arranged with agents of the Penn Mutual Life Insurance Company "to sell said property free from said loan, and said corporation, through its said agents, agreed that it would accept payment of the debt, with interest to the date of payment, in full of the amount of said loan, said money to be paid out of the proceeds of said sale, to which agreement said Michael Curran assented, and in the advertisement which he published of said administrator's sale he advertised for sale as administrator the fee-simple interest in said property." On the day fixed for the sale, within the legal hours and at the courthouse door, the property was exposed for sale by the administrator through his auctioneer. The auctioneer, who was the agent of the administrator, made public announcement at the time the property was exposed for sale, in clear and unequivocal terms and in the presence and hearing of the administrator, "that the property would be sold free from the lien of the debt due the corporation above referred to, and that the purchaser would get a fee-simple title from said administrator; the loan deed, above referred to, to be paid by the administrator out of the proceeds of said sale, and the purchaser to get for the amount of his bid a title free of the claim of said loan deed." The auctioneer then invited bids for the property, which was finally knocked off to the plaintiff for $4,200, the highest bid. Shortly thereafter the administrator, with-

out warrant or authority, stated that he would not comply with the terms of the sale, and that he would not make the plaintiff a deed to the property. Nevertheless the plaintiff made a tender of $4,200, the amount of the bid, to the administrator, which was a continuing one, and which he has refused to accept; and she tendered the money into court. The administrator is again advertising the property for sale, and will sell it unless restrained by the court. The reasonable rental value of the property is $50 per month. The administrator is in possession of the property and refuses to deliver possession to the plaintiff. If he is allowed to sell the property, as he is attempting to do, no title will pass to the purchaser, but a cloud will be created on the plaintiff's title, which she alleges vested in her upon the acceptance of her bid by the auctioneer. Curran, individually and as administrator, has acted in bad faith, and has put the plaintiff to unnecessary trouble and expense; and she is entitled to a judgment against him for $750 on that account. The prayers of the petition were: That the administrator, the trustee for the insurance company, and the company itself be made parties defendant, and that process issue directed to each; that the administrator be enjoined from interfering with the title to the property, and from making or attempting to make any further sale thereof; that the administrator be required to make title to the property to the plaintiff, in compliance with the terms of the sale; that the administrator be required to pay to the insurance company, out of the fund tendered in court, the amount of the principal, interest, and charges due on its loan; and that the insurance company be then required to execute a quitclaim conveyance of the property, or legal cancellation of its loan papers; for judgment against Curran, as administrator and individually, for $750, costs and damages as set out in the petition. To this petition Curran, the administrator, demurred generally, and on the grounds that the petition does not set out the terms of the sale as to the time of paying the purchase price, nor does it allege the time when the tender was made; that it does not show that the plaintiff insisted on her bid, or made known to the administrator any objection to withdrawing the property from sale and advertising it for sale on another and later day; that the petition is bad for misjoinder of parties defendant, in that it prays for a judgment against Curran for damages individually in an action against him as administrator, and in that it joins three other defendants, who are strangers to the administration, to give effect to an alleged administrator's sale of land; that the petition is multifarious; and that damages are not recoverable under the facts alleged, the particular items of damage are not shown, and there is a misjoinder of a claim for damages against Curran individually and as administrator. The court, after argument, ordered that the demurrer be sustained and the petition dismissed, and the plaintiff excepted.

Jno. L. Hopkins & Sons, for plaintiff in error. Henry Walker and Du Bignon & Alston, for defendants in error.

CANDLER, J. (after stating the foregoing facts). While no express ruling was made by the trial judge on the separate grounds of demurrer, it follows, from the fact that the petition was dismissed at the plaintiff's cost, that the general demurrer was sustained, and we turn our attention first to the question whether the petition set out a cause of action.

1. There can be no doubt that, where there is in the vendor power to make a sale of real estate at auction, a contract of purchase and sale is completed upon the fall of the auctioneer's hammer and the acceptance of the bid. Either party to the contract may then enforce performance by the other, or sue for damages on account of nonperformance. 3 Am. & Eng. Enc. L. (2d Ed.) 501; Tillman v. Dunman, 114 Ga. 409, 40 S. E. 244, 57 L. R. A. 784, 88 Am. St. Rep. 28. Of course, the court will not require an administrator to do an unlawful or unauthorized act; so that the issue narrows down to the single question whether or not the administrator had power and authority, under the allegations of the petition, to advertise and sell at public outcry the fee-simple title in the property of his decedent. It goes without saying that a man cannot sell that which he does not own; and, as the administrator in the present case did not own the fee to the property, but had only an equity of redemption therein, it might seem at first blush that he was without authority to convey anything more than that equity. It is to be borne in mind, however, that the insurance company, by its trustees, together with the administrator, did own the entire interest; and we know of no legal reason why the united action of all the parties concerned might not operate to convey the fee-simple title. The insurance company is not a party to this demurrer, and has not been heard so far to object to the consummation of the sale upon which the plaintiff insists. According to the petition, full power was given by it to the administrator to sell its entire interest in the land. Certainly there can be no objection to its taking this method of obtaining payment of its debt, in preference to the institution of foreclosure proceedings. This agreement by it was not kept secret from the public, thus injuring the chances of bidding by those who did not desire to purchase property with an incumbrance; but it was made known by public announcement at the time of the auction that the purchaser would get a fee-simple title clear of all incumbrances. This, then,

was tantamount to an authority granted by it to the administrator to sell its interest in the property along with its own. A case closely in point is that of Thompson v. Atwater, 84 Ga. 270, 10 S. E. 718, where it was held: "Where a vendor sells land, and the vendee pays a part of the purchase money and then dies, the only interest which his administrator can sell is that which the vendee had in the land as represented by the amount of purchase money he paid. Nor can the administrator and vendor, when the land is exposed for public sale, privately agree that it shall be sold and the proceeds applied first to the payment of balance of purchase money, and that the interest of the vendor shall be sold provided he receives that balance. The vendor may consent for the whole interest in the land to be sold, but notice of this consent must be publicly given at the sale, that the property may bring its full value." It will be seen that the allegations of the petition in the present case measure fully up to the rule laid down in the last sentence quoted above. There is no suggestion in the record that the property did not bring its full value on the sale, or that the estate was thereby injured. We are forced to the conclusion that the court erred in dismissing the petition on general demurrer.

2. We are clear, however, that the allegations of damages and the prayers for recovery of $750 should be stricken. Aside from the fact that the administrator could not be held liable in both his individual and his representative capacity, and the further fact that the estate should not be mulcted in damages for the alleged misdeeds of the administrator, there were no such allegations of bad faith, stubborn litigiousness, and wanton disregard for the rights of the plaintiff as would support a recovery for the expenses of the litigation. See, on this subject, Pferdmenges v. Butler, 117 Ga. 400, 43 S. E. 695. The other grounds of the special demurrer, however, are without merit. The allegations of tender and the other circumstances surrounding the transaction were sufficiently explicit, the petition was not bad for misjoinder, nor was it multifarious.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., and LUMPKIN, J., disqualified.

(123 Ga. 876)

CARTER v. SOUTHERN BANKING & TRUST CO.

(Supreme Court of Georgia. Aug. 5, 1905.)

APPEAL—REVIEW—NEW TRIAL.

There was at least some evidence to authorize the verdict, and no sufficient reason has been shown for reversing the judgment.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3949.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Southern Banking & Trust Company against D. K. Carter. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. W. & Jno. D. Humphries, for plaintiff in error. Walter S. Colquitt, for defendant in error.

COBB, J. Mrs. Carter was the owner of a lot of land upon which there was an incumbrance represented by a loan deed. The debt was evidenced by a note for the principal and coupon notes for interest each six months during the time the loan was to run. Having made an advantageous sale of the property, she desired to secure the cancellation of the loan deed. The deed was canceled, and a sum paid the holder which represented the principal of the debt and the interest that had accrued to the date of the cancellation. It is claimed that there was a mistake in the settlement, and that the real transaction between the parties provided for the payment of the amount above referred to and six months' unearned interest as a consideration for the cancellation before maturity of the principal note; and the present suit is brought for this unearned interest.

The defendant contends that the deed was to be canceled upon the payment of the principal and interest up to the date of the cancellation. The issue is therefore sharply drawn between the parties. The trial resulted in a verdict in favor of the plaintiff. The agreement to pay the six months' unearned interest was made by the defendant's husband, and the question is whether there was sufficient evidence to show that the husband had authority to represent the wife in the transaction. The evidence is by no means strong; but upon a careful consideration of the brief of the testimony appearing in the record we have reached the conclusion that there was at least some evidence to authorize a submission of this issue of agency to the jury, and to sustain a finding in favor of the plaintiff that there was such an agency. The trial judge having approved the verdict, we will not interfere with his judgment overruling the motion for a new trial.

Judgment affirmed. All the justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, J., disqualified.

(123 Ga. 798)

PALMETTO MFG. CO. v. PARKER & ANDERSON.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. STATUTE OF FRAUDS—NOVATION.

"Where a creditor, his debtor, and a third person who owes the debtor agree in parol that such third person shall be substituted for the debtor and that the latter shall be released, the case is not within the statute of frauds, but the debt is extinguished as to the debtor, and the

third person becomes by substitution the debtor in his place."

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 49.]

2. NOVATION—PLEADING.

While the petition alleged an agreement between the debtor and the defendants, who owed him, to pay the former's debt to the plaintiff, the averments were not sufficient to show that the plaintiff was a party to the agreement, or that the defendants made to it any promise to pay the debt.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Novation, § 7.]

3. SAME.

The demurrer was properly sustained.

(Syllabus by the Court.)

Error from City Court of Douglas; Levi O. Steen, Judge.

Action by the Palmetto Manufacturing Company against Parker & Anderson. Judgment for defendants, and plaintiff brings error. Affirmed.

The Palmetto Manufacturing Company sued Parker & Anderson, a mercantile copartnership, alleging in its petition as follows: The defendant firm is indebted to the plaintiff in the sum of $202.63. On February 16, 1903, and March 13, 1903, plaintiff sold two bills of merchandise to J. M. Parker, aggregating $202.63. Thereafter J. M. Parker sold his entire mercantile business to Parker & Anderson, at which time it was agreed between Parker and Parker & Anderson that the defendants were to assume and pay all indebtedness that might exist against J. M. Parker for the merchant price of goods which had been previously bought by him. By reason of this agreement Parker & Anderson agreed with J. M. Parker to pay the plaintiff the amount sued for, and J. M. Parker agreed for them to retain out of the purchase money due him the sum of $202.63, which amount they retained for the express purpose of paying the indebtedness due by Parker to the plaintiff. The sixth paragraph of the petition was as follows: "That the Palmetto Manufacturing Company was informed of the agreement between said J. M. Parker and the firm of Parker & Anderson; that the said Palmetto Manufacturing Company agreed and consented for this defendant to be substituted for J. M. Parker and become their debtor in the place and stead of J. M. Parker, and that J. M. Parker be relieved and released from any indebtedness to them; that said defendant was notified by this petitioner of petitioner's consent to the change above set out and described." The petition alleges a demand upon the defendants and a refusal to pay. The defendants demurred to the petition, upon the grounds that no cause of action is set out, that no privity of contract is shown between the defendants and plaintiff and J. M. Parker, and because no written contract is shown whereby the defendants agreed to pay the debt of J. M. Parker to the plaintiff. The demurrer was sustained, and the plaintiff excepted.

Lankford & Dickerson, for plaintiff in error. Quincey & McDonald, for defendants in error.

COBB, J. "Where a creditor, his debtor, and a third person who owes the debtor agree in parol that such third person shall be substituted for the debtor and that the latter shall be released, the case is not within the statute of frauds, so as to require the agreement to be in writing, but the debt is extinguished as to the debtor, and the third person becomes by substitution the debtor in his place." Sapp v. Faircloth, 70 Ga. 690. See, also, to the same effect, Brown v. Harris, 20 Ga. 403; Harris v. Young, 40 Ga. 65; Anderson v. Whitehead, 55 Ga. 277; Steadwell v. Morris, 61 Ga. 101; Ferst v. Bank of Waycross, 111 Ga. 229, 36 S. E. 773. In order, therefore, to take such a transaction without the operation of the statute of frauds, it must appear that the person substituted for the debtor was, by agreement between the creditor, the debtor, and himself, substituted for the original debtor, who was released from the promise. In other words, it must be shown that the person substituted as the debtor in the place of the person released became such as the result of an agreement in which all three concurred. In every case either there must be an express promise to pay the creditor by the person assuming the debt, or the conduct of such person must be such as that a promise to pay the debt can be implied. Of the latter character was the case of Davis v. Tift, 70 Ga. 52.

In the light of these principles, what is the legal effect of the petition in the present case? It is clear from the allegations that Parker, the original debtor, and the defendants entered into an agreement by which they were to pay Parker's debt to the plaintiff. In furtherance of this agreement they retained from money due by them to Parker the amount of such debt. It is obvious, therefore, that, as between Parker and the defendants, they were under a legal duty to apply the amount retained to the debt due the plaintiff. If Parker had not been released from the debt to plaintiff, and he is compelled to pay to the plaintiff, he would have his action against the defendants for a breach of their undertaking with him. The sixth paragraph of the petition alleges that the plaintiff was informed of the agreement between Parker and the defendants, and "agreed and consented" for the defendants to be substituted for Parker. Clearly this was not intended to amount to an averment that the defendants made any promise to the plaintiff to pay to it the amount of Parker's debt. Properly construed, the allegations are simply that the plaintiff heard of the agreement between Parker and the

defendants, and interposed no objection, but approved such an arrangement and was willing to abide by it. The allegation that the defendants were notified by the plaintiff that it consented to the agreement, in the absence of an allegation that the defendants and Parker then concurred in the substitution, would not prevent the case from being obnoxious to the statute of frauds. There was no error in sustaining the demurrer.

Judgment affirmed. All the justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 801)

SWEAT v. SWEAT.

(Supreme Court of Georgia. Aug. 4, 1905.)

DIVORCE — TEMPORARY ALIMONY — COUNSEL FEES.

On the hearing of an application for "temporary alimony, including expenses of litigation," the judge may allow as counsel fees such sum as in his discretion appears proper under all the facts and circumstances of the case, although there is no evidence before him fixing any amount as the value of the services rendered and to be rendered by the plaintiff's counsel.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 613.]

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action by Lula E. Sweat against S. A. Sweat. From a judgment allowing a certain sum in alimony, defendant brings error. Affirmed.

Lula E. Sweat brought suit for divorce against her husband, S. A. Sweat, and, pending the suit, filed an application for an allowance for temporary alimony and counsel fees. The application was submitted to the judge on affidavits for both parties, such affidavits relating entirely to the conduct and character of the husband. There was no evidence before the judge as to the husband's financial condition, but he admitted, in his answer to the suit, that he was sheriff of Clinch county, that the income from his office was from $900 to $1,000 a year, that he had 12 shares of bank stock worth $1,200, and that he owned real estate worth $2,500. The judge allowed the plaintiff $20 per month for her support and $75 counsel fees. The defendant excepted. The only contention made by the plaintiff in error in this court is that, as there was no evidence of the value of the services of the plaintiff's counsel, it was erroneous to allow any sum as counsel fees.

Toomer & Reynolds, R. G. Dickerson, and S. C. Townsend, for plaintiff in error. Wilcox & Johnson and Walter T. Dickerson, for defendant in error.

COBB, J. The Code provides that in applications for temporary alimony, "after hearing both parties, and evidence as to all the circumstances of the parties and as to the fact of marriage, the court shall grant an order allowing such temporary alimony, including expenses of litigation, as the condition of the husband and the facts of the case may justify." Civ. Code 1895, § 2457. The only requirement of the Code is that the court shall hear evidence of the marriage and of all the facts and circumstances of the marriage before allowing temporary alimony, which shall include expenses of litigation, under which head falls counsel fees. The judge may hear the testimony of expert witnesses on the value of the services of the plaintiff's counsel. But is he bound to do this? Counsel fees are allowed as a part of the wife's maintenance, to enable her to litigate the questions at issue between herself and her husband, and are as necessary as an allowance for support. Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637. In Campbell v. Campbell, 67 Ga. 423, while there was evidence as to the value of the services of counsel, it was held that "the sum allowed for counsel fees and support pendente lite are dependent on the circumstances of the parties and the facts of the case. * * * It is much in the discretion of the chancellor to fix fees and the amount needed for support." While the judge may hear the evidence of attorneys as to the value of the services of the plaintiff's counsel, he is not bound by such evidence, but may award a less amount than the services may appear therefrom to be worth. Dicken v. Dicken, 38 Ga. 663, 670. It has also been held that a jury is not bound absolutely by the testimony of an expert witness as to what would be reasonable attorney's fees in a given case (Baker v. Richmond Works, 105 Ga. 225, 31 S. E. 426); and that an auditor would likewise not be so bound (Brown v. Ga. Min. Co., 106 Ga. 518, 32 S. E. 601). In Peyre v. Peyre, 79 Cal. 336, 21 Pac. 838, it was held: "The court may require the husband to pay to the wife temporary alimony and a reasonable attorney's fees; and no testimony is necessary to determine what the amount of the fee should be. The court may determine what is reasonable fee, from its own experience and from the facts and circumstances of the case appearing before it, and may base the allowance on the ability of the husband to earn money, though it does not appear that he has money or other property with which to pay the amount allowed." To the same effect see De Llamosas v. Llamosas, 62 N. Y. 618. A different conclusion seems, however, to have been reached in Jeter v. Jeter, 36 Ala. 391 (7). See, also, Blair v. Blair, 74 Iowa, 311, 37 N. W. 385.

The judges of the superior courts of this state are experienced and able lawyers. Before coming to the bench they were for years engaged in the practice. Doubtless most, if not all, of them participated in the trial of alimony cases. It would be strange if practicing lawyers were more capable of

fixing counsel fees than the judges. Besides, as shown above, it has been expressly decided that the judge is not bound by the estimate placed by attorneys upon the services of their brother attorney in the particular case. Why require such evidence, if the judge can disregard it? The Code requires that he shall examine into all the circumstances of the case. This would include the financial condition of the husband, the social position of the parties and their previous manner of living, and the needs of the wife. Evidence of these facts affords a sufficient basis for fixing an allowance for temporary alimony, which includes the expenses of litigation. We think that, under the language of the section of the Code above quoted, the judge is not bound to hear expert evidence as to counsel fees. Whether the same rule would apply in a case heard before a jury, we do not now decide. In the present case the judge could find that the defendant had an income of $1,000 a year, and owned property worth nearly $4,000. Certainly it was not an abuse of discretion to allow $75 as attorney's fees. The judge could well decide, without the aid of expert testimony, that the services of the plaintiff's attorneys were worth at least the sum which he allowed them.

Judgment affirmed. All the Justices concur except SIMMONS, C. J., absent.

(123 Ga. 727)

BATES v. BIGBY.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. BAILMENT — WHAT CONSTITUTES — JUSTICE OF THE PEACE—JURISDICTION.

A delivery of personalty for some particular purpose, upon a contract, express or implied, that after the purpose has been accomplished the property shall be returned to the person who delivered it, constitutes a bailment. A justice's court has jurisdiction of an action on the breach of such contract, when the amount sued for does not exceed $100.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bailment, § 1; vol. 31, Cent. Dig. Justices of the Peace, § 109.]

2. JUSTICE OF THE PEACE—JURISDICTION.

A notary public and ex officio justice of the peace, although his resignation is tendered to and accepted by the Governor, continues in office, under the statute of this state, until his successor is appointed and qualified.

3. SAME—CERTIORARI.

The certiorari was properly sustained, and there was no error in the direction, given by the judge of the superior court, that an irregularity in the entry of the case on the justice's docket be corrected in accordance with the facts.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by E. K. Bigby against the Southern Dye & Cleaning Works and others. Judgment for plaintiff. On levy of execution, J. G Bates filed an affidavit of illegality. Decree sustained, and judgment reversed on certiorari, and Bates brings error. Affirmed.

C. B. Reynolds, for plaintiff in error. H. W. Dent, for defendant in error.

FISH, P. J. J. G. Bates filed an affidavit of illegality to an execution issued by Ormond, notary public and ex officio justice of the peace of the 1,234th district, G. M., Fulton county, in favor of Mrs. E. K. Bigby against "Southern Dye & Cleaning Works, J. G. Bates, Pro., George B. Beck, Security," claiming that the execution issued against him and was proceeding illegally. Plaintiff moved to strike the illegality upon various grounds, which motion was overruled by the magistrate, and the illegality sustained. Upon certiorari this ruling was reversed, and the case remanded, with direction. Bates sued out a writ of error, which brings in review the judgment rendered in the superior court.

One ground of the illegality was: "The account sued upon in the case in which said fi. fa. was issued was in substance as follows: Southern Dye & Cleaning Works (J. George Bates, Pro.), to Mrs. E. K. Bigby, to value of one pair double blankets, turned over to the Southern Dye & Cleaning Works to be cleaned, July, 1902, and which have not been returned, $20. Below which follows an affidavit by the plaintiff in addition that demand has been made. Affiant claims that the same sets forth no cause of action of which a justice court has jurisdiction; the action sounding in tort, and not being for any injury or damage to said personal property. This being true, affiant claims that, the suit being void, the fi. fa. issued thereon is likewise void." If the court did not have jurisdiction of the subject-matter of the suit, the judgment was void, and illegality would lie to the execution issued thereon. Planters' Bank v. Berry, 91 Ga. 264, 18 S. E. 137. The Constitution of this state provides that "justices of the peace shall have jurisdiction in all civil cases arising ex contractu, and in cases of injuries or damages to personal property, when the principal sum does not exceed one hundred dollars." Civ. Code 1895, § 5856. Clearly the action was not for injuries or damages to personal property. Did the cause of action arise ex contractu? From the affidavit of illegality it appears that the suit purported to be on account for $20, the value of one pair of double blankets turned over to the defendant to be cleaned, and which were not returned, although demand for same had been made. Technical rules of pleading are not required in justices' courts, and a fair construction of the whole statement in reference to the account, especially after judgment, is that the plaintiff delivered to the defendant a pair of double blankets to be cleaned by him, which, after being cleaned, were to be redelivered by defendant to plaintiff; that defendant had failed

after demand to redeliver them; and that they were of the value of $20, for which amount plaintiff sued. A delivery of personalty for some particular purpose, upon a contract, express or implied, that after the purpose has been fulfilled the property shall be redelivered to the person who delivered it, constitutes a bailment. 5 Cyc. 161. Therefore, after the blankets had been cleaned, it was the duty of the defendant, in accordance with his contract, implied at least, to return them to the plaintiff, and for his failure or refusal so to do, without legal excuse, a right of action accrued to the plaintiff. When a tort has been committed with respect to the subject-matter of the bailment, the bailor may either sue for the tort, or waive the tort and sue in assumpsit for a breach of the contract of bailment. 5 Cyc. 214. In Rockwell v. Proctor, 39 Ga. 105, the suit was against an innkeeper for the value of a lost overcoat deposited with him by a guest. It was held that the justice's court had jurisdiction of the subject-matter of the action, as it was for the breach of the implied contract of the innkeeper "to secure his guest's goods in his inn." When the transaction partakes both of the nature of a tort and a contract, the party injured may waive the one and rely solely on the other. Civ. Code 1895, § 3811. All the authorities agree that, where personal property is tortiously taken and converted into money, the owner may waive the tort and sue the wrongdoer in assumpsit. They differ, however, as to the right of the owner to sue in assumpsit, where the wrongdoer has not sold or otherwise disposed of the property, but retains it for his own use. This court has held that, where one wrongfully takes the personalty of another and converts it to his own use in some manner or other than by a sale and receipt of money therefor, the owner is restricted to his right of action ex delicto. He cannot waive the tort and sue ex contractu. Cragg v. Arendale, 113 Ga. 181, 38 S. E. 399, and cit. Where, however, a contractual relation exists between the parties, such as that of bailor and bailee, so that the latter rightfully obtains possession of the property, a tort arising out of the breach of the bailee's duty imposed by his relation may be waived by the bailor, and assumpsit maintained; the reason being that the relation of the parties, out of which the duty violated grew, had its inception in contract. 4 Cyc. 331, 332; Zell v. Dunkle, 156 Pa. 353, 27 Atl. 38; Tindall v. McCarthy, 44 S. C. 487, 22 S. E. 734. As the cause of action declared on in the suit wherein the judgment was rendered upon which the execution issued was the breach of the defendant's duty to return the blankets to the plaintiff in accordance with his implied contract, such cause of action arose ex contractu, and the justice's court had jurisdiction thereof.

2. Another ground of illegality was that the judgment upon which the execution is sued was based upon a verdict rendered on an appeal to a jury in the justice's court from a judgment rendered on August 25, 1903, by W. L. Venable, who had, on August 22, 1903, "in writing and unconditionally" resigned the office of notary public and ex officio justice of the peace of the militia district in the justice's court of which the case was then pending, and the Governor on the same date "accepted said resignation unconditionally," and for this reason Venable, at the time he rendered such original judgment, was neither de jure nor de facto a magistrate, and that, therefore, the appeal from his judgment, the verdict on the appeal, and the judgment "rendered by the present justice" on the verdict were all void. "Public officers are trustees and servants of the people" (Const. Civ. Code 1895, § 5698); and "all officers of this state must * * * discharge the duties of their office until their successors are commissioned and qualified" (Pol. Code 1895, § 226). This statute is mandatory, and there are good reasons why it should be so, among them, that governmental functions should not cease, and that the public records of the office should be preserved and handed over to a successor. In Badger v. United States, 93 U. S. 599, 23 L. Ed. 991, the Supreme Court of the United States had under consideration a section of the Constitution of the state of Illinois which provided that public officers "shall hold their offices until their successors shall be qualified," and the court held that "a supervisor, town clerk, or justice of the peace, although his resignation is tendered to and accepted by the proper authority, continues in office, and is not relieved from his duties and responsibilities as a member of the board of auditors, under the township organization laws of the state of Illinois, until his successor is appointed, or chosen, and qualified." The principle ruled in that case has been followed in United States v. Justices (C. C.) 10 Fed. 460, People v. Supervisors, 100 Ill. 332, Jones v. Jefferson, 66 Tex. 576, 1 S. W. 903, and Keen v. Featherston (Tex. Civ. App.) 69 S. W. 983. So, notwithstanding the resignation of Venable and its acceptance—it not appearing that a successor had been appointed and qualified—we hold that he was legally a notary public and ex officio justice of the peace at the time he rendered the judgment in question.

3. Other grounds of illegality were that no judgment had ever been entered on the docket in the justice's court against the defendant in fi. fa.; and, if one had been entered, the execution did not follow it. The basis of these grounds is that the case was entered upon such docket as follows: "Elizabeth K. Bigby v. Sou. Dye & Cleaning Co., Geo. B. Beck, Prop.;" that the original judgment appealed from, as well as the judgment entered on the verdict rendered on the

appeal, was entered on the docket as being in favor of the plaintiff against the defendant for a given sum, without stating who the defendant was; and that the execution was issued against "Southern Dye & Cleaning Works, J. G. Bates, Pro., George B. Beck, Security." As we have seen, the account sued on was against "Southern Dye & Cleaning Works (J. George Bates, Pro.)," and it is fair to presume that the same phraseology was used in the summons to designate who was being sued. The entry of the case on the docket differently from the way it appeared in the summons was a mere irregularity; and, even if Bates could now be heard to complain of it for any reason, after having appealed from the original judgment in the case and thereby secured another trial, and not having objected at any time pending the suit to such irregularity (see Reynolds v. Neal, 91 Ga. 609, 18 S. E. 530), he has no meritorious complaint of the direction given by the judge of the superior court in this respect—that is, that the entry on the docket be amended so as to conform to the facts.

We have dealt with all of the assignments of error referred to in the brief of counsel for the plaintiff in error, and our conclusion is that the certiorari was properly sustained.

Judgment affirmed. All the Justices concurring except SIMMONS, C. J., absent, and LUMPKIN, J., disqualified.

(123 Ga. 770)

MACON RY. & LIGHT CO. v. VINING.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. CARRIERS — STREET RAILROADS — INSTRUCTIONS.

A charge that it is the duty of a street car company to select a reasonably safe place for landing passengers, wherever it may stop a car for that purpose, states a sound legal proposition, and is not open to the criticism that it impliedly instructs the jury that a failure to perform such duty would be negligence per se.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1151, 1224, 1231.]

2. SAME—NEGLIGENCE.

On the trial of an action against a railway company for personal injuries, it is error for the trial judge to instruct the jury that a given state of facts would be sufficient to establish negligence on the part of the defendant; these facts not being such as would in law, per se, constitute negligence. The fact that the Supreme Court, in passing upon demurrers to the petition in the same case, when formerly under review, stated that certain acts or their omission would constitute negligence and render the defendant liable, does not make it proper for the trial judge to make such statement in charging the jury.

3. SAME.

One of the charges excepted to was somewhat argumentative, and presented with too much stress plaintiff's contention of fact.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 561.]

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by H. J. Vining against the Macon Railway & Light Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dessau, Harris & Harris and Roland E. Ellis, for plaintiff in error. Marion W. Harris and T. J. Cochran, for defendant in error.

FISH, P. J. Mrs. Vining sued the Macon Railway & Light Company for damages for personal injuries alleged to have been sustained by her while a passenger of the defendant company and by reason of its negligence. A verdict was found for the plaintiff, and the defendant excepts to the refusal of a new trial. The allegations of the plaintiff's petition are fully set forth in the report of the case when it was formerly before this court. 120 Ga. 511, 48 S. E. 232.

1. The court instructed the jury that it was the duty of a street car company to select a reasonably safe place for landing passengers, wherever it may stop a car for that purpose. This charge was excepted to, because it placed a duty upon the company which is not imposed by any statute or ordinance, and because it in effect instructed the jury that a failure to perform such duty would be negligence per se. The exceptions were not well taken. The charge was in the language of the opinion rendered in the case in 120 Ga. 511, 48 S. E. 232, and merely stated a correct legal proposition applicable to the case. It left the question of fact, as to whether the landing was reasonably safe or not, entirely with the jury. Western & Atlantic R. Co. v. Burnham, 123 Ga. 28, 50 S. E. 984; Atlanta & West Point R. Co. v. Hudson, 123 Ga. 108, 51 S. E. 29.

2. Other instructions excepted to were: "If, however, a passenger selects a place which is reasonably safe, and the car has stopped, and on account of the darkness the passenger cannot determine whether the car has stopped at the place designated, and the passenger exercises ordinary care and diligence, and the conductor in charge of the car permits the passenger to attempt to alight without informing him that the place selected has not been reached, and also without informing him as to any danger that might exist incident to alighting at the place at which the car had actually stopped, then the company would be liable, provided the passenger is injured in alighting as a consequence of a danger of which he is not aware, and which, on account of the darkness, was not apparent to him at the time he attempted to alight by the exercise of ordinary care and diligence, or if, after having stepped from the car, the passenger attempted to proceed along what would have been a safe way in the event the car had stopped at the place which he, the passenger, selected." "If the passenger selects

a place which is reasonably safe, and the car is stopped, and the passenger in the exercise of ordinary care and diligence cannot determine whether the car has stopped at the place designated by him, and the conductor permits the passenger to alight, without informing him that the place selected has not been reached, and without informing him of the place where the car was actually stopped, and such place was not actually safe for landing, and the passenger is injured and damaged, without fault or negligence on his part, by reason of such failure on the part of the conductor, then I charge you that the company would be liable to such passenger for injuries and damage occasioned by the negligence of the company's servants." One of the exceptions to these charges was that the court therein instructed the jury as to what facts or acts would constitute negligence on the part of the company's servants. Obviously this is a just criticism. West End Ry. Co. v. Mozely, 79 Ga. 463, 4 S. E. 824. The question as to what acts do or do not constitute negligence is exclusively for determination by the jury, in the absence of a statute or valid municipal ordinance declaring a particular act to be negligence. Atlanta & West Point R. Co. v. Hudson, supra, and citations. "The trial judge should not tell the jury what acts would constitute negligence and what would not, but should instruct them as to the proper measure of diligence, and leave them to determine, in view of all the evidence bearing on the subject as to the time, place, circumstances, and happenings, and the whole transaction as disclosed by the evidence, as to whether there was or was not a want of due care." Id. That the Supreme Court, in passing upon a demurrer to the petition in the present case when formerly under review, used expressions contained in the instructions now under consideration, did not of itself make it proper for the trial judge to use such language. "There are many things said by [the Supreme Court], both in headnotes and opinions, that are sound law, but which nevertheless would be improper instructions to a jury." Savannah Ry. Co. v. Evans, 115 Ga. 315, 41 S. E. 631, 90 Am. St. Rep. 116; Atlanta & West Point R. Co. v. Hudson, supra. The error in the charges last above quoted requires a reversal of the judgment refusing a new trial.

3. The tenth ground of the motion for new trial complains of a lengthy extract from the judge's charge on the grounds that it was argumentative and presented with too much stress and detail plaintiff's contention of fact. We think this charge open to the criticism made upon it, but deem it unnecessary to say more upon the subject, as upon the next trial the judge in his instructions will no doubt avoid such objectionable features. There are other assignments of error not necessary to be dealt with, as they relate to matters not at all likely to arise on another trial.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 781)

REED v. HOLBROOK.

(Supreme Court of Georgia. Aug. 4, 1905.)

HOMESTEAD—EXEMPTIONS — NOTICE TO CREDITOR.

Where personalty duly exempted was used in connection with the labor of the applicant and his family in the making of crops on land purchased by him subsequently to the exemption, title to which was taken in his own name, and the proceeds of the sale of the crops were applied to the payment of the purchase money of the land, such land was subject to a debt afterwards contracted by the applicant for provisions and supplies for himself and family; the creditor having no notice as to how the land had been paid for, and having extended credit knowing that the legal title to the land was in the applicant, and upon the belief, in good faith, that he had an absolute and unincumbered title to the same. The record of the exemption was not of itself sufficient to put the creditor on notice of the homestead character of the land.

(Syllabus by the Court.)

Error from Superior Court, Hart County; Horace M. Holden, Judge.

Action by J. W. Holbrook against Aaron Reed. Judgment for plaintiff. Under levy of execution, defendant claimed the property as a homestead as trustee for his wife. Judgment for plaintiff, and claimant brings error. Affirmed.

J. H. Skelton, O. C. Brown, and W. L. Hodges, for plaintiff in error. A. G. & Julian McCurry, for defendant in error.

FISH, P. J. Holbrook had an execution against Aaron Reed levied upon certain land claimed as homestead property by Reed as trustee for his wife. Upon the trial the claimant admitted being in possession of the land at the time of the levy, and assumed the burden of proof, offering as evidence to support his claim the record of the proceedings exempting certain personal property, including three horses, several head of cattle, and farm supplies and implements, and testimony to the effect that the land levied upon had been bought from one T. T. Holbrook, as agent, etc., with the proceeds of the sales of crops grown on the land and made with his labor and that of his wife and children, the beneficiaries of the exemption, and with the use of the exempted property. The plaintiff testified that he had no knowledge that the land had been purchased with the proceeds of the sale of such crops, but, on the contrary, believed the title thereto to be absolutely in Reed individually, as he (the plaintiff) had held the deed conveying the property from T. T. Holbrook into Reed as collateral security for certain indebtedness due him by Reed; that for a number of years he had sold Reed pro-

visions and supplies; that the fi. fa. in this case was based upon a judgment against Reed for provisions; and that he "extended him the credit on the faith of this deed and that title to the land was in Aaron Reed." This deed, which was to Reed individually, and which bore no mark indicating that its consideration was in part the proceeds of exempted property, was also placed in evidence. The court directed a verdict finding the land subject to the levy. The claimant made a motion for a new trial, upon the grounds that the verdict was contrary to law and the evidence, and because the court erred in directing the verdict. The motion was overruled, and the claimant excepted.

When this case was here before (118 Ga. 1168, 39 S. E. 445), all the questions which are now presented were decided, except (1) as to whether or not the exemption, which was set apart prior to the time credit was extended to Reed by Holbrook, was constructive notice to the latter that the beneficiaries of the exemption had an interest in the land; and (2) if the record of the exemption was not such notice, whether the lien of the plaintiff's judgment should be enforced against the secret equities of the beneficiaries under the exemption. In the case of Walden v. Brantley, 116 Ga. 298, 42 S. E. 508, where Walden had set apart to him as the head of a family a homestead consisting of realty and personalty, and subsequently sold the real estate and some of the personalty under an order of court, and reinvested the proceeds in a house and lot, and some time thereafter exchanged that house and lot for another, it was held that these facts did not charge a subsequent creditor, who was also a mortgagee of Walden, with notice of the homestead character of the property, and that the property, as against the execution of such creditor, was not exempt. If the head of a family desires to sell or otherwise trade with exempted property, he should do so in the way the law prescribes, and when he disregards the formal requisites of the law he does so at his peril. Pate v. Oglethorpe Co., 54 Ga. 515. In our opinion, the plaintiff in the case now under consideration was not, under the evidence submitted, chargeable with notice of the homestead character of the property levied upon.

The record of the exemption proceedings not being constructive notice to the plaintiff that the equitable title to the land was in the beneficiaries of the exemption, was the property subject to the plaintiff's levy, he having given Reed credit upon the belief that he owned the land unincumbered? We think it was. There being no notice to the plaintiff, actual or constructive, of the real character of this property, the interest of the beneficiaries under the exemption was no more than a secret equity, and cannot be enforced against the claim of a bona fide creditor, who gave credit on the faith that the property was Reed's and unincumbered. This is a principle which has been long recognized by this court, it having been held in the case of Zimmer v. Dansby, 56 Ga. 79, that "if the legal title to land be in the husband, and he holds the possession thereof under such title, and the title and possession so remain until a creditor, who gave credit on the faith that the property was the husband's, without notice of the wife's equity, reduces his debt to judgment, the lien of such judgment will bind the land and will be enforced against a secret equity of the wife, resulting from the fact that her money paid for the land." The evidence being undisputed that credit was extended to Reed on the faith that the property to which he held the legal title was his own and unincumbered, and that the plaintiff had no notice of the equities of the beneficiaries therein, the court did not err in directing the verdict finding the property subject.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 754)

GRIMES v. STATE.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. HOMICIDE — VOLUNTARY MANSLAUGHTER — INSTRUCTIONS.

On the trial of one indicted for voluntary manslaughter, the evidence of the state's witnesses, if believed, made out a case of murder, while the statement of the accused, if all of it were believed, showed the homicide to be justifiable. If, however, part of the statement were believed and the balance disbelieved, the offense committed was voluntary manslaughter. *Held* that, as the jury are free to give the prisoner's statement such credence as they think proper, and may therefore believe all or a part of it as they see fit, a charge on the law of voluntary manslaughter was proper, and that a verdict finding the accused guilty of that offense was not unwarranted.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 653–655.]

2. CRIMINAL LAW—NEW TRIAL.

A new trial will not be granted on account of newly discovered evidence which is merely of an impeaching character; nor on account of alleged newly discovered evidence of any kind, when movant's counsel files no affidavit of his ignorance, before the verdict, of the existence of such evidence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2331, 2332, 2396–2402.]

3. HOMICIDE—INSTRUCTIONS.

An exception to a correct charge on voluntary manslaughter was not well taken, when the error assigned was that "the court should have gone further and submitted the question of involuntary manslaughter."

4. SAME—REASONABLE FEAR.

The court did not err in charging the doctrine of reasonable fears, as contained in Pen. Code 1895, § 71.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 629.]

(Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Henry Grimes was convicted of voluntary manslaughter, and brings error. Affirmed.

J. W. Wise, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., for defendant in error.

FISH, P. J. Judgment affirmed. All the justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 869)

PARKS v. BALDWIN et al.

(Supreme Court of Georgia. Aug. 5, 1905.)

INJUNCTION—SALE OF MORTGAGED PROPERTY—BANKRUPTCY OF MORTGAGOR.

The judge of the superior court did not err in refusing, on the petition of the trustee in bankruptcy of the mortgagor for such relief, to enjoin the sheriff from proceeding to sell the mortgaged property in his possession by virtue of a levy under the mortgage fi. fa., and in not ordering him to deliver such property to the trustee; the mortgage having been executed more than four months prior to the petition in bankruptcy, there being no question raised as to the validity of the mortgage or the debt it was given to secure, the debt not having been proved in bankruptcy, and the trustee not offering to pay the same. See Reed v. Equitable Trust Co., 42 S. E. 102, 115 Ga. 780, and citations; Merry v. Jones, 46 S. E. 861, 119 Ga. 643; Heath v. Shaffer, 2 Am. Bankr. R. 98, 93 Fed. 647; In re Gerdes, 4 Am. Bankr. R. 346, 102 Fed. 318; Carling v. Seymour Lumber Co., 8 Am. Bankr. R. 29, 113 Fed. 483, 51 C. C. A. 1; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Railroad Company v. Gomilla, 132 U. S. 478, 10 Sup. Ct. 155, 33 L. Ed. 400.

(Syllabus by the Court.)

Error from Superior Court, Terrell County; H. C. Sheffield, Judge.

Action by James G. Parks, trustee, against A. J. Baldwin and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Slaton & Phillips, W. H. Gurr, and James G. Parks, for plaintiff in error. R. R. Morlin, H. A. Wilkinson, and Smith, Hammond & Smith, for defendants in error.

FISH, P. J. Judgment affirmed. All the justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 784)

HOUSE v. OLIVER et al.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. CITY COURT — JURISDICTION — EQUITABLE RELIEF.

While a city court has no jurisdiction to grant affirmative equitable relief, it may entertain jurisdiction of an equitable plea purely defensive in its nature, which, upon being sustained, would result simply in a general verdict in favor of the defendant.

2. INJUNCTION—ACTION ON NOTE.

A verdict and judgment in favor of the defendant in a suit on a note as effectually cancels the note as would a decree in equity; and a suit thereon in a city court will not be enjoined in order that the superior court as a court of equity may decree a cancellation of the note.

3. SAME.

There was no error in refusing to grant an injunction.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action by T. W. House against W. N. Oliver and others. Judgment for defendants, and plaintiff brings error. Affirmed.

The record discloses the following state of facts: House and Oliver were partners. They agreed upon a dissolution and settlement of the partnership affairs. Under the agreement certain assets were turned over to Oliver, and House delivered to him his note for $850. Thereafter House brought an equitable petition against Oliver and Martin, the latter having become the owner of the $850 note, in which it was alleged that a fraud had been perpetrated upon House in the settlement of the partnership affairs, as a result of which Oliver had received more than he was entitled to; such fraud consisting in misrepresentations as to the amount of the debts due by the partnership, etc. It was alleged that, upon an equitable and fair settlement of the partnership affairs, Oliver was not entitled to the note for $850, nor to any of the assets delivered to him, and hence that the note was entirely without consideration, and that Martin was not an innocent purchaser without notice. The prayers were for a full and complete accounting, that the $850 note be declared void and canceled, and that Oliver be required to return the other assets which had been turned over to him. The case was referred to an auditor, and, while it was pending on exceptions to the auditor's report, House, with the consent of Oliver and Martin, dismissed the case. Subsequently to the dismissal Martin brought a suit in the city court of Hall county against House on the $850 note, and Oliver, in the same court, brought a suit against House for the amount which he claimed House had wrongfully collected of the assets turned over to him in the partnership settlement. The present case is a petition brought by House against Oliver and Martin, in which the partnership settlement is attacked upon the same grounds that it was assailed in the original suit, and also upon other grounds; and the prayers were for an accounting between the parties, that the contract of dissolution be canceled, that Martin be decreed not to be an innocent holder of the note and the note be delivered up to be canceled, that, if this cannot be done, House recover of Oliver the full amount of the principal, interest, and costs that he may be required to pay to Martin, that he have judgment against Oliver for the value of the assets of the partnership turned over to him in the settlement, that he be restrained from collecting any of the assets that remain uncollected, and that the suits in the city court be enjoined. Oliver answered, denying all of the allegations of

fraud, and set up that the settlement was fair in every way. The answer of Martin set up that he was an innocent purchaser of the note for value and without notice. The evidence as to the details of the settlement was conflicting. The judge refused to grant the injunction restraining the suits in the city court, and House excepted.

Dean & Hobbs, for plaintiff in error. H. H. Perry, F. M. Johnson, and Parks & Gaillard, for defendants in error.

COBB, J. Merely that a defense involves the application of equitable principles does not deprive a city court of jurisdiction to entertain the same. A plea which, though setting up a defense which is equitable in its nature, is purely defensive, and does not involve the exercise of any of the extraordinary powers of a court of equity, may be filed in a city court. But, when the plea calls for the exercise of those powers which have sometimes been described as "the larger powers" of the court of chancery, such as cancellation, reformation, and the like, a city court cannot entertain jurisdiction. In the case of National Bank v. Carlton, 96 Ga. 469, 23 S. E. 388, a suit in a city court was enjoined upon the ground that the plaintiff was entitled, under her allegations, to a cancellation of a deed, and that this relief could not be granted to her by the city court. In English v. Thorn, 96 Ga. 557, 23 S. E. 843, a suit in a city court was enjoined upon the ground that the plaintiff was entitled, under the allegations of the petition, to a reformation of the contract, and that this was beyond the power of the city court. In Ragan v. Standard Scale Co., 123 Ga. 14, 50 S. E. 951, a claimant sought to mold a decree enforcing the equitable right of subrogation, which involved the revival of a canceled mortgage; and it was held that such relief was beyond the power of a city court to grant. The cases cited are those upon which the plaintiff in error relies for a reversal of the judgment refusing to grant the injunction, but the allegations of the petition do not bring the case within the principle of any of those decisions. There is a prayer for the cancellation of the dissolution agreement of the partnership; but, when the allegations of the petition are taken as a whole, it appears that the plaintiff does not desire that the dissolution be set aside and the partnership reinstated, but that the relief sought is simply an accounting of the partnership affairs according to the truth and justice of the case. Nor is it necessary, even if it had been desired, that the agreement of dissolution should be set aside. If the $850 note was obtained by fraud, or if other assets reached the possession of Oliver for a similar reason, we do not see why House cannot avail himself of these facts by a purely defensive plea in the city court. If the note was without consideration, and of such a character that a plea of no consideration would be available as a defense to it, this defense can be pleaded in the city court, and any evidence which would be admissible in any court to establish this fact would be admissible there. If House had a right to collect from debtors to the firm those claims which had been turned over to Oliver, a defensive plea setting up this right would be within the jurisdiction of the city court, and he could be as fully protected in that court under such a plea as in any other court.

House claims simply that Oliver has perpetrated a fraud upon him, that therefore he had no right to collect the $850 note, and that House had a right to collect other claims which were turned over to Oliver. These matters can be fully pleaded; and, if House establishes his defense, the city court can render a judgment in his favor in each of the cases in which he is sued. If Martin is not an innocent purchaser, his suit may be defeated by any defense of which House could avail himself if the note had not been transferred. But it is said that there is a prayer for a cancellation of the $850 note, and that the city court cannot decree a cancellation of the note. If House had a complete legal or equitable defense to the note, and can establish this defense in the city court, a judgment in his favor will be rendered, and no decree canceling the note will be necessary for his protection. In the Carlton Case, above referred to, the prayer was not for a cancellation of the note, but for a cancellation of the deed given to secure the note, and for other equitable relief in connection with the transaction. Where there is a single transaction represented by a single note, a judgment by any court of competent jurisdiction in favor of the defendant on any plea which has the effect to discharge him from liability on the note as completely cancels the note as would a decree in equity. If this were not true, then every defendant, sued in any court upon a written promise to pay, could transfer the case to the superior court by simply setting up in his petition what would have been a proper plea in the case and adding a prayer for cancellation. If the transaction involved a series of notes, all subject to the same defense, and only one was sued, and the petition sought to enjoin this suit and to cancel all of the notes connected with the transaction, thus avoiding a multiplicity of suits, a different question would arise. We do not think there was any error in refusing to grant the injunction restraining the prosecution of the suits in the city court.

Judgment affirmed. All the justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 722.)

HAWKINS v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Supreme Court of Georgia. Aug. 3, 1905.)

FOREIGN CORPORATIONS—ACTIONS AGAINST.

"A foreign corporation doing business in this state, and having agents located therein for this purpose, may be sued and served in the same manner as domestic corporations upon any transitory cause of action, whether originating in this state or otherwise; and it is immaterial whether the plaintiff be a nonresident or a resident of this state, provided the enforcement of the cause of action would not be contrary to the laws and policy of this state." Reeves v. Southern Railway Co., 49 S. E. 674, 121 Ga. 561.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2595–2603.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Jerry Hawkins against the Fidelity & Casualty Company of New York. Judgment for defendant, and plaintiff brings error. Reversed.

F. M. Johnson and W. R. Hammond, for plaintiff in error. Slaton & Phillips, for defendant in error.

LUMPKIN, J. Hawkins brought suit in the city court of Atlanta against the Fidelity & Casualty Company of New York. He alleged that the defendant was a corporation of the state of New York, engaged in the business of accident insurance, and that it had an agency and office for the transaction of business, and an agent in charge of the same, in Fulton county, Ga., over which the jurisdiction of the city court of Atlanta extends. A demurrer was filed on the ground that the defendant was a nonresident corporation; that the action was based on a policy of accident insurance issued by the company on the life of James W. Hawkins, the son of the plaintiff, and payable to the latter; that the contract was issued outside of the state of Georgia, and the insured died in Oklahoma Territory; and that, these facts appearing on the face of the declaration, the court was without jurisdiction. The demurrer was sustained and the action dismissed. The plaintiff excepted.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 736)

ATLANTA & W. P. R. CO. v. REDWINE et al., Com'rs.

(Supreme Court of Georgia. Aug. 3, 1905.)

1. HIGHWAYS — ESTABLISHMENT — OBJECTIONS—CERTIORARI.

In an application for a new public road, a landowner whose land is sought to be taken may, in response to the notice served on him, as provided in Pol. Code 1895, § 521, urge before the ordinary (or county commissioners, as the case may be) any legal objection to establishing the public road, and the judgment of the ordinary (or commissioners) is reviewable by certiorari.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 204–207.]

2. INJUNCTION—CONSTRUCTION OF HIGHWAY.

As the landowner's remedy at law was ample, it was not erroneous to refuse to enjoin the county commissioners from continuing a proceeding to establish a public road, pursuant to Pol. Code, §§ 520–522, in advance of the hearing provided for in section 521.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 334; vol. 27, Cent. Dig. Injunction, § 149.]

(Syllabus by the Court.)

Error from Superior Court, Campbell County; L. S. Roan, Judge.

Action by the Atlanta & West Point Railroad Company against F. H. Redwine and others, commissioners of roads and revenues of Campbell county. Judgment for defendants, and plaintiff brings error. Affirmed.

The Atlanta & West Point Railroad Company filed a petition for injunction against the commissioners of roads and revenues of Campbell county, alleging that they were proceeding illegally to establish a public road over, and longitudinally upon, a portion of its right of way, which had been already devoted to a public use and was necessary to the operation of its business as a common carrier. The petition was met by both a demurrer and an answer, which was considered by the presiding judge upon the interlocutory hearing in connection with certain evidence submitted by the parties. The court declined to grant an injunction, and the railway company excepted.

Dorsey, Brewster & Howell and C. S. Reid, for plaintiff in error. J. H. Longino, for defendants in error.

EVANS, J. (after stating the facts). The commissioners are proceeding, under Pol. Code 1895, §§ 520–522, to lay out and open a public road. The different steps pointed out by the statute are: (1) The appointment by the county commissioners of three road commissioners to pass upon the public utility of the new road, and to mark out its boundaries; (2) the road commissioners must go upon the land, and, if they find the road to be of public utility, must proceed to mark it out and make their report under oath to the county commissioners that the road has been laid out conformably to law; (3) when this report is filed with the county commissioners, they determine ex parte whether or not they are "willing to grant such road"; (4) if so, then it is their duty to publish a citation for 30 days at the door of the courthouse and in a public gazette (if there is one in the county), giving a particular description of the proposed new road, and notifying all persons concerned that on and after a certain day therein named the road "will be finally granted, if no good cause is shown to the contrary"; (5) at the same time, the

county commissioners shall issue a notice in writing to all persons, their overseers or agents, residing on the land which such road goes through, that they may put in their claims for damages, "or be forever estopped," which notice may be served personally, or by leaving it at their most notorious place of abode; (6) upon the day specified, in the order to show cause, the county commissioners shall sit as a court for the purpose of determining whether sufficient cause is shown why the road should not be established, and, as cause why it should not be, any party at interest may show that the law with respect to the laying out of the road has not been complied with, or any other legal reason why the commissioners are without power to establish the road as marked out by the reviewers. Nichols v. Sutton, 22 Ga. 369. The superior court can properly interfere with the proceedings only when the county commissioners seek to violate the law. So long as they keep within their legal power, the exercise of their discretion ought not to be controlled. Ponder v. Shannon, 54 Ga. 187.

That the county commissioners, when they sit for the purpose of finally determining whether or not they will grant the proposed new road, sit as a court, has been recognized in several of the cases reported in our books. In some of them the point was not directly raised, and it was assumed that the county authorities were exercising judicial functions, not merely performing ministerial duties. Thus, in Hightower v. Jones, 85 Ga. 697, 11 S. E. 872, a dissatisfied landowner complained of the decision of the county authorities, by presenting a petition for certiorari to the superior court, the superior court overruled the certiorari, and its judgment was affirmed by this court. In Ponder v. Shannon, supra, the issue was raised by objection filed with the county commissioners, testimony was introduced before them, and their judgment was in favor of altering the road in accordance with the report of the reviewers, whereupon a writ of certiorari was sued out by the objectors. The sections of the Code above cited were codified from the act of 1818. At the time the county affairs were administered by the justices of the inferior court. Upon the abolition of that court, the duties appertaining to county matters, theretofore exercised by the justices, were imposed upon the ordinary, save in those counties where the county affairs were administered by commissioners. In the case of Nichols v. Sutton, supra, it was expressly held that the justices of the inferior court had authority to alter or lay out public roads, and, in a proceeding to establish a road which had ceased to be a public highway, the remedy of a landowner who was dissatisfied with the decision of the justices of that court was to sue out a writ of certiorari to the superior court, and not a bill in equity to restrain an alleged trespass upon his property. Judge McDonald, who delivered the opinion of the court in that case, remarked (page 372): "We cannot sanction the principle that every controversy respecting roads is to be converted into a case for a court of chancery." Since that decision the practice, so far as we are informed by the reported cases, has uniformly been to complain by a petition for certiorari of any error committed by the ordinary or county commissioners in laying out a new road or in altering one already established. Such was the course pursued in Frith v. Justices, 30 Ga. 723.

The plaintiff in error, upon receiving the notice that the reviewers had marked out a road over its right of way, should have appeared before the county commissioners in response to the notice, and urged before them the objections made in its petition for injunction. Had the commissioners differed with the company as to the law respecting their power to lay out a public road longitudinally upon its right of way, the company could avail itself of its remedy by certiorari to review their finding. Its remedy at law being adequate, there was no error in refusing the injunction for which it prayed. The court below, in a written opinion assigning the reason why the injunction was not granted, stated that the merits of the company's complaint were not passed on, and that the relief it prayed was denied upon the ground that it had not pursued the appropriate remedy.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 723)

PITTSBURGH PLATE GLASS CO. v. PETERS LAND CO. et al.

(Supreme Court of Georgia. Aug. 3, 1905.)

MATERIALMAN'S LIEN—CONTRACT WITH LESSEE—LIABILITY OF OWNER.

One who furnishes material for the improvement of real estate, upon the employment of a contractor whose contract for the improvement is with a lessee, and who sustains no contractual relation with the owner of the fee, is not entitled to a lien, as against such owner, under the provisions of Civ. Code 1895, § 2801, par. 2, as amended by the act of 1899 (Acts 1899, p. 33; Van Epps' Code, § 6176).

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 80.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Pittsburgh Plate Glass Company against the Peters Land Company and others. From an order dismissing the petition as to the Peters Land Company, plaintiff brings error. Affirmed.

The Pittsburgh Plate Glass Company, a corporation, brought suit against the Peters Land Company, a corporation, the Gale Manufacturing Company, a partnership, De Saussure, trustee in bankruptcy of the part-

nership, and Daniel Bros., a partnership. The petition alleged that the plaintiff was a materialman, and as such supplied to the Gale Manufacturing Company glass of a stated value, which was used by the company in improving the premises of the Peters Land Company, consisting of a described lot and building in the city of Atlanta. Daniel Bros. were lessees of the Peters Land Company, holding under a three-year lease, and at the time of its execution neither the glass nor window inclosures for which the material was supplied by the manufacturing company were in the rented premises. The lease was for a portion of the building above referred to, and contained a provision that Daniel Bros. should have the privilege, at the expiration of their lease, of removing fixtures and show-window inclosures which they had at their own expense placed in the premises during the term. It was averred that the building was incomplete at the time the glass was furnished, and that the plaintiff was not aware of any agreement that the glass should be considered and treated as personalty, but understood that it was to form a part of the building. The work was done and the glass and window inclosures put in place with the actual knowledge of the Peters Land Company and by its consent, in accordance with and evidenced by the stipulation in the lease above referred to. The Gale Manufacturing Company was adjudged a bankrupt, and De Saussure was appointed trustee. The plaintiff filed a claim of lien against the Peters Land Company, claiming a lien upon the land, and also against Daniel Bros., claiming a lien upon their leasehold interest. The prayer of the petition was for a judgment against the Gale Manufacturing Company, and for a foreclosure of its lien against the Peters Land Company and Daniel Bros. Attached to the petition were copies of the account against the Gale Manufacturing Company and the claims of lien above referred to. To this petition the Peters Land Company and Daniel Bros. filed demurrers, both general and special. The court dismissed the petition as to the Peters Land Company and overruled the demurrer of Daniel Bros. The plaintiff excepted, but Daniel Bros. acquiesced in the ruling against them.

Slaton & Phillips, for plaintiff in error. Jno. L. Hopkins & Sons, C. D. Maddox, W. D. Ellis, Jr., and Walter R. Brown, for defendants in error.

COBB, J. The plaintiff had no contractual relation with the Peters Land Company. Neither had it any contractual relation with Daniel Bros., the tenants of the Peters Land Company. Its contractual relation was solely with the Gale Manufacturing Company, which sustained an independent contractual relation with Daniel Bros. The question, therefore, is whether, under the law of this state, under such a condition of affairs, the plaintiff can assert a lien against the Peters Land Company, an entire stranger to it in every way. The provision of law under which this right to a lien is claimed is found in Civ. Code 1895, § 2801, par. 2, as amended by the act of 1899. As amended that paragraph reads: "When work done or material furnished for the improvement of real estate is done or may be furnished upon the employment of a contractor, or some other person than the owner, and in that case, the lien given by this section shall attach upon the real estate improved, as against such true owner, for the amount of the work done, or material furnished, and unless such true owner shows that such lien has been waived in writing, or produces the sworn statement of the contractor, or other person, at whose instance the work was done or material was furnished, that the agreed price or reasonable value thereof has been paid; provided, that in no event shall the aggregate amount of liens set up hereby exceed the contract price of the improvements made." Acts 1899, p. 33; Van Epps' Code, § 6176.

Under this law a materialman, who furnishes material to one who has a contract for the improvement of real estate with the true owner of the same, unquestionably has a lien; the law declaring that this lien shall arise in favor of such person when the material is furnished upon the employment of a contractor. There is no question that the lien arises when the material is furnished upon the employment of a contractor, and it is also declared that it shall arise when furnished upon the employment of "some other person than the owner." The right of the plaintiff to a lien against the Peters Land Company depends, therefore, upon whether it is embraced within that class which is described by the words just quoted. There was at one time a law in this state that mechanics had a lien upon property improved by them, "without regard to the title." Code 1863, § 1971; Code 1868, § 1959. But this law was repealed by the lien law of 1873. National Bank v. Danforth, 80 Ga. 68, 7 S. E. 546 (5). The words, "some other person than the owner," following the word "contractor," seem to have first made their appearance in the law of this state in the lien act of 1873. Acts 1873, p. 43, § 7. If these words can properly be construed to mean any person furnishing, under any circumstances, material for the improvement of real estate, then the plaintiff might have a lien, provided the material furnished under the circumstances shown in the petition could properly be considered as an improvement of real estate; but, if the plaintiff is entitled to a lien, then any person who should happen to furnish material for the improvement of real estate would be so entitled, without reference to whether he

had any relation, contractual or otherwise, with the true owner, or with any one having any interest in the property. This certainly could not have been intended by the General Assembly; but, of course, the words must be given some meaning, and the question, therefore, is, what do they mean? They follow the word "contractor," being connected with that word by the disjunctive "or," and under the well-settled rule of construction the persons embraced within the meaning of the words will be persons occupying a similar relation to the owner as that of a contractor.

Thus interpreting the statute, it would mean that a materialman who furnished material for the improvement of real estate to one who occupied the legal relation of a contractor, or one who had some contractual relation with the true owner in connection with the improvements to be made, would have a lien, and that no one else would. The word "contractor" is not to be construed in its technical sense, which would embrace any person who had any contract of any character, but is to be given its limited, colloquial sense, meaning a person engaged in the business of making contracts for the improvement of real estate, and the other persons referred to in the statute embrace that class who may furnish material for the improvement of real estate, but may not be engaged in a business commonly known as the business of a contractor. Before a lien can arise against the owner of the property, there must be some link of a contractual nature which will connect the furnisher of the material, directly or indirectly, with the owner, and it could never have been contemplated that an entire stranger to the owner, and an entire stranger to every one with whom the owner had dealt in reference to the property, should, by the mere furnishing of material to be used in improving the owner's property, be entitled to a lien. Giving to the words above quoted the meaning we have given to them will not render them entirely useless and meaningless in the statute, and at the same time such a construction will prevent the statute from operating harshly upon all owners of real estate; the question whether real estate shall be improved being left, under any other construction, to the discretion of entire strangers to the true owner, and not to those with whom the owner has dealt in relation to the matter of the improvement. Whether the glass furnished to the tenants of the store, subject to be removed, and capable of being removed without injury to the freehold, at the expiration of the tenancy, would be under any circumstances an improvement of real estate as against the true owner, we will not now undertake to decide. The plaintiff did not stand in any relation, directly or indirectly, to the owner, which would authorize a claim of lien against it under the existing laws of this state. There was no error in sustaining the general demurrer of the Peters Land Company.

There being no exception by Daniel Bros. to the judgment overruling their demurrer, we are not called upon to determine whether a lessee for a term less than five years is an owner of real estate, within the meaning of the lien laws.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, J., disqualified.

(123 Ga. 882)

BUDDEN v. BROOKS et al.

(Supreme Court of Georgia. Aug. 5, 1905.)

1. WRIT OF ERROR—DISMISSAL—FILING BILL OF EXCEPTIONS.

Whenever it appears that the clerk of a trial court has failed to transmit to the Supreme Court, within the time prescribed by law, a bill of exceptions and transcript, and that an attorney for the plaintiff in error "has been the cause of the delay * * * by consent, direction, or procurement of any kind," the writ of error will be dismissed. Civ. Code 1895, §§ 5571, 5572; Brunswick Book Co. v. Torsch Co., 37 S. E. 737, 112 Ga. 537; Ashley v. Howard, 24 S. E. 875, 99 Ga. 132.

2. SAME—NEGLIGENCE OF ATTORNEY.

The bill of exceptions in this case was filed in the clerk's office of the superior court, January 27, 1905. The transcript of the record was certified by the clerk April 10, 1905, and reached the Supreme Court the next day thereafter. The clerk of the superior court certified that the delay was caused by reason of the following facts: On the day the bill of exceptions was filed, counsel for plaintiff in error offered to copy the record in order to aid the clerk, and took the record from the clerk's office for that purpose; the copy to be returned for verification. At the time of taking the record counsel for plaintiff in error informed the clerk that counsel for defendant in error had a deed which was necessary to complete the record. The next day the deputy clerk asked counsel for defendant in error about this deed, and was informed by him that the deputy could get it whenever it was needed. On March 31, 1905, the deputy clerk obtained the deed from counsel for defendant in error. On April 7, 1905, counsel for plaintiff in error returned to the clerk's office the original record and a copy thereof. The facts certainly place counsel for plaintiff in error in the attitude of consenting to, directing, or procuring the delay of the clerk in making out and certifying the transcript of the record within the time prescribed by the statute.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by Charlotte Budden against Clyde Brooks and others. Judgment for defendants, and plaintiff brings error. Dismissed.

Lavender R. Ray and Jno. C. Reed, for plaintiff in error. Green, Tilson & McKinney, for defendants in error.

FISH, P. J. Writ of error dismissed. All the Justices concurring, except SIMMONS, C. J., absent.

nership, and Daniel Bros., a partnership. The petition alleged that the plaintiff was a materialman, and as such supplied to the Gale Manufacturing Company glass of a stated value, which was used by the company in improving the premises of the Peters Land Company, consisting of a described lot and building in the city of Atlanta. Daniel Bros. were lessees of the Peters Land Company, holding under a three-year lease, and at the time of its execution neither the glass nor window inclosures for which the material was supplied by the manufacturing company were in the rented premises. The lease was for a portion of the building above referred to, and contained a provision that Daniel Bros. should have the privilege, at the expiration of their lease, of removing fixtures and show-window inclosures which they had at their own expense placed in the premises during the term. It was averred that the building was incomplete at the time the glass was furnished, and that the plaintiff was not aware of any agreement that the glass should be considered and treated as personalty, but understood that it was to form a part of the building. The work was done and the glass and window inclosures put in place with the actual knowledge of the Peters Land Company and by its consent, in accordance with and evidenced by the stipulation in the lease above referred to. The Gale Manufacturing Company was adjudged a bankrupt, and De Saussure was appointed trustee. The plaintiff filed a claim of lien against the Peters Land Company, claiming a lien upon the land, and also against Daniel Bros., claiming a lien upon their leasehold interest. The prayer of the petition was for a judgment against the Gale Manufacturing Company, and for a foreclosure of its lien against the Peters Land Company and Daniel Bros. Attached to the petition were copies of the account against the Gale Manufacturing Company and the claims of lien above referred to. To this petition the Peters Land Company and Daniel Bros. filed demurrers, both general and special. The court dismissed the petition as to the Peters Land Company and overruled the demurrer of Daniel Bros. The plaintiff excepted, but Daniel Bros. acquiesced in the ruling against them.

Slaton & Phillips, for plaintiff in error. Jno. L. Hopkins & Sons, C. D. Maddox, W. D. Ellis, Jr., and Walter R. Brown, for defendants in error.

COBB, J. The plaintiff had no contractual relation with the Peters Land Company. Neither had it any contractual relation with Daniel Bros., the tenants of the Peters Land Company. Its contractual relation was solely with the Gale Manufacturing Company, which sustained an independent contractual relation with Daniel Bros. The question, therefore, is whether, under the law of this state, under such a condition of affairs, the plaintiff can assert a lien against the Peters Land Company, an entire stranger to it in every way. The provision of law under which this right to a lien is claimed is found in Civ. Code 1895, § 2801, par. 2, as amended by the act of 1899. As amended that paragraph reads: "When work done or material furnished for the improvement of real estate is done or may be furnished upon the employment of a contractor, or some other person than the owner, and in that case, the lien given by this section shall attach upon the real estate improved, as against such true owner, for the amount of the work done, or material furnished, and unless such true owner shows that such lien has been waived in writing, or produces the sworn statement of the contractor, or other person, at whose instance the work was done or material was furnished, that the agreed price or reasonable value thereof has been paid; provided, that in no event shall the aggregate amount of liens set up hereby exceed the contract price of the improvements made." Acts 1899, p. 33; Van Epps' Code, § 6176.

Under this law a materialman, who furnishes material to one who has a contract for the improvement of real estate with the true owner of the same, unquestionably has a lien; the law declaring that this lien shall arise in favor of such person when the material is furnished upon the employment of a contractor. There is no question that the lien arises when the material is furnished upon the employment of a contractor, and it is also declared that it shall arise when furnished upon the employment of "some other person than the owner." The right of the plaintiff to a lien against the Peters Land Company depends, therefore, upon whether it is embraced within that class which is described by the words just quoted. There was at one time a law in this state that mechanics had a lien upon property improved by them, "without regard to the title." Code 1863, § 1971; Code 1868, § 1959. But this law was repealed by the lien law of 1873. National Bank v. Danforth, 80 Ga. 68, 7 S. E. 546 (5). The words, "some other person than the owner," following the word "contractor," seem to have first made their appearance in the law of this state in the lien act of 1873. Acts 1873, p. 43, § 7. If these words can properly be construed to mean any person furnishing, under any circumstances, material for the improvement of real estate, then the plaintiff might have a lien, provided the material furnished under the circumstances shown in the petition could properly be considered as an improvement of real estate; but, if the plaintiff is entitled to a lien, then any person who should happen to furnish material for the improvement of real estate would be so entitled, without reference to whether he

had any relation, contractual or otherwise, with the true owner, or with any one having any interest in the property. This certainly could not have been intended by the General Assembly; but, of course, the words must be given some meaning, and the question, therefore, is, what do they mean? They follow the word "contractor," being connected with that word by the disjunctive "or," and under the well-settled rule of construction the persons embraced within the meaning of the words will be persons occupying a similar relation to the owner as that of a contractor.

Thus interpreting the statute, it would mean that a materialman who furnished material for the improvement of real estate to one who occupied the legal relation of a contractor, or one who had some contractual relation with the true owner in connection with the improvements to be made, would have a lien, and that no one else would. The word "contractor" is not to be construed in its technical sense, which would embrace any person who had any contract of any character, but is to be given its limited, colloquial sense, meaning a person engaged in the business of making contracts for the improvement of real estate, and the other persons referred to in the statute embrace that class who may furnish material for the improvement of real estate, but may not be engaged in a business commonly known as the business of a contractor. Before a lien can arise against the owner of the property, there must be some link of a contractual nature which will connect the furnisher of the material, directly or indirectly, with the owner, and it could never have been contemplated that an entire stranger to the owner, and an entire stranger to every one with whom the owner had dealt in reference to the property, should, by the mere furnishing of material to be used in improving the owner's property, be entitled to a lien. Giving to the words above quoted the meaning we have given to them will not render them entirely useless and meaningless in the statute, and at the same time such a construction will prevent the statute from operating harshly upon all owners of real estate; the question whether real estate shall be improved being left, under any other construction, to the discretion of entire strangers to the true owner, and not to those with whom the owner has dealt in relation to the matter of the improvement. Whether the glass furnished to the tenants of the store, subject to be removed, and capable of being removed without injury to the freehold, at the expiration of the tenancy, would be under any circumstances an improvement of real estate as against the true owner, we will not now undertake to decide. The plaintiff did not stand in any relation, directly or indirectly, to the owner, which would authorize a claim of lien against it under the existing laws of this state. There was no error in sustaining the general demurrer of the Peters Land Company.

There being no exception by Daniel Bros. to the judgment overruling their demurrer, we are not called upon to determine whether a lessee for a term less than five years is an owner of real estate, within the meaning of the lien laws.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, J., disqualified.

(123 Ga. 382)

BUDDEN v. BROOKS et al.

(Supreme Court of Georgia. Aug. 5, 1905.)

1. WRIT OF ERROR—DISMISSAL—FILING BILL OF EXCEPTIONS.

Whenever it appears that the clerk of a trial court has failed to transmit to the Supreme Court, within the time prescribed by law, a bill of exceptions and transcript, and that an attorney for the plaintiff in error "has been the cause of the delay * * * by consent, direction, or procurement of any kind," the writ of error will be dismissed. Civ. Code 1895, §§ 5571, 5572; Brunswick Book Co. v. Torsch Co., 37 S. E. 737, 112 Ga. 537; Ashley v. Howard, 24 S. E. 875, 99 Ga. 132.

2. SAME—NEGLIGENCE OF ATTORNEY.

The bill of exceptions in this case was filed in the clerk's office of the superior court, January 27, 1905. The transcript of the record was certified by the clerk April 10, 1905, and reached the Supreme Court the next day thereafter. The clerk of the superior court certified that the delay was caused by reason of the following facts: On the day the bill of exceptions was filed, counsel for plaintiff in error offered to copy the record in order to aid the clerk, and took the record from the clerk's office for that purpose; the copy to be returned for verification. At the time of taking the record counsel for plaintiff in error informed the clerk that counsel for defendant in error had a deed which was necessary to complete the record. The next day the deputy clerk asked counsel for defendant in error about this deed, and was informed by him that the deputy could get it whenever it was needed. On March 31, 1905, the deputy clerk obtained the deed from counsel for defendant in error. On April 7, 1905, counsel for plaintiff in error returned to the clerk's office the original record and a copy thereof. The facts certainly place counsel for plaintiff in error in the attitude of consenting to, directing, or procuring the delay of the clerk in making out and certifying the transcript of the record within the time prescribed by the statute.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by Charlotte Budden against Clyde Brooks and others. Judgment for defendants, and plaintiff brings error. Dismissed.

Lavender R. Ray and Jno. C. Reed, for plaintiff in error. Green, Tilson & McKinney, for defendants in error.

FISH, P. J. Writ of error dismissed. All the Justices concurring, except SIMMONS, C. J., absent.

(128 Ga. 763)

SANDERS v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Aug. 4, 1906.)

1. EVIDENCE—HEARSAY.

The evidence which the court refused to admit, being hearsay, was properly excluded.

2. NEW TRIAL—GROUNDS OF MOTION.

A ground of motion for new trial, assigning error upon the refusal of the court to permit a witness of the complaining party to answer a designated question, should show, not only what answer was expected, but that the judge was informed as to it. Leverett v. Bullard, 49 S. E. 591, 121 Ga. 536.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 256–258.]

3. APPEAL—ASSIGNMENT OF ERROR.

An assignment of error upon the admission of testimony should show, not only that it was admitted over objection of the complaining party, but what grounds of objection he urged at the time the evidence was offered. Powell v. Georgia, Fla. & Ala. Ry. Co., 49 S. E. 759, 121 Ga. 803.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3010–3012.]

4. NEGLIGENCE—ORDINARY DILIGENCE.

On the trial of an action brought by an employé against a railway company for personal injuries alleged to have been caused by the negligence of the company, the court charged the jury as follows: "Ordinary care and diligence is that care and diligence which every prudent man takes under the same or similar circumstances. You are to judge of the conduct, the diligence, the negligence, and the acts of the plaintiff and the defendant in this case by that rule." *Held*, that the definition of ordinary diligence was correct (Richmond R. Co. v. Mitchell, 18 S. E. 290, 92 Ga. 77 [2]), and that the court did not express an opinion to the effect that the plaintiff was negligent any more than that he was diligent. The instruction meant that the jury should judge of (i. e., concerning) the conduct, the diligence, the negligence, and acts of both parties by the application of the rule given.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 5–7, 872.]

5. INJURY TO EMPLOYÉ—INSTRUCTIONS.

In such a case it was not error to charge that, in order for the plaintiff to recover, it should appear from the evidence that at the time he was injured he "was in the exercise of ordinary care and diligence and was free from fault." If he was free from fault, as he had to be in order to recover, he was necessarily in the exercise of ordinary care. Moreover, the petition alleged that at the time of the injury the plaintiff "was in the exercise of all ordinary care and diligence, and was free from any fault whatsoever."

6. SAME—NEGLIGENCE OF MASTER.

Nor was it error for the court in its charge to assume "that negligence of the company and its failure to exercise ordinary care and diligence were synonymous terms."

7. SAME—EVIDENCE.

In order for an employé to recover in an action of the nature above referred to, it must appear from the evidence that he was free from fault contributing to his injuries, and that they were caused by the negligence of the company. If the plaintiff and the defendant were both negligent, or if they were both free from fault, in neither instance can the plaintiff recover. The instructions of the court on this subject, to which exceptions were taken, were in substantial accord with the rules above announced, and were not erroneous, at least for any reason assigned.

8. SAME—INSTRUCTIONS.

The court charged the jury: "Now, you look to the evidence, and see whether or not it is shown that the bell was not rung. See what the truth of that is. If you find that the bell was rung, you need give no consideration to that allegation contained in the declaration. If you find * * * that the bell was not rung, as contended for by plaintiff, * * * then you look to the * * * evidence, and see whether or not the railway company * * * [was] in the exercise of ordinary care and diligence." This charge did not ignore the issue as to whether or not the bell was rung; nor "was it error, as not fully submitting the issue to the jury, in that the court did not tell the jury how and in what manner the bell should be rung in order to comply with the demand of diligence." Had the court so told the jury, it would have been an expression of opinion that the acts specified would constitute diligence.

9. SAME—OPINION ON FACTS.

The court properly instructed the jury not to consider the Carlisle mortality table, which was in evidence, if they should believe from the evidence that the plaintiff was not entitled to recover, or that his injuries were not permanent. There was no expression of "opinion on the facts" in such charge.

10. SAME—INSTRUCTIONS.

After the court had in its charge twice stated fairly and explicitly all the specifications of negligence alleged against the defendant in the petition, it was not cause for a new trial that, in the same connection and while instructing the jury to look to the evidence in order to ascertain the truth as to each allegation and contention, the court omitted from its enumeration of such allegations one charge of negligence; it appearing that this portion of the charge closed with the statement that "all these matters and all these contentions, wherein it is charged that the defendant company was negligent, * * * are matters entirely for you to pass upon," under the evidence submitted and the law given in charge.

11. SAME—EVIDENCE.

The verdict was amply supported by evidence, and the court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by J. C. Sanders against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

M. W. Harris and Jno. R. Cooper, for plaintiff in error. Hall & Wimberly, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(104 Va. 665)

NORFOLK & W. RY. CO. v. COFFEY.

(Supreme Court of Appeals of Virginia. Sept. 26, 1905.)

1. PLEADING—ADDITIONAL PLEADINGS—FILING IN VACATION—NOTICE TO ADVERSE PARTY.

Though there is no statutory provision authorizing it, the court may permit additional pleadings to be filed in vacation; but, when an additional pleading is so filed, the counsel of the adverse party ought to be given notice of the application therefor and an opportunity to resist it, or to procure leave to file other pleadings and make up the issue.

2. SAME—FAILURE OF PLAINTIFF TO REPLY TO PLEA—APPLICATION BY DEFENDANT FOR JUDGMENT.

Where a plaintiff fails to reply to a plea within the time prescribed by law or the order of the court, defendant should apply for a rule to compel him to do so, or, in default, to suffer judgment of non prosequitur.

3. TRIAL—DEMURRER TO EVIDENCE.

After issue was joined on the plea of not guilty in an action for negligence, defendant obtained leave to file a plea of limitations, and liberty was granted plaintiff to reply. Defendant during vacation filed the plea, but no issue was taken by plaintiff. Plaintiff's counsel obtained for the first time on the argument of the demurrer to the evidence knowledge of the existence of the plea, and he was taken by surprise. *Held*, that the court of its own motion should have set aside the demurrer to the evidence and the award of damages thereon, and caused issues to be made up on the plea, and ordered a new trial.

4. PLEADING—DEFECTS—STATUTE OF JEOFAILS.

The statute of jeofails does not, in an action at law, cure the nonjoinder or want of issue, and no verdict or judgment can properly be rendered therein.

Error to Circuit Court, Rockbridge County.

Action by one Coffey against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. M. Pendleton, M. McCormick, and Jos. I. Doran, for plaintiff in error. G. D. Letcher, for defendant in error.

WHITTLE, J. The object of this action is to recover damages for personal injuries sustained by the defendant in error while at work as a laborer in the quarry of the plaintiff in error. A brief outline of the proceedings in the case is essential to an intelligent apprehension of the questions presented for decision.

After issue joined upon the plea of not guilty, the defendant obtained leave of the court to file pleas of the statute of limitations within 15 days from the date of the order; and liberty was also granted the plaintiff to reply generally or specially to said pleas. Accordingly the defendant, within the time prescribed by the order and during the vacation of the court, filed with the clerk two pleas of the statute of limitations; but no issue was taken upon them by the plaintiff. At a subsequent term, a jury was impaneled to try the issue joined; and at the conclusion of the testimony the defendant demurred to the evidence, in which demurrer the plaintiff joined. Whereupon the jury assessed the plaintiff's damages at $2,000, subject to the opinion of the court on the demurrer to the evidence. During the progress of the trial, the defendant introduced evidence tending to prove that more than 12 months had elapsed between the date at which the plaintiff attained his majority and the institution of the action, and upon the argument of the demurrer to the evidence it was insisted that the right of action was therefore barred by the statute of limitations. To repel that contention counsel for the plaintiff presented an affidavit to the effect that he was ill at the time the defendant obtained permission to file the pleas in question, and knew nothing of the entry of the order or the filing of the pleas; that no record was made of the fact of such filing, either in the clerk's office or at the succeeding term of the court; that no rule was asked or awarded against the plaintiff, requiring him to reply to the pleas; that no issue was ever joined upon them; that the existence of the pleas and the fact that the statute of limitations was relied on by the defendant were for the first time made known to counsel on the argument of the demurrer to the evidence, and operated a complete surprise; and that the plaintiff was full-handed with proof to meet that defense, but had adduced no evidence on the subject, not conceiving the matter to be in issue upon the pleadings. Counsel also tendered replications to the pleas, and furthermore agreed that, if the defendant would consent to file rejoinders to said replications, the verdict of the jury might be set aside, and the issue thus made submitted either to the court or jury for trial. But the defendant declined to accede to said proposal, and thereupon the court, disregarding the pleas, proceeded to overrule the demurrer to the evidence, and rendered judgment for the plaintiff.

It is alleged, in support of that ruling, that the court was without authority to permit the pleas to be filed in the first instance, and in order to validate the proceeding it was essential that the vacation filing should have been ratified, or at least recognized, by an order at the succeeding term.

It is true that after a case has been matured for trial at rules and docketed, while the court has ample power to allow additional pleadings to be filed during the term, there is no statutory sanction for permitting such pleadings to be filed in vacation. Nevertheless, in conformity with a rule of practice which obtains throughout the state, such power is freely exercised by the trial courts in the practical administration of justice. Subject to proper limitation, the practice is not only unobjectionable, but tends to prevent surprise and facilitates the preparation of cases for trial. Opposing counsel, however, ought always to be given notice of such

application, and opportunity to resist it, or else, if desired, to procure supplemental leave to file other pleadings and make up the issue. The court, at the next term, by analogy to the statutory control which it may exercise over all proceedings in the clerk's office during the preceding vacation (Va. Code 1904, p. 1785, § 3293), exerts similar supervisory control over vacation proceedings done by leave of court to correct irregularities and prevent abuses. Thus guarded, the practice is salutary and ought not to be disturbed.

Where a plaintiff fails to reply to a plea within the time prescribed by law or the order of the court, the correct practice is for the defendant to apply for a rule to compel him to do so, or,in default thereof, to suffer a judgment of non prosequitur. 18 Ency. of Pl. & Pr. 650.

That judgment is appropriate where the plaintiff, after appearance and before final judgment, fails to prosecute his action by neglecting to file his pleadings in due course. 4 Min. Inst. (3d Ed.) pt. 1, p. 957; St. Pl. 136.

If that practice had been pursued by the defendant in the present instance, no doubt issue would have been joined on the pleas of the statute of limitations, and the dilemma which subsequently confronted the court would have been avoided.

It is, however, apparent that both court and counsel were taken by surprise at the reliance of the defendant on the statute of limitations, and it would have been manifestly improper, under the circumstances, to have sustained that defense. When attention was called to the matter, the whole proceeding upon the demurrer to the evidence was in fieri and under the control of the court; and, it appearing that by mistake the pleadings were in such condition that the merits of the case upon a material ground of defense could not be decided, the court ought, of its own motion, to have set aside the demurrer to the evidence and the award of damages thereon, and, having caused the issues to be made upon the pleas of the statute of limitations, ordered a new trial of the case. Tallaferro v. Gatewood, 6 Munf. 320; Fairfax v. Lewis, 11 Leigh, 233; Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888.

In an action at law the statute of jeofails does not cure the nonjoinder or want of issue altogether, and no verdict or judgment can properly be rendered therein. The authorities on the subject will be found in a note to Rowans v. Givens, 10 Grat. 250.

Other grounds of error have been pressed, but inasmuch as, for the reasons assigned, the judgment must be reversed and a new trial had, upon which the evidence may not be the same, it would not be proper to express any opinion in regard to them.

The judgment is reversed, and the case remanded for further proceedings to be had therein, not in conflict with this opinion.

(104 Va. 476)

RISQUE'S ADM'R v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of Virginia. Sept. 26, 1905.)

1. RAILROADS—INJURY TO LICENSEE—NEGLIGENCE.

Where a railroad company furnished defective cars to the employer of plaintiff's intestate for use upon the employer's side track, to be loaded and unloaded upon such side track, it was the employer's duty to inspect the cars for defects, and the railroad company was not liable for the death of plaintiff's intestate caused by such defective cars.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where plaintiff's intestate, who was operating a switch engine upon private tracks, backed his engine upon the track of defendant railroad company at a time when he knew a passenger train was due, he was guilty of contributory negligence, precluding a recovery for his death caused by collision with the passenger train in question.

Appeal from Circuit Court, Rockbridge County.

Action by Risque's administrator against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hugh A. White, for appellant. Robert L. Parrish, for appellee.

HARRISON, J. This action was brought to recover damages for the alleged negligent killing of the plaintiff's intestate in a collision between an engine of the Alleghany Ore & Iron Company, which owns and operates the Buena Vista Iron Furnace, and a passenger train of the Chespeake & Ohio Railway Company, at a crossing near Buena Vista.

There was a demurrer to the evidence, and a judgment thereon in favor of the defendant, and thereupon the case was brought to this court.

We are of opinion that the demurrer to the eighth and ninth counts of the declaration was properly sustained. These counts aver that the defendant railway company was guilty of negligence in furnishing the ore and iron company cars without brakes, or with unsound brakes, to be handled upon its yards, and assume that this alleged negligence rendered the defendant liable to the plaintiff's intestate for any injury he may have sustained in the use of such cars.

The plaintiff's intestate was an employé of the Alleghany Ore & Iron Company. The declaration shows that the cars were delivered by the railway company to the ore and iron company on a side track, to be moved, and either unloaded of freight belonging to the ore and iron company or loaded with the product of that company. If these cars were without brakes, or equipped with unsound brakes, it was the duty of the ore and iron company to ascertain the fact by proper inspection, and either remedy the defect or decline to use the cars. No relation of em-

ployer and employé existed between the defendant company and plaintiff's intestate, and, if he suffered any injury by reason of the cars in question being without brakes or equipped with unsound brakes, the liability, if any, would rest upon his master, the Alleghany Ore & Iron Company, for failing to make proper inspection, and not upon the defendant railway company. Baltimore & Potomac R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624; Texas Pac. R. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. See 20 Am. & Eng. Enc. Law, pp. 80, 81, and 23 Am. & Eng. Enc. Law, p. 731.

We are futher of opinion that the demurrer to the evidence was properly sustained. The Chesapeake & Ohio Railway Company's passenger train No. 83 was approaching its Buena Vista station on schedule time. Five hundred and forty feet south of the station its main line is crossed by a track of the Alleghany Ore & Iron Company, said crossing being used by the latter company for delivering freight to and receiving it from the Chesapeake & Ohio and Norfolk & Western Railways. As the engine attached to the passenger train of the defendant company was passing over the crossing mentioned, the engine of the ore and iron company backed upon it, striking the tender attached thereto, and causing a wreck, which resulted in the death of plaintiff's intestate. The ore and iron company's yard, on which its engine was run before it reached the crossing, was obstructed by box cars on the side track near the crossing and by fog.

The defendant in error relies on several defenses; but as one is, in our opinion, conclusive of the case, it is unnecessary to advert to others.

The plaintiff's intestate was the engineer in charge of the engine of the ore and iron company, and at the time of the accident was engaged in shifting cars on the yard of his employer. While attempting to make what is called a flying switch, he backed his engine upon the defendant company's main line with his back to the railroad track, so that he could not see, and this at a time when he knew the defendant's passenger train was due at its Buena Vista station, and could not reach it except by passing over the crossing upon which he was backing his engine. Such negligence can only be characterized as reckless, if not wanton. If it were conceded that the defendant railway company was guilty of the negligence it is charged with in approaching its Buena Vista station, the contributory negligence of the intestate disclosed by the record would preclude a recovery. Pittsburg R. Co. v. Browning (Ind. App.) 71 N. E. 227; Kelly v. Duluth R. Co. (Mich.) 52 N. W. 81.

The case last cited is very similar in its facts to that at bar, except that the case in judgment is much stronger for the defendant. After stating the facts in that case, the court says: "Both of these engineers were reckless. Both knew that there were no semaphores, flagmen, or gates at this crossing. The view of each was obstructed. It was the duty of each, in the performance of his obligations to his employers, to see that the way was clear before attempting to make the crossing. A compliance with the statutory duty of stopping and giving the crossing signals did not relieve either from the duty of keeping his train under control, so that it could have been stopped in time to avoid the collision. The only difference in conduct was possibly in the rate of speed of the trains; but this does not excuse plaintiff in the neglect of a plain duty in the line of his employment. The trial judge was right in directing a verdict for the defendant, and the judgment is affirmed."

For these reasons the judgment complained of must be affirmed.

(104 Va. 400)

WISE TERMINAL CO. v. McCORMICK.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—NEGLIGENCE.
Where plaintiff, a brakeman in defendant's employ, was injured while attempting to board defendant's sole locomotive at a time when plaintiff was off duty, and when there was no reason to suppose that any one was in the vicinity or would attempt to get upon the engine, defendant was not negligent in leaving an oil can used by the engine hostler on the footboard of the engine, or in not having a rule forbidding such obstruction.

2. SAME—ABSENCE OF LIGHTS—PROXIMATE CAUSE.
Where, in an action for injuries to a servant while attempting to board an engine, plaintiff testified that he both saw and heard the engine coming toward him prior to the accident, defendant was not negligent in failing to have marking lights on the rear of the tender.

3. EVIDENCE—SPEED—EXPERT TESTIMONY.
The speed of a train and within what distance it could be stopped are questions on which expert testimony cannot be introduced, unless based on the operation of cars or engines of similar construction and equipment under like circumstances.

4. MASTER AND SERVANT—INJURIES TO SERVANT — RAILROADS — CONTRIBUTORY NEGLIGENCE.
Where plaintiff, without necessity, after the termination of his service for the day, went to defendant's railroad yard to give the watchman a coach key, and for that purpose stood in the middle of the track when he knew the engine was approaching him backwards, and attempted to get on the footboard in the rear, when he slipped and was injured, he was guilty of contributory negligence, precluding a recovery.

5. SAME—DISCOVERED PERIL.
In an action for injuries to a brakeman while attempting to board the tender of an engine approaching him at night, evidence *held* insufficient to entitle plaintiff to recover on the theory that the man in charge of the engine was negligent in failing to stop the same after he discovered plaintiff's danger.

Error to Circuit Court, Wise County.

Action by W. B. McCormick against the Wise Terminal Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Ayers & Fulton and Bullitt & Kelly, for plaintiff in error. William H. Werth, for defendant in error.

CARDWELL, J. The defendant in error, W. B. McCormick, brought this action and recovered in the circuit court of Wise county a verdict and judgment against the plaintiff in error, Wise Terminal Company, which was the defendant in the court below, for $5,000 as damages for personal injuries alleged to have been inflicted upon him by the negligence of the defendant company.

In the view taken by this court, there was a total failure on the part of the plaintiff to trace actionable negligence to the defendant company, and in no aspect of the case was he entitled to a verdict. Therefore it is unnecessary to notice in detail the numerous assignments of error, other than the refusal of the trial court to set aside the verdict on the ground that it was contrary to the law and the evidence.

The Wise Terminal Company operates a line of railroad about six miles in length, extending from the town of Glamorgan, in Wise county, to the town of Norton, in the same county. The business conducted by the company, at the time of the injuries received by the plaintiff, consisted of two passenger trains between the two points named, one in the morning, and the other in the evening, and the carrying of freight between the same points.

In carrying on this business, the defendant company found it necessary to purchase and use only one engine and one passenger car; the freight cars being furnished by connecting roads. The engine used, though secondhand, was duly inspected before it was purchased by the defendant company by competent inspectors, and pronounced reasonably safe and suitable for the work required of it—in fact, according to the undisputed evidence in the case, was more desirable and much safer on the new roadbed which the defendant company was operating than a new engine would have been. The defendant company employed competent men to manage and conduct its business, and among others of its employés was the plaintiff, McCormick, who was a brakeman, well versed in railroad rules, who usually performed his duties reasonably well, but had fallen into the habit of drinking ardent spirits to excess at times. His duties were those of an ordinary brakeman, and to keep one of the two keys to the passenger coach from the time he went on duty at 7 o'clock a. m. till about 7:30 p. m., when he was to lock the passenger coach and deliver the key to another employé, Taylor, and thereupon his (McCormick's) duties and employment ceased for the day, and it became the duty of Taylor, as the night watchman (or "hostler"), to take charge of the engine and passenger coach and keep them in charge during the night. He (Taylor) was also to clean, oil, sand, water, and coal the engine, clean up the passenger coach, and have them ready for the first passenger run from Glamorgan to Norton the next morning. No one besides Taylor had anything to do with the engine or passenger coach after the last or night passenger run from Norton to Glamorgan was completed; the engine and passenger coach remaining at Glamorgan for the night in the exclusive custody and control of Taylor, with no reason whatever for him to expect any one to come about them. There was no regular roundhouse for the protection and care of this one engine, and in the performance of his duties in cleaning said engine and getting the same ready for duty on the road early next morning it became necessary to use kerosene oil, and for this purpose there was kept in the passenger coach a five-gallon can of such oil, which Taylor, the night watchman, would use and then return to its place in the passenger coach. The road being new and the grounds muddy, it frequently became necessary for the night watchman in the performance of his duties to detach the engine and take it to a certain switch in the yard, where, on account of the increased width of the level space at the switch, he could stand the engine and more easily and with less contact with the mud get around it and do the necessary cleaning and other work upon it. After the necessary cleaning and oiling was done the night watchman would take the engine back down the main track, respectively, to the places where he could sand, coal, and oil it and then attach it to the passenger coach, to be followed by sweeping out the passenger coach and otherwise putting it in proper condition for the first passenger run, leaving Glamorgan about 7 o'clock the next morning; the night watchman remaining in charge until the next morning, when he delivered the engine and coach to the crew which made the runs between Glamorgan and Norton, said crew including the plaintiff, McCormick, who had no duties or business on the engine or coach from about 7:30 o'clock p.m. the previous evening until 7 o'clock the next morning. When the night watchman would get his engine clean and start it back for sand, water, and coal, and to be attached to the passenger coach, he would of necessity place the oil can on a certain step affixed to the rear end of the tender of the engine and extending entirely across the tender, which was, according to the evidence, the only place where the oil can could be safely placed while carrying it back to its final destination in the passenger coach, and it was the custom to so carry it from the passenger coach to the point where the engine was cleaned and

oiled, and back to the passenger coach when the work of cleaning and oiling the engine had been done. Of the two keys to the passenger coach mentioned, the watchman had one, and it was therefore no impediment to him in the discharge of his duties, if McCormick, the plaintiff, did not deliver the other key to him when he went off duty until the next morning; hence there was no actual necessity for McCormick, when he went off duty, to give the key he held to the night watchman, and the only reasons for his doing so were (1) that he would be observing the rules, and (2) that there would be less risk of some outsider getting hold of the key, if given to the night watchman, who remained on duty and awake all night. There were no lights on the rear or tender of the engine, and none were necessary, as no one was expected or allowed to attempt to get on the engine while it was off duty and in the charge of the night watchman. As there was but one engine to move in the yard, there was no danger of a collision by reason of the absence of lights or "markers" on it, and therefore the reason why standard roads with a number of engines and trains constantly moving have these lights or "markers" did not apply. The step that ran across the rear end of the tender, and on which the oil can was usually placed, as stated, was a board about 9 inches wide, and about 1½ inches thick, and about 17 or 18 inches high from the track, and some 8 or 9 inches higher than the usual height of such steps. Just why this was so the evidence does not disclose, but it does appear that the danger in attempting to board the engine by getting on said step would be far greater than if it had been of the ordinary height, 8 or 9 inches, a fact which, by reason of his experience, was well known to McCormick. The engine while in use on the road was not fully equipped with an air brake, though the tender was so equipped, and from this the air could be made to operate and control the other parts of the train, and, as no great speed was required or attained in the handling of the defendant company's trains, this equipment was all that was necessary, but after the day's work was over even the air brake on the tender was not required nor used, and the air valve was cut off and the engine controlled in the few movements it made on the yard during the night by the steam brake and reverse lever. This was customary with all roads, and was uniformly followed in the handling of the engine in question on the yard of the defendant company, and that there was no real necessity to use air brakes when being so handled is apparent.

On July 6, 1903, the last passenger run from Norton to Glamorgan was made, and the engine, as usual, turned over to the night watchman, Taylor, in its usual condition; i. e., with the air valve closed. McCormick, however, for some reason forgot to turn over to Taylor the key to the passenger coach that was in his possession, and which it was his duty to have delivered to Taylor on the completion of the run, about 8 o'clock p. m., and which duty McCormick generally performed and had been remiss in doing but a few times before. In his examination in chief in this case he started out to excuse his omission on this occasion by the statement that on arriving at Glamorgan and going off duty for the night he did not see Taylor, but on cross-examination he frankly admits that he simply "forgot" it. He claims that he occupied the time between 8 o'clock p. m. and midnight in writing two letters and in reading a newspaper, when he discovered that he had failed to deliver the key to Taylor, as he should have done on arrival of the train, and that he then had it in his pocket, and, although there was no necessity for his doing so, so far as enabling Taylor to get into the coach was concerned, he started out in quest of Taylor to deliver to him the key.

Taylor, as usual, had taken the engine up to the switch above referred to for the purpose of cleaning and oiling it, and McCormick claims that, when he came down looking for Taylor to give him the key, he went up to the engine and could not discover him there. He does not claim to have called for Taylor, but only that he glanced around to see if he was at the engine. After failing to see Taylor on the engine, McCormick went down the track to a point under or near what is known in the record as the "Larry Trestle," and there, observing that the engine was rolling towards him, he stopped in the middle of the track for the purpose of boarding the tender (which was in front, as the engine was moving backward) by getting on the step across the same, and when the tender rolled on down he made the attempt to so board the tender, but in doing so, as he claims, his foot struck the oil can which Taylor had placed on the step, and it caused him to fall under the tender, and the tender and engine ran over him inflicting such injuries that his right arm and right leg had to be amputated. He claims that, when he saw he was falling, he commenced hallooing, that he caught with his hands on the end of the tender and was dragged a few feet, when his hold broke and the tender and the engine passed over him, the latter passing him a few feet before it stopped; but he does not undertake to state definitely the distance the engine ran after he fell or after the accident, which was quite natural under the circumstances.

The theories upon which the plaintiff grounds his claim to damages were (1) that Taylor, the night watchman, was incompetent to perform the duties intrusted to him; (2) that Taylor was negligent in placing the oil can on the step across the front of the tender; (3) that the engine was not suitably equipped with air brakes and was not

properly lighted; and (4) that Taylor did not stop the engine as soon as he ought to have done after plaintiff fell under it.

There was practically no effort made in the introduction of the evidence to sustain the allegation of the declaration that the defendant company was negligent in using a secondhand engine, nor as to the incompetency of Taylor, the night watchman. With reference to the placing of the oil can on the step, or the lack of lights or air brakes on the engine, there is absolutely no evidence in the record from which to impute to the defendant company any negligence whatever. Therefore the instructions to the jury, from 1 to 9, inclusive, given for the plaintiff, all of which were in one form or another predicated upon the supposed negligence of the defendant company in the respect mentioned upon familiar principles, ought not to have been given.

It is a fundamental principle of negligence that one charged therewith must have done something which he knew or had reason to believe might cause an injury to some one else, and unless this is proven negligence cannot be imputed.

In addition to plaintiff's own evidence, showing conclusively that no one had any business on the step or footboard across the rear end of the tender after the train came in and the engine was turned over to Taylor, the uncontradicted statement of Taylor is that no one had any business there, so far as he knew, and therefore he was not looking for anybody about the engine or on the track.

At one point it is alleged and argued that the negligence of the defendant company with respect to the oil can consisted in a violation of a rule against putting such an obstruction on the step of the engine, and at another that the negligence consisted in not having such a rule. Either contention might have been plausibly made, if the accident out of which this suit arises had occurred at a time and place when and where there was any reason whatever to expect that any one would attempt to get upon the step or footboard of the engine in question; but that is not the case here. Moreover, the plaintiff himself testifies that he had with him a regular railroad lantern, which he admits afforded him sufficient light to see the small iron handhold on the end of the tender, which he got hold of or attempted to get hold of; yet he tries, as it would seem, to leave the impression that the lantern did not afford him sufficient light to see the five-gallon oil can on the step, and, accepting this as true, it but adds to the strength of the proof his evidence affords of his own gross negligence, proximately causing the injuries for which he sues, or at least contributing thereto.

It is also shown in the evidence that, while the engine is moving to and fro at work on the yard at night, colored lights are set back on the tender, so that the edge of the tender throws a shadow down immediately around the tender and no light is thrown on the step or footboard. These lights are only put on the engine as "markers"; i. e., for the purpose of indicating to people and trainmen the location of the engine, and not for the purpose of enabling them to get upon the engine. Their absence from the engine on the night of this accident, even if under the circumstances they should have been there, could not by any possibility have contributed to the accident, since the plaintiff himself testifies that he both heard and saw the engine coming towards him. It also clearly appears, there being really no evidence to the contrary, that with the air valve shut off, which was the case, the engine could have been stopped without the air brakes as quickly and within the same distance by reversing and giving the engine steam.

A number of witnesses were permitted to give opinions in answer to hypothetical questions which assumed facts concerning the speed of the engine at the time the plaintiff was injured, and within what distance it could have been stopped after Taylor had notice of the plaintiff's peril, when these facts had not been and never were proved in the case; but we deem it unnecessary to comment on this evidence further than to say that it was, under the circumstances, irrelevant and incompetent. The speed at which a train was moving or within what distance it could be stopped are questions of actual facts, and expert testimony thereon can under no circumstances be introduced, unless based upon the operation of cars or engines of similar construction and equipment and under like conditions. Richmond Pass., etc., Co. v. Rack's Adm'r, 101 Va. 487, 44 S. E. 709.

The remaining question in the case is whether or not Taylor, after he knew or had notice of plaintiff's peril, exercised ordinary care to prevent the injuries to him?

We do not attach any importance to the question whether the plaintiff was upon the track of the defendant company on the night of his accident as an employé, or a stranger, or a trespasser. Conceding that it was his duty, as is so earnestly contended, to deliver the key to Taylor when he found it in his pocket several hours after he should have so delivered it, and that he was properly in the yard of the defendant company for that purpose as an employé, the question remains whether there was reasonable and proper cause for him to step in the middle of the track to await the approach of the engine to him and then attempt to mount the step across the front of the tender from the middle of the track, without sufficient light to enable him safely to do so, as he insists.

It was neither reasonably necessary nor

proper for him to take this risk in the performance of the duty resting upon him to deliver the key to Taylor. Thomp. Neg. §§ 3748, 3749, 4988; Bertha Zinc Works v. Martin, 93 Va. 791, 22 S. E. 869. He admits that, if he had safely gotten upon the step, he could not have delivered the key from there to Taylor, who was in the cab of the engine, but would have had to ride on the step down to where the engine was to stop at the coach, a distance less than 200 feet, before he could accomplish his purpose. Obviously, he could have avoided the hazardous and dangerous undertaking to board this engine, as he did, by walking down to where the engine was to stop, as he knew, and it is conceded that he might have gotten upon the step of the tender from the side of the track, or could have stood outside of the track, clear of all danger, and handed the key to Taylor as he passed. His only excuse for not pursuing one or the other of these obviously safe courses is that there was a ditch on each side of the track in which there was some water. Yet, on cross-examination, when pressed to answer whether, in crossing this ditch to get in the middle of the track, he did not get mud on his feet which caused him to slip and fall when he attempted to board the engine, he stated, "No"; that he "stepped" over the ditch.

No principle of law is better established than that "where an employé is confronted with two methods of performing work, the one safe and the other dangerous, he owes a positive duty to his employer to pursue the safe method, irrespective of the degree of danger which may be involved in the unsafe method, and any departure from the path of safety will prevent his recovery, if he is injured." Street's Adm'r v. N. & W. R. Co., 101 Va. 746, 45 S. E. 284, and authorities cited; Newport News, etc., Co. v. Beaumeister, 102 Va. 678, 47 S. E. 821.

Accepting his statement as true, notwithstanding the strong proof to the contrary, that he was sober when he attempted to board the engine as he did, the fact of the plaintiff's gross negligence so clearly appears that his case is put beyond the possibility that reasonably fair-minded men might differ as to whether or not his negligence contributed directly to his own injury.

This being the situation at the beginning of the occurrences, when plaintiff attempted to board the engine and fell under it, the law is equally well settled as to the liability or nonliability of the defendant company for the injuries he sustained.

"One who is injured by the mere negligence of another cannot recover any compensation for his injury, if he by his own ordinary negligence or willful wrong contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened, except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." Dun v. S. & R. R. Co., 78 Va. 645, 49 Am. Rep. 388.

The opinion in that case, by Lacy, J., says: "That a person who by his own default has brought upon himself a loss or an injury can claim no loss or compensation for it from another is a principle of universal application; and it is equally true that, if his imprudence or negligence has so materially contributed to the loss or the injury that, but for such imprudence or negligence, it would not have occurred, he can claim no recompense from another who has been instrumental in causing it, unless the latter, upon the discovery of the danger into which the party had brought himself by his own fault, could, by the use of such diligence as the extent of the danger and the nature of the threatened injury required, have avoided the occurrence. Hutchinson on Carriers, pp. 502, 505."

This principle of law is clearly discussed, and many of the authorities bearing upon it reviewed, in the opinion by Buchanan, J., in the late case of Richmond Pass., etc., Co. v. Gordon, 102 Va. 498, 46 S. E. 772.

The principle was applied in Dun v. S. & R. Rd. Co., supra, where the suit was by a passenger suing for an injury sustained while rightfully on board of one of the defendant's passenger trains, and to whom the defendant owed the highest degree of care, and what was said in the opinion and by the text-writer cited applies with greater force to a case such as we have under consideration, since, although conceding that the plaintiff was in the line of his duty when he went to deliver the key to Taylor, the night watchman, the well-established principle that in entering the employ of the master he assumed the risks ordinarily incident to the duties to be performed also applies, and also the further principle that it is as much the duty of the servant to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, as it is the master's duty to provide for him (Russell Creek C. Co. v. Wells, 96 Va. 416, 31 S. E. 614), and that where an employé is confronted with two methods of performing work, the one safe and the other dangerous, he owes a positive duty to his employer to pursue the safe method, irrespective of the degree of danger which may be involved in the unsafe method, etc. (Street's Adm'r v. N. & W. R. Co., supra; Bowers v. Bristol Gas & Elec. Co., 100 Va. 533, 42 S. E. 296, and authorities cited).

"The extent of a person's duties is to be determined by a consideration of the circumstances in which he is placed. The law imposes duties upon men according to the circumstances in which they are called to act." It is true that, "when the facts are disputed, the question of negligence is a mixed ques-

tion of law and fact. The jury must ascertain the facts, and the judge must instruct them as to the rule of law which they are to apply to the facts as they may find them. Where, however, the direct fact in issue is ascertained by undisputed evidence, and such fact is decisive of the case, a question of law is raised, and the court should decide it. The jury has no duty to perform. The issue of negligence comes within the rule." Dun v. S. & R. R. Co., supra.

If we concede that the tenth instruction, given for the plaintiff with the view of submitting to the jury the question whether or not Taylor failed to perform his duty after the plaintiff fell under the engine, fairly and correctly propounded that question, although it failed to tell the jury that the defendant company was not liable unless Taylor failed to do his duty after he knew or had notice of plaintiff's peril, we are still of opinion that the verdict of the jury should have been set aside on the ground that it is without evidence to trace actionable negligence to the defendant company.

As to what transpired after the plaintiff fell under the engine and before the engine was stopped, which required but a moment of time, there is but little evidence. The engine, including its tender, was about 30 feet long, and one of the plaintiff's witnesses, who evinced intelligence to form a correct opinion on that subject, testified that it could not have been stopped in less than a length and a half of itself, which would mean 45 feet, and in any view of the plaintiff's evidence it did not run over 50 feet after the plaintiff fell, to run which distance, if going the speed claimed by the plaintiff, from 2½ to 3 miles per hour, required but a few seconds. The engine was unquestionably stopped within the distance of 45 feet, or about that distance. The plaintiff's statement is that he tried to get on the engine "right under the Larry Trestle," fell, and "commenced hollowing before he hit the ground"; that he hollowed "a dozen times, I expect," holding on to the step "for 15 feet or more," and was "hollowing for him to stop all the time"; and he is corroborated as to "hollowing" by several witnesses, one of them about 150 yards away and another in the power house with several engines in motion, but quite naturally neither of these witnesses stated that Taylor heard or could have heard the "hollowing," as they did not know and could not have known the conditions surrounding Taylor. Taylor was in the cab, and the engine was "drifting" along, making "no noise" other than that that is usual when an engine is so moving. He says that he first heard the man "hollow" right under the trestle, right under his feet, and about the time he heard his voice he felt the wheels hitting him, and frankly admits that, when he heard the man under the wheels of his engine, he became "rattled and excited," and that it was a moment or two before he could think, but insists that he stopped the engine as soon as it was possible for him to have done so, and there is not the slightest evidence tending to prove that he was unduly excited, or to contradict the statement that he did all he could to stop the engine after hearing the man under it. To hold, according to plaintiff's view, that Taylor heard him "hollowing" to "stop the engine" and paid no heed to his cries would be to impute to Taylor a criminal intent to inflict an injury to a man known to be in peril under his engine, when, too, Taylor was uninformed as to the position of the man, and could not know what was necessary to be done for his protection. Such an imputation could not be justified, except upon the clearest and strongest proof, while here it finds no justification whatever, although we may accept as true the statement of the plaintiff's father that Taylor told him "that when he heard him hollow he thought of the oil can that was sitting on the footboard; he said that was the first thing that came into his mind when he heard him hollow."

Ordinarily it is the party injured who invokes the doctrine sanctioned by this court in Richmond Ry. & Elec. Co. v. Hudgins, 100 Va. 409, 41 S. E. 736, that "one may not, by his own negligence or want of proper care, place another in a perilous situation, and, when sued for injuries resulting therefrom, put the burden on the plaintiff of showing that he acted with reasonable care. Persons in great peril are not required to exercise the presence of mind required of prudent men under ordinary circumstances"; but, as it seems to us, no good reason can be given why the converse of the proposition is not equally sound. Here the party doing the injury—i.e., the watchman, or acting engineer, Taylor—claims, and as we think properly, that, having been suddenly put into an emergency by the negligence of the plaintiff, the latter could not require of him the wisest possible action. In other words, if the view of the plaintiff in this case be correct, A. by his gross negligence may require action on the part of B. to save him from the consequences of his own fault, and if B. does not automatically and instantly do that which will conduce to his safety B. is liable. Having no reason whatever to expect that the plaintiff, or any one else, would on a dark night attempt to mount the engine in his charge from the middle of the track in front, or be on the track where the engine could inflict an injury upon him, Taylor was, by the negligence of the plaintiff, suddenly put into an emergency when and where the wisest possible action on his part could not be reasonably required of him. "It would violate every principle of justice or law if the defendant were compelled to foresee and provide against that which reasonable men

would not expect to happen." Con. Brewing Co. v. Doyle, 102 Va. 404, 46 S. E. 390.

It was a matter of pure speculation or conjecture as to what Taylor could or should have done after the plaintiff had by his own gross negligence gotten beneath the moving engine, since the evidence fails utterly to point out any negligence on Taylor's part intervening between the accident and the negligence of the plaintiff.

"The existence of negligence must not be left entirely to conjecture, and courts cannot uphold the tentative conclusions of jurors, based upon no sure grounds of inference." N. & W. R. Co. v. Cromer, 101 Va. 671, 44 S. E. 898.

This is therefore, clearly a case where the acts of the plaintiff and the conduct of Taylor were so substantially concurrent as to render it impossible to separate the conduct of the former from the injury itself, whereby plaintiff's right of recovery is precluded. Seaboard, etc., R. Co. v. Hickey, 102 Va. 394, 46 S. E. 392; Richmond Trac. Co. v. Martin (Va.) 45 S. E. 886, and other authorities cited above.

For these reasons, we are of opinion that the lower court erred in overruling the motion of the defendant company to set aside the verdict, and its judgment must be reversed, and the case remanded for a new trial.

(104 Va. 337)

COMMONWEALTH ex rel. VICARS v. WAMPLER et al.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

JUDGMENT — ASSIGNMENT — BREACH OF OFFICER'S DUTY—RIGHT OF ASSIGNEE TO SUE THEREFOR.

The statute making choses in action assignable, and authorizing an assignee to maintain in his own name any action which the original obligee might have brought, does not authorize an assignee of a judgment to maintain an action against an officer and the sureties on his official bond for a breach occurring prior to the assignment, by reason of the officer's failure to return a forthcoming bond taken on the judgment as prescribed by statute to give the bond the force of a judgment against the obligors; the statute not investing in assignees as an incident to assignments a litigious right against a third person for an injury which accrued prior to the assignment.

Error to Circuit Court, Wise County.

Action by the commonwealth, on the relation and for the use of A. M. Vicars, against W. G. Wampler and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Vicars & Perry, for plaintiff in error. Ayers & Fulton, for defendants in error.

WHITTLE, J. The single question presented by this record is whether the assignee of a judgment is entitled to maintain an action for damages against an officer and the sureties on his official bond for a breach of the condition thereof which occurred prior to the assignment, by reason of his failure to return a forthcoming bond taken upon the judgment within the time and in the manner prescribed by statute to give such bond the force of a judgment against the obligors therein.

Upon demurrer to the declaration the trial court resolved that question in the negative, and rendered judgment for the defendants. Whereupon the plaintiff brings error.

The authorities are generally agreed that the assignment of a judgment carries with it "the cause of action on which it was based, together with all the beneficial interest of the assignor in the judgment and all its incidents." Freeman on Judgments, § 431.

Upon the same principle the assignment of a note carries with it all securities provided for its payment.

The doctrine is founded upon the theory that the debt is the principal thing and the security an accessory. They are not severable, and the security passes by virtue of the assignment as an inseparable dependent incident. Carpenter v. Longan, 16 Wall. 271, 21 L. Ed. 313.

It will be observed that the present inquiry does not involve the power of the judgment creditor to assign the right of action in question, but whether that right passed to the assignee as an incident to the assignment of the judgment.

Citizens' National Bank v. Loomis, 100 Iowa, 266, 69 N. W. 443, 62 Am. St. Rep. 571, is the only case to which our attention has been called which directly sustains the pretension of the plaintiff in error. In that case it was held that "the assignment of a judgment in an action in which an attachment has been allowed and property seized thereunder passes to the assignee the judgment creditor's right to recover damages of the sheriff for negligence in the care of property seized by allowing a disposition to be made of it."

The reasoning upon which that decision is based is not satisfactory. It proceeds upon the false premise that the right to sue for the breach of official duty must exist somewhere, and as the assignor cannot sue, having parted with the judgment, the right of action must rest in the assignee, whereas, we apprehend, it appears by the weight of authority, that the right of action for the previous breach of duty by the officer is a mere personal right, which appertains to the judgment creditor.

The right to recover damages for the tort, it is true, is an incident to the judgment in the qualified sense that it belongs to the owner of the judgment at the time the injury is committed; but it is separate and distinct from the right to the judgment, both in its character and in respect to the persons liable to respond in damages for the wrong. It is a collateral right, over which the judg-

ment creditor possesses exclusive dominion, which he may enforce or forbear to enforce, and may assign or withhold, at pleasure.

The assumption, therefore, that the right to sue the officer exists in the assignee of the judgment, proceeds upon the hypothesis that it is such an incident as must necessarily pass by the assignment of the judgment, a conclusion which the authorities do not sustain.

Bouvier, in defining the word "incident," observes:

"This term is used both substantively and adjectively of a thing which, either usually or naturally and inseparably, depends upon, appertains to, or follows another that is more worthy. For example, rent is usually incident to a reversion (1 Hill, R. P. 243); while the right of alienation is necessarily incident to a fee simple at common law, and cannot be separated by a grant (1 Washb. R. P. 54). So a court baron is inseparably incident to a manor, in England. Kitch. 36; Co. Litt. 151.

"All nominate contracts and all estates known to common law have certain incidents which they draw with them and which it is not necessary to reserve in words. So, the costs incurred in a legal proceeding are said to be incidental thereto." 1 Bouv. L. D. (Rawle's Rev.) 1006.

It will be seen from the foregoing definition and illustrations, that the distinguishing characteristic of an incident consists in the fact that it "usually or naturally and inseparably depends upon, appertains to, or follows" its principal.

The distinction as to what does and what does not pass by incidental assignment is in some instances nice and difficult to draw; but in order for it to pass the incident must in a legal sense constitute a security for the debt, and that can hardly be predicated of a mere collateral right of action against a public officer for a quasi tort in failing to discharge an official duty, although his misconduct may affect the value of the judgment.

Accordingly, the Supreme Court of Kentucky, upon a similar state of facts, held "that the assignment of a judgment could not operate to transfer the right to recover for such an injury, for a right to compensation for such an injury and the right to the judgment are separate and distinct rights. They are separate and distinct, not only in their origin and nature, but in relation to the persons against whom they must be asserted. The right to compensation for the injury may, indeed, be said to be incident to the right to the judgment in one sense, for it must necessarily belong to the person who was entitled to the judgment at the time the injury was done, but it is clearly not such an incident as must necessarily pass by the assignment of the judgment." Com'th, for, etc., v. Fuqua, 3 Litt. (Ky.) 41.

In Redmond v. Staton (N. C.) 21 S. E. 186, it was held that: "The clerk of the court is liable for damages to a judgment creditor arising from his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands. The mere assignment of a judgment does not carry with it a right of action which has accrued to the judgment creditor against the clerk of the court for his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands." The court then cites with approval the case of Timberlake v. Powell (N. C.) 5 S. E. 410, as analogous authority, where the court says: "The present suit is not upon the judgment, but upon an alleged independent liability incurred by other tort-feasors. * * * The cause of action is separate and distinct from that involved in the former adjudication, and is outside the scope of the assignment."

In Robinson v. Town, 30 Ga. 818, the court held that the assignment of the judgment did not pass any interest in the money which the sheriff had previously collected on the judgment. The court, at page 821, observes: "It was said that the plaintiffs could not maintain the suit, because they had parted with their interest by the assignment. They did part with their interest in the further enforcement of the judgment, but not with their interest in their money which the sheriff had previously collected. The assignee acquired, and they lost, the right to enforce the judgment as it stood at the time of the assignment; that is, the right to collect what was still due at the time of the assignment out of the defendants in it. Money previously collected and held by the sheriff would not be reached by the exercise of the assignee's right of enforcing the judgment, for such money was the fruit of the previous enforcement of the judgment to that extent. Such money constituted a debt due from the sheriff to the plaintiffs, to be enforced by a rule or suit against him."

While the Virginia statute has enlarged the rule of the common law so as to make choses in action assignable, and authorizes the assignee to maintain in his own name any action which the original obligee, etc., might have brought, it does not create new causes of action, and has no application to cases in which there is no assignment.

It would, in our judgment, be impolitic to extend the scope of the statute by judicial construction, so as to allow the assignment of a chose in action to invest in the assignee, as an incident, a litigious right against a third party to recover damages for an injury which accrued prior to the assignment.

The conclusion reached in this case is not in conflict with the decision in National Valley Bank v. Hancock, 100 Va. 101, 40 S. E. 611, 57 L. R. A. 728, 93 Am. St. Rep. 933, where the court recognizes the established general doctrine that a mere right in litem is not the subject of incidental assignment,

but enforces a qualification of the rule called for by the facts of the particular case. In that case the debtor, without consideration, in the interest of his children, devested himself of property to the prejudice of creditors. The diversion as to them was void, and hence they, or their assignees, had the right to follow the property or its proceeds and subject it to their debts in the hands of the alienee. The debtor's individual liability and diverted property were securities for the debt, and passed as incidents to the assignment.

The case under consideration is wholly different. The effect is, not to hold the debtor or his property liable, but to maintain an action to recover damages on an individual liability of a third person to the judgment creditor.

The judgment complained of is without error, and must be affirmed.

(104 Va. 343)

NEECE v. NEECE et al.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

1. EXECUTORS—RIGHT TO TESTATOR'S TITLE PAPERS.

Though the executor has the right to the custody of the title papers of his testator, the parties in interest have a right to examine them.

2. EVIDENCE—ADMISSIONS—CONDUCT.

A party's conduct, indicating a belief in the weakness of his case, may be shown against him as an admission, subject to explanations he may offer.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 762.]

3. SPECIFIC PERFORMANCE—CONTRACT TO CONVEY LAND—POSSESSION AND IMPROVEMENTS BY PURCHASER.

Where defendant's ancestor took possession of the land under contract binding plaintiff to convey the same, and improved the same, and continued in the possession thereof for many years with the acquiescence of plaintiff, it was inequitable to refuse specific performance of the contract.

Appeal from Circuit Court, Dickenson County.

Suit by James H. Neece against Margaret Neece and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

A. A. Skeen, for appellant. Vicars & Peery and Columbus Phipps, for appellees.

CARDWELL, J. The appellant, complainant in the court below, filed his bill in this cause, alleging ownership of a boundary of about 40 acres of land situated on McClure creek, in Dickenson county, and sought to enjoin and did enjoin appellees from committing divers trespasses upon said land. To this bill appellees, the widow and children of John C. Neece, deceased, filed their answer, asked to be treated as a cross-bill, charging that they were the owners of the land in question, that John C. Neece in his lifetime had obtained from appellant, a title bond for the land, and had been put in possession thereof, and had made valuable improvements thereon, etc.; the prayer of the cross-bill being that appellant be required to convey to appellees the said land.

The answer of appellant to the cross-bill denied its allegations, but admitted that appellant did verbally agree to let John C. Neece have a small piece of land for a house seat; that John C. Neece built a house upon said small piece of land, which house and other improvements in the way of buildings were afterwards burned, whereupon said verbal agreement was annulled by like verbal agreement, and possession of said small piece of land was delivered back to appellant.

Upon the pleadings and depositions taken on behalf of both appellant and appellees, the circuit court made its decree, appealed from, dissolving the injunction theretofore awarded, and requiring appellant to convey to appellees the land in question.

The sole question presented, therefore, is whether or not the evidence in the record justifies the decree complained of.

The facts disclosed are as follows: During the Civil War, or soon after its close, John C. Neece, as a settler, entered into actual possession of a tract of land, including the 40 acres in controversy in this suit; the section where the land is situated being covered by patents for large areas held in the name of nonresident claimants. He cleared and cultivated a portion of the land, lived upon it, and claimed it as his own, but some years later moved to West Virginia, after first trying without success to sell the land thus claimed by him to his neighbors, and after removal continued his efforts to sell without avail. During the absence of John C. Neece, one E. J. Long had a survey made, which embraced the land in controversy, and soon afterwards appellant made a trip, presumably to West Virginia, and upon his return represented to E. J. Long that he had bought the land claimed by John C. Neece, but had no title bond or other written evidence of his purchase; whereupon Long, without payment to him of any consideration, executed to appellant a quitclaim deed to certain lands embracing the 40-acre tract in controversy. Some time after this John C. Neece moved back to Virginia, found appellant in possession of his land, and obtained from him a title bond for the 40 acres in controversy, or a verbal agreement to give up or release that much of it, and pursuant thereto John C. Neece immediately entered into possession of the land, built a substantial two-story log house, two corncribs, cleared and fenced a considerable portion of the land, and made other permanent improvements thereon. These improvements were made some 8 or 10 years prior to the year 1900, and John C. Neece lived on the land, claiming and using it as his own from the comple-

tion of his dwelling until it was burned, a short time prior to his death, which occurred in December, 1900.

In the meantime John C. Neece had bought another tract of land, known as the "Keel and Turner Land," on the opposite side of the creek from the land in controversy, and, when his house was burned, he moved into a small house on this Keel and Turner tract, but continued in the actual possession of the land in controversy. The upper portion of the Keel and Turner tract lay on the opposite side of the creek from the land of appellant upon which he lived, and his home place extended down near the house of John C. Neece, which was burned. Two or three years before John C. Neece's death he made a verbal agreement of exchange with appellant, by which he was to receive from appellant a small piece of land containing five or six acres off the lower end of appellant's land, adjoining the land in controversy, just above and near the house of John C. Neece, and in exchange therefor John C. Neece was to let appellant have a piece of land of like size off the upper end of the Keel and Turner land, and near the house of appellant, which parol agreement of exchange was, after the house of John C. Neece burned, rescinded by mutual consent.

Throughout the entire period that the land in controversy was occupied by John C. Neece, his right thereto was never questioned by appellant. On the contrary, it was surveyed at the instance of John C. Neece in the presence of appellant, with the view of a deed therefor being made to him, and appellant was heard to say repeatedly, in the presence of disinterested persons who have testified in this case, that he was ready to make the deed to John C. Neece, his brother, at any time, and on one or two occasions the land was pointed out in appellant's presence as the land he was ready to convey to John C. Neece at any time. The land was recognized by all the neighbors as being the land of John C. Neece. He sold timber off the land to the same sawmilling firm, operating near by appellant's home, to whom appellant at the same time sold timber from his own land, and the timber was cut and hauled by John C. Neece from the land in controversy to the sawmill, and his right to the timber so cut and delivered was never questioned by appellant, although he knew of it and was a frequent visitor to the sawmill. Nine days after the death of John C. Neece appellant appeared with what purported to be a will of John C. Neece, the existence of which was known only to himself and one other, written at appellant's house in his own handwriting, signed in the same handwriting, witnessed by himself and one E. B. Jessee (who testified in this case on behalf of appellant), naming appellant as executor of the will, and in which the Keel and Turner land of John C. Neece was disposed of, but no mention was made of the land here in controversy; and appellant sought to have the widow and heirs of John C. Neece sign a writing agreeing to the probate and recordation of the will without contest, which they declined to do. When asked by the widow and heirs why the land in controversy was not mentioned in said will, appellant then and for the first time made the claim that this 40-acre tract was the land which he was to exchange with John C. Neece for the 5 or 6 acres off of the Keel and Turner land, and that the contract of exchange had been rescinded before John C. Neece's death. This pretended will was afterwards offered by appellant for probate in the county court of Dickenson county, and he and E. B. Jessee were examined as witnesses touching the same; but the court refused to admit the paper to probate as the will of John C. Neece, deceased. Thus a cunningly devised scheme on the part of appellant to put John C. Neece, deceased, in the attitude, just before his death, of making no claim to the land in controversy, and to which he (appellant) was not heard theretofore to make a claim, proved unavailing.

Belle Neece, a daughter, and Margaret Neece, the widow, of John C. Neece, testify that John C. Neece had a title bond for the land from appellant, and the first-named witness says that her father so stated in the presence of appellant, to which statement he made no dissent. These witnesses are corroborated touching the title bond by a witness introduced on behalf of appellant. Margaret Neece, the widow, and Louisa Holbrook, another daughter, of John C. Neece, testify that, while preparations were being made for his burial, they were looking over some title papers found in his clothes, when appellant appeared, took possession of all these papers except one, and also of the clothes containing other title papers of the deceased, and they were never afterwards returned by him or seen by any member of the family of John C. Neece.

This testimony touching the conduct of appellant concerning the title papers held by John C. Neece is uncontroverted by appellant himself, who testified on his own behalf touching other matters in dispute.

As contended for by appellant, an executor named in a valid will has the right to the custody of the title papers belonging to his testator; but there is neither law nor reason for the parties in interest being denied the right to see and examine such papers.

In general, a party's conduct, so far as it indicates his own belief in the weakness of his cause, may be used against him as an admission, subject, of course, to any explanations he may be able to make removing that significance from his conduct. In particular, "falsehood is a badge of fraud, and a case which is sought to be supported by means of deception may prima facie, until the contrary be shown, be taken to be a bad and dishonest case; and this applies equally to civil and criminal cases. * * * So, also, the attempt to suppress evidence by intimidat-

ing or removing witnesses is admissible, as having 'a tendency to show consciousness in him of title in the opponent.' Concealing or destroying evidential material is likewise admissible; in particular the destruction [spoliation] of documents, as evidence of an admission that their contents are as alleged by the opponents." 1 Greenleaf, Ev. (16th Ed.) p. 325, § 195.

The circumstances proven, aside from the direct proof on the subject, warrant the presumption that when John C. Neece returned from West Virginia and found appellant in possession of this land, with a quitclaim deed therefor from an outsider for which no consideration whatever was paid, a dispute arose between them as to their rights, and that by way of a settlement of the dispute appellant agreed to and did execute to John C. Neece a title bond for the 40-acre parcel here in question.

But, if it could be conceded, even for the sake of argument, that the evidence is insufficient to establish the fact that John C. Neece had a title bond for the land in dispute, it clearly shows that he was in the possession of the land for a number of years under contract or agreement so far executed that it would be a fraud upon his rights to now refuse an enforcement of such contract or agreement.

It is not controverted that improvements amounting in value to $300 or $400 were put upon the land by John C. Neece; nor that a division line was run by a competent surveyor at the instance of John C. Neece and in the presence of appellant, so that "they would know how to make the deed"; nor that on another occasion, when appellant, as well as John C. Neece, was present, the latter pointed out to a disinterested witness testifying in this case the lines of the 40-acre tract as the land owned by him, and that appellant made no claim whatever to the land. It is clearly proved, also, by several witnesses, that on several occasions appellant told John C. Neece, in the presence of these witnesses, that he was ready to make him a deed for the land at any time, without a suggestion that he had not been fully paid therefor, and whereby it necessarily follows that the consideration for the land had been fully paid.

In addition to the facts and circumstances stated as going to discredit appellant and at least one of his principal witnesses in this cause (E. B. Jessee), the appellant stands impeached in this record by the testimony of five reputable citizens of Dickenson county.

The claim, set up by appellant, that the land he was to let John C. Neece have in exchange for 5 or 6 acres of the Keel and Turner tract, afterwards rescinded, was the 40-acre tract in controversy, and included John C. Neece's house site, was clearly an afterthought, absurd on its face, and plainly had its origin in a fraudulent design to take advantage of the death of John C. Neece and a supposed inability on the part of his widow and children to defend their right to the land.

We are of opinion that the proofs in the cause fully justify the decree of the circuit court, and therefore it is affirmed.

(123 Ga. 877)

SMITH v. CITY OF ATLANTA.

(Supreme Court of Georgia. Aug. 5, 1905.)

MUNICIPAL CORPORATIONS — ORDINANCES — NOTICE OF INTRODUCTION.

A provision in a city charter that notice of the introduction of an ordinance "shall be published at least as many as ten days before the adoption of such ordinance" is satisfied by a publication one time at least 10 days prior to the adoption of the ordinance.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 243.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Affidavit of illegality on levy of execution by the city of Atlanta against J. N. Smith. From an order striking the affidavit, Smith brings error. Affirmed.

E. M. & G. F. Mitchell, for plaintiff in error. J. L. Mayson and W. P. Hill, for defendant in error.

COBB, J. An execution in favor of the city of Atlanta against Smith for an amount claimed to be due as an assessment upon a described lot of land, the property of the defendant in execution, was levied upon the property, and an affidavit of illegality interposed, and the papers returned to the superior court of Fulton county for trial. The affidavit set up numerous grounds of illegality, and when the case came on for trial the court, on motion of counsel for the city, struck the affidavit, and the defendant in execution excepted. Only one ground in the affidavit was urged in this court, and therefore our discussion will be limited to this ground. The charter of Atlanta requires that, "after the first reading of an ordinance providing for a sewer, a notice of the introduction of the same shall be published in one or more of the daily papers of the city." The contents of the notice are provided for in the charter, and it is required that the "notice shall be published at least as many as ten days before the adoption of such ordinance"; and the charter distinctly declares that a substantial compliance with the requirement as to notice shall be sufficient. Anderson's Code of Atlanta, 18, § 46; Acts 1889, p. 958. The ordinance in question was introduced on November 16, 1903. The notice required was first published in a daily paper of the city issued on November 17th, and appeared in 10 issues of the paper immediately following that date. November 22d was Sunday. It was contended that the charter required that notice shall be published for 10 consecutive days, exclusive of Sunday, and that the publication was therefore insufficient. The ordinance was finally adopted on December 7th. The case turns

upon the proper construction to be placed upon the words "at least as many as ten days before the adoption of such ordinance." It is said that the use of the word "many" carries with it the idea of continuous publication as to the days, whereas if the word "much" had been used, a different construction may have been placed upon the provision. We cannot concur in this view. The purpose of the charter was to give notice to those interested in the passage of the ordinance at least 10 days before it was passed that such an ordinance was under consideration. In other words, the 10 days was the time the party was allowed to investigate the matter after it was brought to his knowledge that a proceeding affecting his property would be passed upon by the city authorities. He was entitled to notice 10 days before the action was taken; but he was not entitled to notice every day for 10 days. Such a construction of the ordinance is possible without doing violence to any of the words used, is a more reasonable construction than the one contended for by the plaintiff in error, and is in line with prior rulings of this court where similar provisions were under construction. See Mayor v. Finney, 54 Ga. 318 (3); Montford v. Allen, 111 Ga. 18, 36 S. E. 305 (1).

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, J., disqualified.

(123 Ga. 734)

ATWOOD v. HIRSCH BROS.

(Supreme Court of Georgia. Aug. 3, 1905.)

JUDGMENT—REVIVAL—SERVICE OF PROCESS.

Civ. Code 1895, § 5381, which requires a writ of scire facias to "be served by the sheriff of the county in which the party to be notified may reside, twenty days before the sitting of the court," contemplates personal service. Service by leaving a copy at the most notorious place of abode of the defendant is not sufficient.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1621.]

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Proceedings by Hirsch Bros. against J. A. Atwood to revive a dormant judgment. Judgment for plaintiffs, and defendant brings error. Reversed.

Wm. L. Gignilliatt and Spencer R. Atkinson, for plaintiff in error. Candler & Thomson and Thomson & Hirsch, for defendants in error.

FISH, P. J. Hirsch Bros. sued out a scire facias to revive a dormant judgment. It was served upon the defendant by "leaving a copy at his most notorious place of abode." After return of service had been made, and at the first term of the court, the defendant appeared and moved the court to dismiss the scire facias, upon the ground that it had not been served upon him personally. The judge overruled the motion, and the defendant excepted.

Civ. Code 1895, § 5381, provides that a scire facias to revive a dormant judgment "shall be served by the sheriff of the county in which the party to be notified may reside, twenty days before the sitting of the court," etc. No particular method of service is prescribed. "The general rule in regard to service of process or legal notice is that it must be served personally on the party or the individual in question, unless some other mode is especially provided for that purpose by statute, or has been otherwise established by long and recognized practice to the contrary." 19 Enc. Pl. & Pr. 614, 620. This rule was cited approvingly in Baldwin v. Baldwin, 116 Ga. 472, 42 S. E. 727, where Chief Justice Simmons said: "The Code provides for notice to the defendant [in a proceeding for alimony], and the defendant himself must be served with notice, before the court can acquire jurisdiction to proceed with the case. If the Legislature desires to make some other method of service sufficient, substituted service may be provided for by statute, as has been done in ordinary suits. In the absence of such a statutory provision, service by leaving a copy of the petition at the defendant's most notorious place of abode is not sufficient. Indeed, it amounts to no service at all." Section 2743 of the Civil Code of 1895, which provides the method of foreclosure of mortgages on realty, declares that "the court shall grant a rule directing the principal, interest, and costs to be paid into court on or before the first day of the next term, * * * which rule shall be published once a month for four months, or served on the mortgagor, or his special attorney, at least three months previous to the time at which the money is directed to be paid into court." In the case of Hobby v. Bunch, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301, the court construes the meaning of the word "served," as employed in the section of the Code last quoted, to be personal service, and not service by leaving a copy at the residence of the defendant. In that case Chief Justice Bleckley said: "But the only service which the sheriff could legally make, and the only service effected less than four months before the term of the court at which the judgment of foreclosure was rendered which could be valid would be personal service. Service by leaving a copy at the defendant's residence is unauthorized and insufficient. * * * Were the sheriff to leave it at his own residence, and return that he had done so, and thereby served the defendant, the service would be quite as good as that which was returned in this instance"—citing Dykes v. McClung, 74 Ga. 382, and Meeks v. Johnson, 75 Ga. 630.

Section 5382 of the Civil Code of 1895, which provides the method of service by publication upon nonresidents against whom dor-

mant judgments are sought to be revived, concludes with this language: "Which service shall be as effectual in all cases as if the defendant or person to be notified has been personally served." This would seem to indicate that the legislative interpretation of the act providing for service within the state was that such service should be personal. But it is contended by the defendant in error that a writ of scire facias is in the nature of an action at law, that it "assumes all the forms and attributes" of such, and therefore comes under the provisions of Civ. Code 1895, § 4985, which describes the mode of service in this state in actions commenced by petition; it being permissible, under that section, to perfect service by leaving "a copy at the defendant's residence." In answer to this contention we cite Civ. Code 1895, § 5380: "Scire facias to revive a judgment is not an original action, but the continuation of the suit in which the judgment was obtained." And to combat the argument that, since scire facias is but the continuation of the suit in which the judgment was obtained, and, personal service not being required in the original action, it should not be required there, we say that neither is 20 days' notice necessary in order to bring the defendant into court in the orignal action, yet by the plain letter of the law it is in scire facias indispensable. The refusal to dismiss the scire facias was error.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 867)

CHATFIELD v. CLARK.

(Supreme Court of Georgia. Aug. 5, 1905.)

1. INJUNCTION—ENFORCEMENT OF DISPOSSESSORY WARRANT—DEATH OF ONE DEFENDANT.

C. filed an application to enjoin A. and B. from dispossessing him under a dispossessory warrant sued out by them jointly. A restraining order was granted, and before hearing on the application for injunction B. died, and C. moved to postpone the case until parties could be made. *Held*, that the interlocutory hearing could properly proceed to determine the question whether A. should be enjoined, notwithstanding the death of B.

2. SAME—PARTIES.

One in possession of real property, having no title thereto or interest therein, but occupying merely the relation of an agent or caretaker of the premises for the owner, cannot in his own name institute an action to enjoin a proceeding sued out against such agent as a tenant of another.

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action by Maria Chatfield against Will Clark and Ida Clark. Judgment for defendant, after the death of Ida Clark. Plaintiff brings error. Affirmed.

Clark and his wife, Ida, claimed title to a house and lot in Barnesville, and sued out a dispossessory warrant to evict Maria Chatfield as a tenant holding over. Maria Chatfield filed a petition praying that the Clarks be enjoined from prosecuting the dispossessory warrant. Clark's wife died before the hearing, and when the injunction case was called the plaintiff moved for a continuance until the legal representative of Clark's wife could be made a party. This motion was denied. At the hearing it appeared that the Clarks had a deed to the property in controversy from Jeff Walker, who had died since making the deed; that before his death he had promised to give Maria Chatfield the rent of the house for services rendered to him; and that after his death his son and sole heir had asked her to take care of the place and live in the house until he returned home. The plaintiff attacked the deed to the Clarks on the ground that Jeff Walker was not of sound mind when he made it. On this question the evidence was conflicting. It was also shown that Clark was insolvent and that Maria Chatfield was unable from poverty to give bond in the dispossessory warrant proceeding. The judge refused to grant an injunction, and Maria Chatfield excepted, assigning error also upon the refusal to grant a continuance.

W. W. Lambdin, for plaintiff in error. J. M. Smith and A. A. Murphey, for defendant in error.

COBB, J. 1. "It is a principle of equity that the death of one defendant only abates the proceeding quoad him." Howard v. Bank, R. M. Charlt. 216. If the suit is of such a character that it is possible to make a final decree against the surviving party, it is not necessary to revive the suit against the legal representative of the deceased party; but the rule is otherwise where the deceased defendant is a necessary party to the determination of the controversy. 5 Enc. Pl. & Prac. 840. As the dispossessory warrant was sued out jointly by the Clarks, claiming to be joint owners of the property, and the present petition was an application to enjoin that proceeding, no final decree could be properly rendered in the present case until the legal representative of Ida Clark was made a party. But the death of Ida Clark and the abatement of the suit as to her would not be a sufficient reason to postpone a hearing of the application for an injunction, where the surviving husband was seeking to revoke a restraining order which had been granted as to him. The restraining order was granted against both the husband and the wife. It was still in force against the husband, notwithstanding the death of the wife; and, while the case as to parties was not ripe for final decree, there was no good reason why the surviving defendant, who was still restrained by an order of the court, should not have the right to be heard on the question as to whether the restraining order should be continued in force

as to him. Nothing done at this hearing would bind in any way the legal representative or heirs of Ida Clark, who were no parties to the proceeding, and the surviving husband had the right to ask that the restraining order as to him be dissolved, in order that he might assert whatever rights he had in the dispossessory warrant proceeding. Whether the death of Ida Clark would abate the dispossessory warrant at the stage of the case at which the injunction was granted, we need not now determine; but we have no doubt that the surviving husband had the right to insist on a hearing of the application to dissolve the restraining order, notwithstanding the death of his wife.

2. The plaintiff was only an agent of one claiming to be the owner. She had no interest in the property, either as tenant or otherwise. 18 Am. & Eng. Enc. Law (2d Ed.) 166. She was a mere caretaker. Her possession was the possession of her principal, and upon his possession she could defend against the dispossessory warrant; and, if the ownership of the principal and her possession in his behalf were established, the dispossessory proceeding of the Clarks would fail. Of course, if she entered under the Clarks, or, after entering, the relation of landlord and tenant arose between them, she could not dispute their title and defeat the dispossessory warrant by showing title in another. But, if she were a mere agent or caretaker, having no beneficial interest in the property, she certainly has no standing in a court of equity as a plaintiff in her own name seeking to enjoin a proceeding brought by others who claim to own the property. See, in this connection, Cunningham v. Elliott, 92 Ga. 159, 18 S. E. 365; 2 High, Inj. (3d Ed.) § 1547. Her rights were purely defensive. She could not become the actor; such a position being one which the law authorizes only her principal to assume. Had it appeared that the plaintiff had title to the property, or claimed possession in her own right, a different question would have been presented. See, in this connection, Gilmore v. Wells, 78 Ga. 197; Brooks v. Stroud, 111 Ga. 875, 36 S. E. 960; Brown v. Watson, 115 Ga. 592, 41 S. E. 998; Johnson v. Thrower, 117 Ga. 1009, 44 S. E. 846. It appearing from the uncontradicted evidence that the plaintiff was at most a mere agent or caretaker for another, and had no interest in the property, it was not error to deny the injunction.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 764)

CITY OF SYLVANIA v. HILTON.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. MUNICIPAL CORPORATIONS—FIRE LIMITS—CONSTRUCTION OF ORDINANCE.

If a municipal ordinance prohibiting buildings of a certain character from being erected within prescribed fire limits is not clear, but of ambiguous or doubtful meaning, it is competent to show what has been the ordinary construction placed upon it by the municipal authorities, in order to aid in its proper construction; but, if the meaning of an ordinance is plain and unambiguous, the fact that it may have been repeatedly violated without objection on the part of the municipal officers will not alter its meaning, or furnish any defense to one who afterwards violates it.

2. SAME—NATURE OF BUILDING.

A building constructed by erecting a wooden frame, and covering it on the outside with sheets of corrugated iron, the interior, including the flooring, ceiling, etc., being entirely of wood, does not meet the requirements of a municipal ordinance which declares that within certain fire limits all buildings shall be constructed of brick, stone, or other incombustible material, and covered with tin or metallic or fireproof roofing.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1333, 1334.]

3. INJUNCTION—ENFORCEMENT OF ORDINANCE.

It was error to grant an injunction against municipal officers to prevent them from enforcing such ordinance against the building of a structure such as that described in the preceding headnote.

4. SAME—ADEQUATE REMEDY.

In so far as the ordinance is criminal in its nature, the owner of the house being built can assert his rights by defense against a prosecution under such ordinance.

(Syllabus by the Court.)

Error from Superior Court, Screven County; B. L. Rawlins, Judge.

Action by L. H. Hilton against the city of Sylvania. Judgment for plaintiff, and defendant brings error. Reversed.

L. H. Hilton filed his equitable petition against the mayor and council and marshal of the city of Sylvania, alleging as follows: Under the act of February 20, 1875 (Acts 1875, p. 186), the town of Sylvania, which had been chartered under the general law of the state and located in the county of Screven, was reincorporated, to be governed and controlled by sections 774 to 797 inclusive of the Code (now sections 684 to 710 of the Political Code of 1895); and under an act of the Legislature approved December 12, 1902 (Acts 1902, pp. 636, 637), it was made the city of Sylvania, the laws and ordinances of the town being left in force and made applicable to the city. On January 7, 1897, the main business block and business portion of the town was destroyed by fire, and immediately thereafter, on January 13th, an ordinance was passed of which the following are the material portions:

"An ordinance to prescribe the fire limits of the town of Sylvania, to prevent the erection of wooden buildings therein, and for other purposes.

"Section 1. The common council of the town of Sylvania do ordain that from and after the passage of this ordinance, the fire limits of said town shall be the space embraced within the following territory, to wit: [Describing it].

"Sec. 2. Be it further ordained that all buildings hereafter to be erected within said

fire limits on said lots and closed street shall be constructed of brick, stone, or other incombustible substance or material, and covered with tin or metallic or fireproof roofing: provided, it shall and may be lawful to repair any wooden building now erected on said lots or closed streets, or to build any barn, stable, or other outbuilding under any sheltered or covered roof now standing, with the permit of the mayor.

"Sec. 3. Be it further ordained that no wooden building shall be erected on the lots adjacent to said fire limits, except by special permit of the mayor, who shall examine the locality upon which it is sought to erect said wooden building, and determine whether the erection thereof will endanger other buildings nearby.

"Sec. 4. Any person, erecting or attempting to erect any wooden building in violation of this ordinance, shall be punished by a fine not less than $5.00, nor more than $50.00, and imprisoned not more than thirty days, in the discretion of the mayor, and for the second offense said parties shall be fined not less than $10.00, nor more than $100.00, and imprisoned not more than thirty days.

"Sec. 5. Be it further ordained that any building erected in violation of this ordinance shall be deemed a nuisance; and if the party erecting or causing same to be erected, or who erected the same, shall fail or refuse to have the same removed after being duly notified, the mayor shall cause the same to be removed by the marshal at the expense of such party."

The plaintiff alleged that the purpose and intention of the ordinance was to require buildings thereafter erected in the fire limits, if framed or constructed of wooden material, to be covered on the outside with some incombustible material or substance, such as tin or iron, and that such construction, from the passage of the ordinance to within a few days prior to the filing of the petition, had been placed on the ordinance by the mayor and council, by permitting and allowing a number of buildings to be erected within the fire limits since the ordinance was passed. Two persons, one of whom was a member of the council, were preparing to erect buildings to be framed of wood covered with sheet iron, and the mayor and council were not making any effort to prevent this, and never contended that such buildings were prohibited by the ordinance until very recently, when plaintiff was about to erect a small restaurant within the fire limits, to be so framed of wooden material and covered on the outside with corrugated iron, an incombustible material or substance. The restaurant which was being erected was to be leased to a colored woman, which met with the disapproval of the mayor and council, and for that reason alone they were endeavoring to prevent him from erecting the building. On March 6, 1905, at a called meeting, and without notice to him or giving him a chance to be heard, they had passed an ordinance declaring the building to be a nuisance, and ordering it to be removed immediately, and served notice upon him that unless he removed it they would cause it to be done. In February, 1905, the marshal, under order of the mayor, arrested him for violating the ordinance, and without a trial imposed a fine of $10 on him, to which sentence he had entered an appeal to council as provided by the ordinances. Section 4 of the ordinance under which the fine was imposed is void, because the mayor and council cannot impose a fine exceeding $50, nor imprison more than 30 days, and such imprisonment can only be in the alternative, while the ordinance seeks to provide a fine exceeding $50, and provides for a fine and imprisonment at the same time. Plaintiff contends that the building was not in violation of the ordinance. If defendants are allowed to tear down the building as they are threatening to do, and continue to harass him, he will be irreparably damaged. He prayed that they be enjoined from tearing down or interfering with the erection of the building, and from enforcing the prosecution against him for a violation of the ordinance.

The defendants' answer was, in brief, as follows: They admitted the incorporation of the city and the passage of the ordinance. They denied the construction placed by the plaintiff thereon. "These defendants answer that they are not bound by the construction put upon the ordinance by other city authorities, or by any mayor or council of Sylvania, which has been in authority heretofore; and, while the present city authorities think that some of the buildings mentioned in said fifth paragraph of petitioner's petition were erected not in compliance with said ordinance and in violation of same, that the proper construction of these buildings is not now under consideration, and has no bearing upon the determination of the present case." They admit that two persons are erecting buildings within the fire limits in violation of the ordinance, but deny that they expect to allow such buildings to be completed in that manner. When plaintiff was about to begin erecting, or had just erected, the pillars upon which he expected to construct a small restaurant within the fire limits in violation of the ordinance, in order to save him from loss they notified him of their construction, and of their intention to prevent him from building it, "not entirely for the reason that he expected to lease said restaurant to a colored woman whose past conduct in the town they did not approve of, but for the additional reason that the building of a restaurant in the main business block, and right in the rear of a number of mercantile establishments, and where combustible substances were liable to be ignited by sparks from said restaurant, and cause danger from fire to be considerably increased." They admit the passage of the order

declaring the building to be a nuisance and directing it to be removed, but deny that it was necessary to give him notice before doing so, as he knew well the meaning of the ordinance, and the order was passed so as to give him an opportunity to test its meaning. They deny that he was fined without a trial, and say that he appeared and admitted that he was erecting the building, and as, according to the construction of the mayor and council, he was doing so in violation of the ordinance, he was fined, and there was no need of any further trial. The entire inside of this building is not even covered with any incombustible substance, but will be wholly of wood and exposed to fire. To construe the ordinance as plaintiff seeks to do would practically nullify it, and destroy the beneficial results that were intended to be reaped from adopting it.

After hearing evidence the presiding judge granted the injunction, and defendants excepted. They assign error because of the admission, over objection, of evidence as to what certain witnesses thought the mayor and council meant by the passage of the ordinance; because another witness was allowed to testify, over objection, as to the construction placed upon the ordinance by various officers of the city at the time of its passage and since; because of the grant of the injunction; and because the court erred in not construing the ordinance in accordance with its written words, instead of according to parol testimony that other buildings of like character had been constructed since its passage, and held that this building could be erected because the city authorities had allowed other buildings of like character to be erected in the past.

H. S. White, for plaintiff in error. E. N. Overstreet, for defendant in error.

LUMPKIN, J. (after stating the facts). Some of the evidence introduced by both sides was incompetent, such as statements that "it was the understanding of deponent," and that "he thought it was the understanding of other members of council," etc., and that "said ordinance meant," etc. The substantial question, however, is whether the ordinance was so clear and unambiguous as not to require the aid of extrinsic evidence for its construction, or whether resort could be had to evidence that other buildings had been erected similar in character to this one, without objection on the part of the municipal authorities, for the purpose of throwing light on the meaning of the language used. If an ordinance is plain, clear, and unambiguous, it needs no aid from parol evidence for its proper construction. In such event the mere fact that it has been violated several times or many times would afford no excuse or reason for another violation, nor would it confer any right on others to violate it. To illustrate: If an ordinance prohibited the shooting of firearms within the corporate limits, upon the trial of one who violated it, the fact that others had committed a like breach of the ordinance and had gone unpunished would furnish no defense to him. So it is also in regard to a state law. It would be no defense to one tried for larceny to show that many other larcenies had been committed and the criminal had escaped without prosecution or punishment, although known. If, however, a building ordinance or an ordinance prescribing fire limits is not clear, but is of ambiguous or doubtful meaning, it is competent to show what has been the ordinary construction placed upon it by the municipal authorities, in order to arrive at a proper construction of it. 1 Dill. Mun. Cor. (4th Ed.) § 43; 1 Smith's Mun. Cor. §§ 540, 541; McQuillin's Mun. Ord. §§ 73, 289, 290; State v. Severance, 49 Mo. 401; Cole v. Skrainka, 105 Mo. 303, 16 S. W. 491; Saunders v. Nashua, 69 N. H. 492, 43 Atl. 620. In McQuillin on Municipal Ordinances, § 292, it is said: "The general rule is that the meaning of an ordinance must be gathered from the law itself, and not from contemporaneous statements of the individuals who framed it or those who voted for it. This rule is particularly enforced where the provisions of the ordinance are clear. In such case, contemporaneous construction adopted by the municipal officers charged with its enforcement will be held inadmissible to aid its construction. However, in doubtful cases, where the language of the ordinance is ambiguous, a contemporaneous construction adopted by the parties interested in the enforcement of the ordinance, while not controlling, is entitled to great weight." See, also, Tiedeman on Mun. Cor. § 159. The rule is similar in construing statutes. Brown v. U. S., 113 U. S. 568, 5 Sup. Ct. 648, 28 L. Ed. 1079; Sherwin v. Bugbee, 16 Vt. 444; Frazier v. Warfield, 13 Md. 279. So, if the terms of a contract are clear and unambiguous, they cannot be changed by proof of usage. Kimball v. Brawner, 47 Mo. 398. The question, then, is, within which of these rules does the ordinance under consideration fall? It is clear that the construction sought to be put upon it by the plaintiff cannot stand. The expression "and covered with tin or metallic or fireproof roofing" plainly refers to the roof of the building, not to its sides. Certainly it cannot be contended that the municipal council intended to provide for a building to be covered all over with roofing, whether tin, metallic, or fireproof. Roofing means the material for a roof, and it needs no argument to show that this ordinance did not mean to provide for covering the sides of the house with materials for the roof.

The only question remaining, then, necessary for a construction of this part of the ordinance, is whether the word "incombustible" is ambiguous, so as to allow it to be construed by parol evidence showing that other houses had been built, similar in char-

acter to that of the plaintiff. The Century Dictionary defines the word to mean "not combustible; incapable of being burned or consumed by fire." In Payne v. Wright [1892] L. R. 1 Q. B. Div. 104, the meaning of the word was under consideration. The metropolitan building act provided that the roof of every building should be covered externally with "slates, tiles, metal, or other incombustible materials." The roof of a building was covered externally with materials consisting of woven iron wire coated with an oleaginous compound. The coating would ignite and burn away, leaving the wirework uninjured. It was held that the roof was not covered with "incombustible materials," within the meaning of the act. Mathew, J., said: "The findings of the magistrate seem, however, themselves to answer the question put to us, for he finds as a fact that the material was partly combustible and partly incombustible. Upon these findings how is it possible for us to say that, as a matter of law, this material was incombustible within the meaning of the act? * * * It is true that the magistrate finds that this material is, for some reasons, safer than glass, but that does not make it incombustible." A. L. Smith, J., said: "Section 19 provides that the roof of every building shall be covered with slates, tiles, metals, or other incombustible materials. Does that mean 'other materials' which are wholly incombustible, or materials which are partly combustible and partly incombustible? In my opinion it means materials wholly incombustible." The evidence in the present case shows without controversy that the entire framework of the house is of wood, and that it is to be covered on the outside with thin plates of corrugated iron. There is no contention that wood is incombustible, so that the material of which the entire framework of the house is built is combustible, and only a part of the material used, being the outer coating or covering, was incombustible in character. There are also other parts of the building composed of wood, such as the floor, ceiling, etc. Thus the case cited is directly in point. In Badley v. Cuckfield Union Rural Dist. Com. (Q. B. Div. 1895) 72 L. T. R. (N. S.) 775, the following ruling was made: "One of the by-laws made by the defendants, as rural sanitary authority, required all new buildings to be 'inclosed with walls constructed with good bricks, stone, or other hard and incombustible materials properly bonded,' etc. The plaintiff proposed to erect a sanitarium for his school, consisting of corrugated sheets of galvanized iron one thirty-second of an inch in thickness, with a layer of felt inside, fixed to the outside of a framework of wooded upright and horizontal posts and rails, with wooden match boarding inside. Held, that the galvanized iron alone was not a wall, and that the structure combined of wood and iron which constituted the wall was not of hard and incombustible material, as required by the by-laws." Lord Russell, C. J., in the opinion said: "I think, therefore, for the purposes of this case, we must regard the wall as consisting of at least the wooden posts and frame and the sheets of corrugated iron. Can that be called a wall of incombustible material? I think decidedly not, and the case is made stronger if we include the felt and the match boarding."

In Ward v. Murphysboro, 77 Ill. App. 549, an ordinance was under consideration which declared it unlawful for any person, company, corporation, or firm to erect, build, or commence the erection within the fire limits of the city of any wooden or frame building or structure exceeding a certain size. Certain persons erected within such limits a building having a wooden frame structure, one side, the ends, and the roof of which were covered with wooden sheeting, and this was covered with corrugated iron; the spaces between the studding being filled with loose brick. As the building was nearing completion, the mayor, marshal, and aldermen of the city, without giving notice to remove the building, tore it down, for which the owners brought suit in trespass. The defendants pleaded in justification the ordinance referred to. The trial court declined, on request, to charge the jury: "The court further instructs you that the plaintiffs had a right to show by evidence, if they can, the fact, if such appears to be a fact from the evidence, that the city has permitted similar buildings to be erected and constructed within the fire limits of Murphysboro as the one alleged to have been torn down by defendants, for the purpose of showing the construction the city and its officers themselves place upon said ordinances as to what buildings it prohibited." On this point the Appellate Court ruled as follows: "If the city officers had tacitly allowed that portion of the city included in the fire limits to be filled with frame buildings no better than tinder boxes, such fact would have thrown no light upon the true construction of the fire ordinance. When the ordinance was duly passed and published, it became a law of the city, and the city officers had no more right to disobey the law or suspend it, enlarge or construe it away, than any other person." See, also, Tuttle v. State, 4 Conn. 68, 70. It has been said: "Where a municipal corporation has power to prohibit the construction of wooden buildings within a district, and has enacted an ordinance to that effect, it may remove any building erected in violation of the ordinance; and this, too, without any judicial proceedings whatever." 13 Am. & Eng. Enc. L. (2d Ed.) 400, and notes. As to the general powers of this municipality, see Pol. Code 1895, § 696. In Stewart v. Commonwealth, 10 Watts, 306, it was said: "On an indictment charging the defendant with

erecting a wooden building within the city of Pittsburg, contrary to the ordinance, the jury found that he had erected a building composed partly of brick and partly of wood. Held, that such building was not within the ordinance." This decision, however, was made in a criminal case, where the rule of construction applicable to criminal laws applied. In the opinion Sergeant, J., said: "If this were a remedial law, it might be construed liberally, so as to effectuate the design of the Legislature, which was to guard against the danger of fires in a populous city; but, being a penal statute and this proceeding of a criminal cast, the rule of law is well settled that such statutes are to be construed strictly, and that no one is to be brought within the penalty of the act who is not within the plain meaning of the words strictly construed; and they are confined to wooden buildings only." The ordinance now under consideration only provides for punishment by fine and imprisonment if any person shall erect or attempt to erect "any wooden building in violation of this ordinance." A building of the character of that described in the evidence is not, strictly speaking, a wooden building, although, as held above, it is not constructed of incombustible material within the meaning of the ordinance. So far as the criminal proceeding is concerned, therefore, it is not sustainable under the ordinance. But it was not proper to grant an injunction to stop the prosecution, inasmuch as the plaintiff can assert all his rights by way of defense.

That part of the ordinance which provides for notifying the owner to remove the building, and on his failure or refusal to do so that the mayor shall cause its removal, is not confined to a wooden building strictly so called, but applies to "any building erected in violation of this ordinance." Under the law, we are of the opinion that the presiding judge erred in granting the injunction.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 304)

JOHN SILVEY & CO. v. TIFT.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. BANKRUPTCY—PREFERENTIAL PAYMENTS—RECOVERY—ACTION BY TRUSTEE.

Where creditors filed a petition to have a debtor adjudged an involuntary bankrupt, alleging several acts of bankruptcy, among them being that while insolvent he made a preference to a firm, named as creditors, within four months before the filing of the proceedings, and after adjudication in bankruptcy the trustee brought suit against such firm, alleging that they received a preference with reasonable ground for believing that it was such, the adjudication in bankruptcy duly made was conclusive of the status of the bankrupt as such, but did not estop the defendants from setting up by way of defense that some time prior to the proceedings in bankruptcy they sold to the bankrupt goods, relying on certain representations made by him, and that they discovered that such representations were untrue, and rescinded the sale on account of fraud and retook their goods.

2. SAME—RESCISSION OF SALE—RETURN OF GOODS.

Where such a defense was made, and the defendant sought to show that the purchaser returned to them after the sale and stated that he had made a material misrepresentation, and thereupon they rescinded the sale, in a suit by the trustee in bankruptcy afterwards appointed, against them, as preferred creditors who had taken with reasonable ground to believe that a preference was made, it was error to instruct the jury that they could consider the statement so made solely for the purpose of impeaching the bankrupt, who was a witness for the plaintiff.

3. SALE—FRAUD OF PURCHASER—RESCISSION OF SALE.

If one purchasing goods makes a false representation as to a material matter, and the owner relies on such statement in making the sale, upon discovering the fraud he may rescind and reclaim his property, or so much of it as is still in the hands of the purchaser, or he may elect to continue the contract. If he elects to rescind, he must give notice to the purchaser thereof, and of his determination to reclaim the goods sold; and, if he has received anything in payment, he must return it or tender it to the purchaser.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 890, 893, 900.]

4. SAME—REMEDIES OF SELLER.

If a vendor, in reliance upon material misrepresentations, has made a sale, and has rescinded it on discovery of the fraud, but all of the property sold is not in the possession of the purchaser, and some of it has been sold or disposed of by him so as to be beyond the reach of the vendor, the latter may reclaim all of the property which can be recovered. As to that which he cannot recover, he may have a right of action against the purchaser, not upon the contract of sale, but based on the theory of the conversion of the goods not found, or an action based upon the contract implied by law where a vendee has disposed of the goods for money and the seller has waived the tort. He cannot, however, proceed both under the contract of sale and against it.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 895.]

5. APPEAL—REVIEW—ERRORS OF LAW.

While in the present case there may have been sufficient evidence to authorize the verdict, it was not so clearly demanded that a new trial will not result from the errors of law.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by M. W. Tift, trustee in bankruptcy, against John Silvey & Co. Judgment for plaintiff, and defendants bring error. Reversed.

Tift, as trustee in bankruptcy of Griffin, brought suit against John Silvey & Co., alleging as follows: On March 15, 1902, Griffin, while insolvent, transferred and delivered to the defendants a portion of a certain stock of goods belonging to him. At the time of the transfer he was insolvent, and the defendants knew and had reasonable cause to believe that such was the case. The effect of the transfer was to enable them to obtain a greater percentage of their debt than the other creditors of the bankrupt of the same class received, and was a prefer-

ence in contemplation of the act of Congress of July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States." Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]. The defendants received this preference, and had reasonable cause to believe that it was intended to give them a preference in contemplation of the act of Congress. They took possession of the property, carried it away, and converted it. On April 29, 1902, certain creditors of Griffin filed a petition in bankruptcy in the District Court of the United States, alleging the commission of certain acts of bankruptcy by him, and praying that he be adjudicated a bankrupt. He was duly adjudicated a bankrupt, and the plaintiff was appointed trustee. In that capacity, and under leave of the court, he sues to recover of the defendants the value of the property so taken by them, which is alleged to be $1,400. The plaintiff alleged that the defendants were concluded and estopped from setting up in this suit "any defense in contradiction to the following facts." The petition then contains what appears to be a copy of a part of the petition in bankruptcy. A demurrer having been filed, the entire petition was set out by amendment, which showed that a number of creditors of Griffin filed a petition to have him adjudicated a bankrupt, alleging him to be insolvent. Three acts of bankruptcy were alleged: First, that, within four months next preceding the filing of the petition, Griffin, while insolvent, transferred a portion of his property, namely, a large part of his stock of goods, of the value of $500, to one Weslosky, doing business under the trading name of the Albany Grocery Company, a creditor, with intent to prefer him over his other creditors; second, that, while insolvent and within four months next preceding the filing of the petition, he transferred a portion of his property, namely, about $1,400 worth of hats, shoes, and dry goods, to John Silvey & Co., creditors of his, with intent to prefer them over his other creditors; third, that, while insolvent and within four months next preceding the date of the petition, he suffered and permitted one Turner, a creditor, to obtain a preference through legal proceedings, and did not within five days before the sale of the property vacate or discharge such preference, the levy being under a distress warrant for rent for $127, and being made upon a lot of hats, shoes, dry goods, etc., which were sold under the warrant, and the proceeds applied to the payment thereof. A subpœna issued to the alleged bankrupt on April 29, 1902, and on May 28th he was adjudicated a bankrupt. Later the trustee was regularly appointed. To that portion of the petition which set up an estoppel a demurrer was urged on the ground that some of the allegations were not properly pleaded, and did not set out facts constituting an estoppel, and merely alleged legal conclusions. The allegations demurred to were as follows: "Petitioner further represents that defendants to this case are concluded and estopped from setting up in this suit any defense in contradiction to the following facts." Also: "The allegations of said petition set out above being necessary allegations of said petition, the said John Silvey & Co. could then and there have pleaded, in defense to said petition, denial of the facts set out in the allegations of said petition transcribed above, and, having failed in said court to sustain any denial or contradiction of any of said facts and allegations, they are now concluded and estopped from contradicting and denying them, because of the judgment of the District Court of the United States of the Southern District of Georgia, made in said matter in favor of the petitioners in bankruptcy, declaring said Ernest H. Griffin bankrupt, said judgment being made and rendered duly and regularly by a court of competent jurisdiction." The court overruled the demurrer to the declaration as amended, and exceptions pendente lite were taken. The jury found for the plaintiff $468.68 principal, besides interest. Defendants moved for a new trial, which was overruled, and they excepted, and also assigned error on the overruling of the demurrer.

Candler & Thomson and W. D. Thomson, for plaintiff in error. A. G. Powel and Shepard Bryan, for defendants in error.

LUMPKIN, J. (after stating the facts). 1. The demurrer to the original declaration contained various grounds, but only one is now insisted on. We do not think it good pleading to allege that a defendant is estopped from setting up any defense in contradiction "to the following facts," and then to set out an entire proceeding in bankruptcy, containing various allegations, several grounds for the proceeding, the adjudication, and the appointment of the trustee, and to allege in sweeping terms that the allegations set out are necessary allegations, and that the defendants could have pleaded in defense of them, but failed to do so, and are estopped from contradicting or denying them. This leaves the court to ascertain what defense the pleader deems to be in conflict with "the following facts." Moreover, to copy a part of a proceeding in bankruptcy and to allege generally that it comprises necessary allegations is a conclusion. It appears from the order overruling the demurrer that this was done after amendment, from which we presume that it was renewed after the amendment had been made. The real question argued before us was whether the adjudication in bankruptcy was conclusive on the defendants to the effect that the goods sued for belonged to the bankrupt on

March 15, 1902, and were transferred by him to them with intent to prefer them as creditors over his other creditors; he being insolvent at the time. Their defense was that they had sold goods to Griffin upon certain representations made by him; that they ascertained that these representations were false, and the goods were therefore procured from them by fraud; and that they thereupon rescinded the sale and retook such of the goods as were on hand, not as a payment or preference to creditors, but as being a taking possession of their own goods. If the plaintiff's contention as to the effect of the adjudication is correct, the defendants would be practically precluded and estopped from defending at all, save possibly on the question of notice; and there would be little to do but take a verdict for the value of the goods. The allegations which he says are necessary, in the petition to have Griffin adjudicated a bankrupt, include not only his insolvency, but also a statement of a transfer by him of a portion of his property to the defendants, the value of the goods so transferred, and that this was a preference. The presiding judge overruled the demurrer.

An adjudication in bankruptcy is in the nature of a proceeding in rem, and the adjudication is in the nature of a decree in rem, so far as it fixes the status of the defendant in the proceeding as a bankrupt. Considered in the light of a proceeding in rem, the res involved is the status of the debtor, and the adjudication determines such status to be that of a bankrupt. All persons are bound by the adjudication to that effect; and this was true under the act of 1867 as well as under the act of 1898. If the court rendering the judgment had jurisdiction, such judgment could not be attacked collaterally, but only by a direct proceeding in a competent court, unless it appeared that the decree was void in form, or that due notice was not given. Lamp Chimney Co. v. Brass & Copper Co., 91 U. S. 656, 23 L. Ed. 336; Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; Shawhan v. Wherritt, 7 How. 627, 12 L. Ed. 847 (under the act of 1841); Hanover Nat. Bank v. Moyses, 186 U. S. 181, 192, 22 Sup. Ct. 857, 46 L. Ed. 1113. Where a proceeding in rem is against a particular piece of property, as a vessel, for charges against it, it is generally taken into possession, and the property itself is treated as the defendant, liable for its own debts or defaults; and, after seizure, subsequent proceedings are had by citation to the world, of which the owner is at liberty to avail himself by appearing in the case. In the present case, however, there was no such proceeding in rem against the goods. The proceeding was to determine the status of Griffin as a bankrupt, and it neither was nor could have been commenced by a seizure of the property claimed by the defendants. Mankin v. Chandler, 2 Brock. 125, Fed. Cas. No. 9,030; The Sabine, 101 U. S. 388, 25 L. Ed. 982; Freeman v. Alderson, 119 U. S. 187, 7 Sup. Ct. 165, 30 L. Ed. 372. To illustrate further, proceedings to appoint an administrator are also in the nature of proceedings in rem, and, where the court has jurisdiction, are not subject to collateral attack. But it will not be contended that if a person applies for administration, and sets out in his petition that the entire estate of the decedent consists of a certain house and lot, the judgment appointing him would establish the title of the estate to the property, if in fact it belonged to another than the decedent. The judgment would establish the status of the applicant as an administrator, and that he was duly appointed, but would not determine the title to the property.

There are two kinds of actions which are commonly spoken of as proceedings in rem. The first is a proceeding against the property without suit against its owner, treating the property as if it were the defendant, but with monition or notice giving any person claiming to be the owner an opportunity to appear. In this class of actions, which are strictly in rem, the judgment is against the property alone. The other class of proceedings in rem are proceedings to determine the status of some person or subject-matter. Such are judgments of outlawry, appointments of guardians, administrators, etc., where the proceeding is to determine status, not title to property. The res which makes it a proceeding in rem is the status, and the determination of status is not a conclusive judgment against third parties as to title. Sometimes a judgment in rem has been defined generally to be an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Stroupper v. McCauley, 45 Ga. 74, 78; Childs v. Hayman, 72 Ga. 791, 796, 797; Woodruff v. Taylor, 20 Vt. 65. In the act of 1898 it is provided that "the bankrupt, or any creditor, may appear and plead to the petition within 10 days after the return day, or within such further time as the court may allow." Act July 1, 1898, c. 541, § 18b, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], 1 Fed. St. Ann. p. 583. The bankrupt and his creditors are those given an opportunity to appear and defend against the adjudication in bankruptcy. The defendants in the present case, however, do not claim to be creditors, or defend as such, but contend that they were defrauded out of certain goods, and upon discovering the fraud rescinded the trade and resumed possession of their own goods. To compel them to admit that they were creditors and received the goods as such would require them to waive their defense before they could make it. In some of the decisions creditors are spoken of as being privies of the bankrupt. Often, however, they claim

against the debtor rather than as privies. To hold that creditors could, by the petition in bankruptcy and the adjudication, conclusively subject the property of third parties, and make it a part of the estate of the bankrupt, if in fact it was not so, would be to go far beyond the determination of his status. To put an extreme case, suppose that creditors should seek to have their debtor declared a bankrupt, and in their petition should allege that he had conveyed a house and lot to a named person, as one among other grounds of the proceeding, when in fact the debtor had never owned the house and lot, and had never transferred it to the person named at any time. Clearly, an adjudication that the debtor was bankrupt would not invest him or his trustee with title to the property, or operate to take away the title of the real owner, who had never been sued or summoned into court, and who, perhaps, never heard of the proceedings. In such a case, to hold that the adjudication of bankruptcy against the debtor would take away the property of a third person and add it to his estate would approximate more nearly confiscation than adjudication. Suppose one should steal the property of another, and upon its discovery the real owner should resume possession; if later creditors of the thief should file a petition in bankruptcy against him, alleging that he had given a preference to the owner, surely an adjudication that the thief was a bankrupt would not vest the stolen property in him or the trustee. The object of the proceeding is to have the debtor adjudged to be a bankrupt, not to recover property from third parties. They cannot deny that he is a bankrupt, but they can deny that he owns their property. To adjudge A.'s status is not to adjudge B.'s property.

In the case of Traders' Ins. Co. v. Mann, 118 Ga. 381, 382, 45 S. E. 426, where a policy of insurance had been transferred by a debtor to creditors, and the debtor was afterwards adjudicated a bankrupt, it was held "that the adjudication in bankruptcy was based on the fact of such preference having been made did not of itself authorize the trustee to ignore the assignment; but it would have been necessary to have the same set aside, or secure a reassignment in writing, before he could sue on the policy in his own name." In the opinion Mr. Justice Lamar said: "The adjudication in bankruptcy was not binding on them [the creditors who received the policy]. As a judgment in rem it conclusively fixed the status of Screws as a bankrupt, but Everett, Ridley, Ragan & Co. had still a right to be heard on the validity of the transfer. They might have been able to show that it was not made within four months before the filing of the petition in bankruptcy, or that they had acted in good faith, without notice of insolvency, and purchased the policy for full value."

In Lewis v. Sloan, 68 N. C. 557, it was held: "The jurisdiction of a bankrupt court being conceded, its adjudication of bankruptcy is a judgment in rem fixing the status of the bankrupt, which upon that point is binding upon all the world, and can only be impeached for fraud in obtaining it. * * * Every court, however, in which a controversy as to the title to the property alleged to have been fraudulently conveyed may arise, has jurisdiction to inquire whether the conveyance was in fact and in law fraudulent; i. e., whether the conditions prescribed by the act to make it fraudulent existed." In the opinion it was said: "Although the adjudication of bankruptcy is a judgment in rem, and as such conclusive on all the world, and although in arriving at the judgment the bankrupt court declares the conveyance alleged as the act of bankruptcy to be a preference among creditors, and therefore fraudulent within the meaning of the act, yet such declaration is no part of the judgment, but is merely incidental to it, and, so far from being conclusive on strangers that the conveyance was fraudulent, is not even evidence against them for that purpose. It is merely 'res inter alios acta quæ nemine nocere debet.' No one not a party to the record is affected by it, except so far as it is in rem. [Duchess of Kingston's Case, 2 Smith's L. C. 438–447]; Barrs v. Jackson, 1 You. & Coll. 585, s. c. 1 Phil. 582. Of the American cases, see King v. Chase, 15 N. H. 9, 41 Am. Dec. 675. In addition to what is said in those cases, there is no reason why the effect of a judgment in rem should be more closely confined to the precise point adjudged, viz., that, so far as it is in rem and fixes the status of the person or property affected, it binds all the world, whereas a judgment in personam binds only parties and privies who have once had an opportunity of contesting it."

In Neustadter v. Chicago Dry Goods Co., 96 Fed. 830, it was held by Judge Hanford, of the United States District Court, that "where the issues arising upon a petition in involuntary bankruptcy were decided adversely to the petitioners, and an order made dismissing the proceedings, no notice of the proposed dismissal being given to the other creditors," certain of such other creditors could not have the case reinstated, but were not debarred from bringing a new and independent petition in bankruptcy against the debtor.

In Re Ulfelder Clothing Co. (D. C.) 98 Fed. 409, where in a petition for involuntary bankruptcy the debtor and one of his creditors answered the petition, putting in issue the allegation of insolvency, and also denying that the petitioner was a creditor, and on a trial the allegations of the petition were found to be true, and an adjudication in bankruptcy was made, it was held to be conclusive evidence of the validity of the petitioner's claim when it was presented

for an allowance as a claim against the bankrupt's estate, and that it could not be disputed either by the bankrupt or a creditor who joined in the proceedings and opposed the adjudication. But, the petitioning creditor having put in evidence certain promissory notes made by the debtor to third parties for the purpose of proving insolvency, and the debtor having contested their validity and consideration, and upon the hearing, with evidence on both sides, the court having found the allegations of the petition to be true and made an adjudication of bankruptcy, it was held that, as such notes were not directly in issue, but only collaterally brought in question, and as the holders thereof were not parties to the proceeding, the adjudication in bankruptcy was not conclusive of their validity, and would not preclude the bankrupt from opposing their allowance as claims against his estate. In the course of the opinion De Haven, District Judge, said: "If the court, upon the evidence then before it, had found against their validity [that is, the validity of the notes of the other creditors], and for that reason had adjudged that the corporation was not insolvent, and dismissed the proceeding, such finding and judgment would not have constituted a bar to a subsequent action by Henry Ulfelder and A. Levy [holders of the notes] against the bankrupt to recover upon the same claims. They would not have been estopped by such a judgment, because, not being parties, the question of the validity of their present claims was not, and could not have been, litigated by them in the insolvency proceeding. In the case of In re Schick, 2 Ben. 5, Fed. Cas. No. 12,455, the defendant was adjudged a bankrupt upon the ground that a certain judgment confessed by him in favor of one Cowen was an act of bankruptcy, and in the course of the opinion it was said by Blatchford, J.: 'This proceeding, however, is, so far, one merely between the petitioning creditor and the debtor. Cowen is no party to it, although examined as a witness for the creditor; and in the further progress of the matter, if the assignee of the debtor to be appointed should institute proceedings to realize, for the benefit of the debtor's estate in bankruptcy, the property levied on by the sheriff under the execution, Cowen will have a full opportunity to assert his rights, and maintain, if he can, the integrity of the judgment, and there is nothing in this adjudication to preclude him from doing so.' And in the case of In re Drummond, 1 N. B. R. 231, Fed. Cas. No. 4,093, McDonald, J., in adjudging the defendant bankrupt because of his act in preferring certain creditors, said: 'It is proper, also, to say that I give no opinion touching the liability of any of the preferred creditors in case of a suit against them by the assignee in bankruptcy who may be appointed in the case. And, indeed, as the preferred creditors are not parties to this proceeding, it would be unjust that the present decision should in any manner affect their interest, except so far as it fixes the status of Drummond as a bankrupt.' See, also, In re Dibble, 3 Ben. 283, Fed. Cas. No. 3,884."

In Magnus v. Ketcham, 112 Fed. 752, 50 C. C. A. 517, it is stated broadly in the syllabus that "an adjudication of involuntary bankruptcy, duly entered on default for want of an answer to the petition, is as binding on the bankrupt and creditors as one entered upon a hearing, and is conclusive of the commission of the acts of bankruptcy charged in the petition." A careful examination of the entire case will show that the real question was whether the adjudication was binding on the question of the insolvency of the bankrupt, and that the creditor who was held to be concluded was a judgment creditor who had obtained the judgment by confession; that in connection with the proceedings in bankruptcy an injunction was prayed for and issued, restraining a sale under the execution; that the creditor appeared and moved to dissolve the injunction, and by agreement a modification was made in the order, and he had ample opportunity to contest the point in issue.

A slight consideration of the difference between the issues involved in a proceeding in bankruptcy and a suit to recover property from a person holding it adversely and claiming to be the owner will show that the two proceedings are not identical, and that the former is not conclusive of the latter, except as to determining the status of the bankrupt as such. The issue in the former proceeding is whether the debtor is or is not a bankrupt within the meaning of the act of Congress. Where it is sought to recover property from one alleged to be a creditor who has received a preference, the proceeding rests upon section 60b of the bankrupt act, which reads as follows: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. The various requisites to a recovery under this section of the act are quite different from the mere determination upon the proceedings in bankruptcy that the debtor is a bankrupt.

This position may be further illustrated by considering a voluntary proceeding in bankruptcy. While differing from a proceeding in invitum, the adjudication there as to the status of the bankrupt would also be, to some extent, in the nature of a judgment in rem, so as to show that he was

a bankrupt, but certainly it would not be pretended that a person voluntarily going into bankruptcy could possess himself of property which did not belong to him, or have the title to property claimed by third parties adjudicated to be his, no matter what allegation he might make in his petition or schedule. The adjudication in bankruptcy, therefore, conclusively determined the status of Griffin as a bankrupt, but did not conclude the defendants from making their defense on a suit by the trustee in bankruptcy against them to recover the property.

In the answer of the defendants no reference is made to other property, except that which they claim to have been obtained from them by fraud, and to have been recovered. It appears from the evidence that they received other property also. The question whether in fact there was a rescission for fraud, or whether there was a preference, in view of the entire evidence, was for the jury. The ground of demurrer insisted on should have been sustained. The adjudication in bankruptcy could be pleaded, but the effort to estop the defendants from pleading rescission for fraud cannot succeed. True, the court charged that the adjudication in bankruptcy did not conclude the defendants, except as to the insolvency and proper adjudication of bankruptcy; but the other ruling remained unreversed.

2. Evidence was introduced to show that Griffin made a certain statement to the defendants as a basis of credit, that they extended credit to him, and that subsequently he informed them that such statement was not true in fact and that it did not correctly give the amount of his indebtedness; and they insist that thereupon they rescinded the sale for fraud and retook their goods. The court charged as follows: "Certain evidence, gentlemen, has been permitted to go to you as to the alleged statements made by Griffin. Any statement made by Griffin, if he made statements, would not be binding upon this plaintiff in this suit as admissions, and such evidence as has been allowed to go to you with reference to the alleged statements of Griffin was successfully impeached or not, and should not be considered by you as an admission of Griffin's, binding upon the plaintiff in this case." One question in the case was whether, if there was a preference, those receiving it had reasonable cause to believe that a preference was intended. On this branch of the case the statements of Griffin to them were admissible and proper for consideration. They were not, of course, binding or conclusive on the plaintiff, but as bearing on the question of knowledge by the defendants they could be considered; and it restricted the use of this evidence too much to confine it solely to the matter of impeaching Griffin as a witness. Civ. Code 1895, § 5176, declares that "when, in a legal investigation, information, conversations, letters and replies, and similar evidence, are facts to explain conduct and ascertain motives, they are admitted in evidence, not as hearsay, but as original evidence." And section 5179 says: "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible as part of the res gestæ." See, also, McLean v. Clark, 47 Ga. 24; Cook v. Pinkerton, 81 Ga. 89, 7 S. E. 171, 12 Am. St. Rep. 297; Cohen v. Parish, 105 Ga. 339, 31 S. E. 205; 3 Wigmore on Evidence, § 1777.

3. If one purchasing goods makes a false representation as to a material matter, and the owner of the goods relies on such statement and sells, upon discovering the fraud the owner may rescind and reclaim his property, or so much of it as is still in the possession of the purchaser. In order to rescind, it is not necessary that the purchaser should consent to a rescission, or to make a new contract with the vendor for that purpose. The vendor, upon discovering the fraud, may elect to rescind or to continue the contract. If he elects to rescind, he must give notice to the purchaser of such election and of his determination to reclaim the goods sold; and if he has received anything in payment, he must return it or tender it to the purchaser. If, however, the transaction, which is claimed on the one hand to have been a rescission and on the other to have been a preference, was accomplished by consent or agreement between the vendor and the purchaser, it is not error for the trial court to submit that fact to the jury to aid them in determining what was the real nature of the transaction. Upon the right of a vendor to rescind upon discovering that he has acted on a false representation in making a sale, see Clayton v. O'Conner, 29 Ga. 687; Woodruff v. Saul, 70 Ga. 271; E. T., V. & Ga. Ry. Co. v. Hayes, 83 Ga. 558, 10 S. E. 350; Newman v. Claflin Co., 107 Ga. 89, 32 S. E. 943; Mashburn v. Dannenberg Co., 117 Ga. 567, 44 S. E. 97; 1 Benj. Sales (6th Am. Ed.) § 661; 24 Am. & Eng. Enc. Law (2d Ed.) 643; 1 Bigelow on Fraud, 76.

4. If a vendor in reliance upon material misrepresentations has made a sale, and has rescinded it on discovery of the fraud, but all of the property sold is not in the possession of the purchaser, and some of it has been sold or disposed of by him so as to be beyond the reach of the vendor, the latter may reclaim all the property which can be recovered. As to that which he cannot recover, he may have a right of action against the purchaser, not upon the contract, but based on the theory of the conversion of the goods not found, or an action based upon the contract implied by law where a vendee has disposed of the goods for money and the seller has waived the tort. 2 Mechem, Sales, § 909, and citations; Hersey

v. Benedict, 15 Hun, 282; Sleeper v. Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377; Cragg v. Arendale, 113 Ga. 181, 38 S. E. 399; Southern Ry. Co. v. Born Steel Range Co., 122 Ga. 658, 50 S. E. 489. He cannot, however, proceed both under the contract of sale and against it. He cannot take back such of the goods as remain on hand as part payment of the indebtedness arising from the contract of sale, and retain a claim or seek payment for the balance of the purchase price. These two positions would be inconsistent.

5. It is insisted by the defendant in error that the evidence demanded the verdict, and that there should be an affirmance, independently of the consideration of any alleged errors on the part of the court. There was undoubtedly ample evidence to have sustained a finding in favor of the plaintiff, but we are not prepared to hold that it so plainly required a verdict for him that an affirmance must necessarily result. The plaintiff contended that there was not in fact a legal rescission, but that Griffin, being insolvent and about to fail, came to Atlanta and conferred with the defendants for the purpose of giving them a preference; that the matter of rescission, now sought to be set up, was not the real transaction between the parties; that the admission of having made a misstatement was merely colorable; that the defendants took, not only their own goods, but other goods of Griffin; and that they did not merely seek to reclaim goods on the ground of an alleged fraud, but to get paid for the contract price, crediting the goods received thereon—both those bought from them and others. The defendants claim that there was a bona fide rescission, and not a preference; that, if any goods were received by them in connection with the rescission which were not included in their sale to Griffin, it was a mere accident, and not intentional; and that the receipt of other goods later was a separate and distinct transaction for the purpose of partly compensating them for such of their goods as could not be reclaimed. Of course, any receipt of additional goods in payment would not stand on the basis of a rescission. While the jury might have found a verdict in favor of the plaintiff, we could not hold that it was so clearly demanded as to require an affirmance.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 731)

ARNOLD v. FARMERS' EXCH.

(Supreme Court of Georgia. Aug. 3, 1905.)

MATERIALMAN'S LIEN—FORECLOSURE—COMPLAINT.

In a proceeding to foreclose a materialman's lien for material furnished a contractor in the improvement of real estate, it is not necessary to allege that the contractor had completed his contract with the owner of the premises, or that such owner had not paid the contractor for the improvements made, upon his sworn statement that he had paid for the materials used. This remedy is statutory, and in its enforcement all the plaintiff need allege is compliance with the statute and that he comes under its protection.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 504.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Farmers' Exchange against M. W. Arnold and B. A. Harris. Demurrer to the petition overruled, and defendant Arnold brings error. Affirmed.

The Farmers' Exchange brought an action against Mrs. M. W. Arnold and B. A. Harris, alleging that Harris was a contractor and had made certain improvements on real estate belonging to Mrs. Arnold; that the plaintiff was a materialman and furnished materials which were used by the contractor in the improvement of the property of Mrs. Arnold; that, within three months from the furnishing of the materials so used, the plaintiff recorded its lien as provided by law; that the contract price for the improvements made by the contractor was in excess of the amount for which the lien was asserted; and that the plaintiff had complied with its contract as to furnishing the materials ordered and used by the contractor in making the improvements upon the property. Suit was commenced within 12 months after the furnishing of these materials. The premises upon which the improvements were made were fully described in the petition, and the plaintiff prayed that its lien be enforced against the property of Mrs. Arnold and that a general judgment against Harris should be rendered in its favor. Mrs. Arnold demurred to the petition on the ground that no cause of action was therein set forth, in that the plaintiff did not allege that the contractor had completed and complied with his contract, nor that the owner of the premises had not paid him the contract price of the improvements made upon his sworn statement that he had paid for the materials used the agreed price therefor or an amount equal to the reasonable value of the same. The demurrer was overruled, and Mrs. Arnold excepted.

J. F. Golightly, for plaintiff in error. Walter McElreath, for defendant in error.

EVANS, J. (after stating the facts). This is a proceeding by a materialman to enforce a statutory lien for materials furnished to and used by a contractor in the improvement of certain real estate belonging to Mrs. Arnold. A materialman who furnishes material for the building, repairing, or improving of real estate is entitled to a lien thereon, as against the owner, when the material is furnished to and used by a contractor in making improvements on the premises, unless the owner shall show that the lien has been waived in writing, or produce the sworn state-

ment of the contractor that the agreed price or reasonable value of the material so furnished has been paid, "provided that in no event shall the aggregate amount of liens set up * * * exceed the contract price of the improvements made." Civ. Code 1895, § 2801; Acts 1899, p. 33; Van Epps' Code, § 6176. The claim of lien must be recorded in the office of the clerk of the superior court of the county wherein the property is situated, within three months after the material is furnished. Civ. Code 1895, § 2804 (2). The materialman's lien must be enforced by an action brought within 12 months from the time his demand against the contractor becomes due. Id. § 2804 (3). And the materialman must allege a substantial compliance with his contract in furnishing the material, that he has duly recorded his claim of lien, and that the contract price or reasonable value of the materials furnished the contractor and for which he asserts a lien comes, in whole or in part, within the contract price agreed on between the contractor and the owner of the property improved. Stevens v. Ga. Land Co., 122 Ga. 317, 50 S. E. 100. The materialman derives his lien from the statute, and in its enforcement he is not required to allege anything more than that his claim comes within the provisions of the statute and that he has complied with its terms in asserting his lien. The petition filed in the present case contained all the necessary averments. It was not essential that the plaintiff should negative the defenses which the statute permits to be interposed by the owner of the premises improved. The act of 1899 puts the burden on the owner to show that the lien has been waived in writing, or that the contractor produced a sworn statement that the agreed price or reasonable value of the materials furnished him had been paid.

One of the points raised by the demurrer is that the plaintiff's petition did not affirmatively allege a completion of the contract by the contractor. The statute does not require this to be alleged, and in the prosecution of his statutory remedy it is not incumbent on the materialman to allege anything more than the statute declares shall constitute a prima facie right to assert and enforce his claim of lien. It may be that the owner of the premises can urge, as a defense, not only that the lien has been waived in writing, or that the contractor was settled with upon a sworn statement that all materials and labor had been paid for, but that nothing is due to the contractor under the contract, because it was voluntarily abandoned by him before its completion. Rowell v. Harris, 121 Ga. 239, 48 S. E. 948. We are content to rest our decision in this case upon the principle that, in the prosecution of a statutory remedy, all the plaintiff need allege is enough to show that he has complied with al' of its essential requirements, and has at least a prima facie right to avail himself of that remedy. The demurrer was, in our opinion, rightly overruled.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 879)

JORDAN v. BOSWORTH.

(Supreme Court of Georgia. Aug. 5, 1905.)

LIMITATIONS—BEGINNING OF ACTION—WHAT CONSTITUTES.

Handing to the clerk a petition, with instructions to indorse upon it an entry of filing and to issue process, but "to hold it" until the plaintiff notifies him further, is not a filing of a suit or the commencement of an action, within the meaning of Civ. Code 1895, § 4973, until the instructions are withdrawn; and, if the bar of the statute of limitations attaches before the instructions are withdrawn, the suit is barred, notwithstanding service was regularly perfected after the withdrawal of the instructions.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 529, 530.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by R. J. Jordan against J. M. Bosworth. Judgment for defendant, and plaintiff brings error. Affirmed.

Suit was brought upon a promissory note under seal, dated November 10, 1882, and due one day after date. The defendant pleaded the statute of limitations. The facts upon which this plea rested were as follows: On November 10, 1902, the plaintiff went to the office of the clerk of the city court, handed him the original petition, and asked him to file it, and issue process, but to hold it in his office until the plaintiff further notified him. The clerk entered upon the petition, "Filed in office this the 10th day of November, 1902," and affixed his signature as clerk, and also issued process at the same time. On November 17, 1902, the plaintiff called at the clerk's office and instructed him "to go ahead with the suit," and then the clerk had prepared a copy and turned the copy and the original over to the sheriff for service, and service was perfected a few days thereafter. The case was not entered upon the docket until November 17th. The court overruled a demurrer to the portions of the defendant's answer which set up the above facts, directed a verdict in favor of the defendant, and overruled the plaintiff's motion for a new trial. The exceptions to these several rulings all raise simply the question whether the court was right in holding that under the facts above stated the suit was barred.

Dorsey, Brewster & Howell, for plaintiff in error. C. B. Reynolds and Du Bignon & Alston, for defendant in error.

COBB, J. The Code provides that actions upon instruments under seal "shall be brought" within 20 years after the right of action accrues. Civ. Code, 1895, § 3765.

There is no substantial difference between bringing a suit and commencing a suit; and the section may be read as if it had said suit shall be commenced within 20 years. Civ. Code 1895, § 4973, provides: "Upon every petition the clerk shall indorse the date of its filing in office, which shall be considered the time of the commencement of the suit." Obviously the proper construction of this section is, not that the indorsement of the date of filing by the clerk, but the actual date of filing, is to be deemed the time of the commencement of the suit; and there is a very substantial difference between the two things. The clerk may write an entry of filing on a petition, and yet not actually file it in his office. The entry of the clerk is evidence of filing, but not necessary or conclusive evidence of that fact. "A paper is said to be filed, when it is delivered to the proper officer, and by him received, to be kept on file." Peterson v. Taylor, 15 Ga. 483, 60 Am. Dec. 705, quoting from 13 Vin. Abr. 211. See, also, Floyd v. Chess-Carley Co., 76 Ga. 752 (1); Laslie v. Laslie, 94 Ga. 721, 19 S. E. 805 (c); Adams v. Goodwin, 99 Ga. 138, 25 S. E. 24. Nor will notice to the opposing party that a particular pleading will be relied on at the trial dispense with an actual filing of the paper in the clerk's office. McDougall v. Banks, 13 Ga. 451. Even the actual filing of the petition will not be regarded as the commencement of the suit, unless followed up by proper service. McClendon v. Phosphate Co., 100 Ga. 219, 28 S. E. 152; Florida Central R. Co. v. Ragan, 104 Ga. 356, 30 S. E. 745; Nicholas v. Assurance Co., 109 Ga. 621, 34 S. E. 1004. "If there is no service, the plaintiff cannot remain inactive, and, after having been guilty of laches, ultimately move in the cause, and then claim that a suit allowed to remain passive is to be treated as having been commenced as of the time of the filing of the petition." Cox v. Strickland, 120 Ga. 114, 47 S. E. 912. In the present case, however, process was issued, and service was perfected; and the question for determination is, on what date was the petition filed in the clerk's office?

The law contemplates that when a pleading is filed in the clerk's office, it becomes an office paper of the court in which it is filed, and the party filing it loses control over it in so far as the regular procedure usually pursued in such a case is concerned. A paper filed in the clerk's office must be allowed to follow, without interference from the parties, the usual course of legal procedure, and a party who interferes does so at his peril. If he prevents that being done which is usual and proper, he cannot thereafter claim a benefit which would only accrue if regularity had been observed. A plaintiff cannot hand a petition to the clerk, with instructions to make an entry of filing on it, and then withhold it from service until further instructions, and afterwards contend that the petition was actually filed when the entry of filing was made. By such conduct he ties the hands of the clerk, makes him merely his agent, deprives him of all official relation to him and the transaction, and official relations do not arise until he removes the bonds. A petition, to be filed, must be lodged with the clerk, with the understanding that the usual procedure is to be followed; that is, process issued and service perfected. The defendant has no legal notice of the suit until served with a copy of the petition and process, and, to make such notice relate back to the time of the commencement of the action, the plaintiff must really commence his action, without any reservation as to the time when service shall be perfected. The filing of the petition must be unequivocal and bona fide, and it must not be lodged with the clerk, to be held by him until the plaintiff determines whether he really intends to sue or not. A suit, with the right reserved in the plaintiff to say whether it shall really become a suit, is a legal paradox, and one for which we are satisfied there is no authority of law. In Maddox v. Humphries, 30 Tex. 494, it was held: "Where the plaintiff filed a petition with the clerk, and indorsed it, 'The clerk will not issue upon this until further instructions by me,' the suit was not properly commenced until the order was given for the citation; and such a deposit or filing with the clerk did not arrest the running of the statute of limitations." See, also, Seaver v. Lincoln, 21 Pick. 267; Ross v. Luther, 4 Cow. 158, 15 Am. Dec. 341; Bates v. Smith (Tex. Sup.) 16 S. W. 47; 1 Cyc. 748. While the cases above cited were dealing with statutes not in all respects like ours, and hence are not exactly in point, still they are nevertheless authority for what is a filing, and so are in principle in point. There was no error in any of the rulings complained of.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 714)

ATLANTA NEWS PUB. CO. v. MEDLOCK (three cases).

(Supreme Court of Georgia. Aug. 8, 1905.)

1. LIBEL—WHAT CONSTITUTES—CHARGE OF PERJURY.

A writing containing a statement that a person had been "bribed" to testify as a witness against one party and in the interest of his adversary imputes to such person the crime of perjury, and is libelous.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 54–60.]

2. SAME—PRIVILEGED COMMUNICATIONS.

The privileged communications, recognized in the law of slander and libel as freeing the speaker or writer from liability, are of two classes—the one where the privilege is absolute, and the other where the privilege is conditional.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander § 113.]

3. SAME—ABSOLUTE PRIVILEGE.
"The characteristic feature of absolute, as distinguished from conditional, privilege, is that in the former the question of malice is not open. All inquiry into good faith is closed."

4. SAME—CONDITIONAL PRIVILEGE.
In every case of conditional privilege, if the privilege is used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted, the party defamed has a right of action.

5. SAME—COMMENTS OF ATTORNEY.
An attorney at law has a conditional privilege to make, during the progress of a trial, such fair comments on the circumstances of the case and the conduct of the parties in connection therewith as in his judgment seems proper.
[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 117, 122.]

6. SAME—NEWSPAPER PUBLISHER.
Ordinarily the publisher of a newspaper has no privilege as to what appears therein, but is liable for the same as any other person.
[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 148.]

7. SAME—REPORT OF JUDICIAL PROCEEDINGS.
The publisher of a newspaper is, however, authorized to publish a fair and honest report of the proceedings of a judicial trial, and is not liable on account of such publication, in the absence of express malice; and this is true, although what appears in such report as a part of the comments of counsel would have been slanderous if uttered under other circumstances by the attorney.
[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 127, 148.]

8. SAME—ALLEGED REMARKS OF COUNSEL.
Where a publication is made in a newspaper of the proceedings of a judicial trial, in which appears what purports to be the remarks of counsel made during the progress of the case, which are slanderous in their nature, and such remarks were not in fact made by the counsel, the publisher is liable in an action of libel to the party aggrieved.
[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 127, 148.]

9. SAME—PLEADING—PETITION.
There was no error in overruling the general demurrer to the petitions.

10. SAME—DEMURRER.
Those portions of the petitions which were made the subject of special demurrers were allegations which were permissible as matter of inducement or aggravation, or by way of innuendo, and therefore were properly embraced within the pleadings, and were not subject to the objections taken in the demurrers.
(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by C. E. Medlock, by her next friend, by M. O. Medlock, by her next friend, and by W. W. Medlock, by his next friend, against the Atlanta News Publishing Company. Demurrers to the declaration were overruled, and defendant brings error. Affirmed.

Three Medlocks, aged, respectively, 13, 14, and 15 years, brought their separate suits for libel against the Atlanta News Publishing Company, a corporation. The petitions in the three cases were substantially the same, and were in substance as follows: The defendant publishes a newspaper known as the "Atlanta News," which claims a circulation of nearly 25,000. On August 23, 1902, Mrs. Moxley, an aunt of the plaintiffs, brought suit against the Georgia Railway & Electric Company, seeking to recover damages for two injuries which she claimed to have received while a passenger upon a car of that company—one on July 11, 1902, and the other on July 15th. The plaintiffs were present when Mrs. Moxley was hurt on the latter occasion, and were subpœnaed as witnesses by the railway company, and testified in the case, honestly and fairly relating what happened on the occasion in question. After they had testified, and before the case was concluded, on January 22, 1904, the defendant published in its newspaper the following article:

"Bribery is Charged to Railway Company.

"Prominent Attorney in Speech Says Witnesses are Bribed.

"A sensational charge of bribery was laid against the Georgia Railway and Electric Company by Colonel W. P. Andrews in the Second division of the City Court this morning. The case of Mrs. Louise E. Moxley against the railway company for $12,000, for alleged personal injuries, was on trial, when Colonel Andrews, Mrs. Moxley's attorney, made several sensational statements in his speech to the jury. Mrs. Moxley claims to have been injured some months ago while in the act of alighting from the car. She claims that it has effected her nervous system greatly, as well as her physical condition. She is unable to walk and is rolled about in a chair.

"The Georgia Railway and Electric Company brought three children into court to testify that Mrs. Moxley had suffered all her life from the troubles alleged to have been received from the injury; and Colonel Andrews stated that they had paid these children $2 each to come into court as witnesses.

"The Georgia Railway and Electric Company put two dollars into the palm of these little children and dragged them here into court after having Mr. Simmons talk with them for an hour, and knowing full well what they were going to say before they came here, said the attorney. Colonel Andrews stated that the defendant company had gone to see three little children, Carrie Medlock, 13 years old, Mary Medlock, 16 years old, and Wood Medlock, 15 years old, the nieces and nephew of the plaintiff, and bribed them to testify against her and in the interests of the company. Some allusion to this alleged bribery was made in the argument yesterday, and Attorney Ben Conyers for the railway company admitted that they had paid the witnesses two dollars each.

"Colonel Andrews says: 'When they pay them this money they expect value received, and the value received in this case is bought

testimony. They make these little children as corrupt as the fountains of hell.'

"The attorneys for the railway company did not reply to these charges in the court-room."

It is alleged that the article is a false and malicious defamation in writing, tending to expose the plaintiffs to public hatred, contempt, and ridicule; that the charges and intimations there set forth were made maliciously; that the attorney for Mrs. Moxley was president of the defendant company, was present during the entire trial, and well knew that no such charges or accusations as set out in said article had been made against the plaintiffs; that the effect of the article was to create the impression upon the minds of the readers that the plaintiffs had been bribed by the railway company to testify falsely, and that they had for a money consideration so testified; that the article in effect charges that the plaintiffs had made a corrupt bargain to testify falsely and had carried the same into effect; that the plaintiffs are the witnesses referred to in the article, and the defendant, by its publication, did declare to the public that its president, the attorney for Mrs. Moxley, had in open court charged that the plaintiffs had given "bought testimony," and that the railway company had made them "as corrupt as the fountains of hell"; that the publication was false and malicious, that no such charges were in fact made by the attorney, and the defendant, through its president, who was such attorney, well knew this fact, and the motive of the article was to defame the plaintiffs and expose them to public hatred, ridicule, and contempt. The defendant filed a demurrer in each case, containing numerous grounds, among others, that the petition does not set forth a cause of action; the words alleged are not libelous per se; if they can be so construed, they show upon their face that some one other than the plaintiffs was libeled; they do not purport to be a statement or declaration of the defendant, but merely of an attorney in an argument before the jury in a case in court, and are consequently not libelous; they are nothing more than the comments of counsel in the discharge of his duty as such, and are therefore absolutely privileged, both as to the attorney who made them and the defendant who printed them. The demurrer also contains numerous objections to stated paragraphs of the petition, which are not necessary to be here referred to. The court overruled the demurrers, and the defendant excepted.

Andrews & Skeen and Dorsey, Brewster & Howell, for plaintiff in error. Jno. L. Hopkins & Sons, Walter T. Colquitt, and Rosser & Brandon, for defendants in error.

COBB, J. Viewed in any light, the writing was libelous. It was none the less a libel upon the plaintiffs because it was a libel upon the railway company. The defendant in effect charged that the railway company had corruptly influenced the plaintiffs to give false testimony, and that they had yielded to this influence. To the mind of any reader, of even less than average intelligence, the writing contained a charge that the plaintiffs had been guilty of perjury, and perjury of the most vicious character; that is, perjury brought about by the acceptance of money. The writing must be taken in that light in which it would appear to the ordinary reader of a public gazette. It does not contain all of the technical niceties of a common-law indictment, nor does it contain all that would be necessary in an accusation under the modern liberal rules in criminal pleading; but the reading public are not special pleaders, and the impression conveyed to the mind of the average public reader is that which is to be sought for in determining whether a writing is libelous in its nature. There can be no two opinions as to the impression which would be conveyed to the mind of any moderately intelligent reader of any age or sex, who was accustomed to peruse the columns of a daily paper, as to what was the charge against the plaintiffs contained in this writing. They were held up by this article before the public gaze as youths of vicious natures, willing to act in utter disregard of all rules of decency, honesty, and propriety, having actually appeared in court and knowingly testified falsely for a money consideration.

But it is said that the words, "they make these children as corrupt as the fountains of hell," while senseless, are not libelous. It is claimed that this languge is absolutely meaningless; that no rational meaning or inference can be drawn from it; that there is no such thing as a "fountain of hell," and, if there is, there is nothing upon which to base a conception whether it is corrupt or not; that the popular idea of a hell is a place of fire and brimstone, and there is nothing corrupt in either of these elements. There are those in the present day who, for reasons satisfactory to themselves, contend that there is no such place as hell; but even this class will admit that, if there is such a place, there is nothing there which is consistent with honesty, decency, or the right conception of things. Both the popular and the theological idea of hell has nothing in it to make any connection with that place either desirable or comfortable from a physical or spiritual point of view. The word "hell" is a synonym for all that is evil and corrupt in the grossest and basest sense of those terms. But, even if these words did not convey to the ordinary mind that these children had been, by the alleged corrupt influences, made as vicious as imps of hell, the writing bore the meaning above referred to, and denounced them to the public as being guilty of base and corrupt perjury. Taken alone, the words "corrupt as the fountains

of hell" may be meaningless; but, when read in connection with the entire article, there can be no doubt that it bore the meaning above referred to, and was of such a character as to hold the plaintiffs up to public hatred, contempt, and ridicule.

But it is said that the article was merely a report of a trial containing the comments of counsel during the progress of the case, and that what was contained in the article was a privileged communication, both as to the counsel and the publisher. From motives of public policy the law recognizes certain communications and publications as privileged. The privilege which the law thus accords the speaker or publisher is either absolute, entirely freeing the party from liability to the person injured by the words, or the publication, or conditional—that is, the words shall be spoken in good faith upon a proper occasion. When the privilege is absolute, the motive of the publication is immaterial. When the privilege is conditional, actual malice will bring about liability. As remarked by Mr. Chief Justice Bleckley, in Wilson v. Sullivan, 81 Ga. 243, 7 S. E. 276: "The characteristic feature of absolute, as distinguished from conditional, privilege, is that in the former the question of malice is not open. All inquiry into good faith is closed. The remarks of a legislator in debate, the words of a judge in the course of a judicial proceeding, the averments in a pleading filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, are instances of absolute privilege." While the Code does not in any place use the term "absolute privilege," it is recognized as a part of the law of this state in section 3842, Code 1895, which deals with the subject of pleadings, and was expressly held to be the law in the case above cited. The privileged communications enumerated in section 3840 are those where the privilege is conditional. Among such are found comments of counsel fairly made on the circumstances of the case and the conduct of the parties in connection therewith. When, in an action for slander, it appears that the words spoken were part of the comments of counsel, and were pertinent and material to the case under investigation, no matter how false the assertions may be, a recovery for slander cannot be upheld, unless it be shown that in making the remarks counsel was animated by express malice. As was said by Mr. Chief Justice Warner, in Lester v. Thurmond, 51 Ga. 118, 119: "The clear distinction which the law recognizes between words spoken by an attorney at law, in addressing a jury in the regular course of judicial proceedings, and the same actionable words spoken in private conversation, not privileged communications, is this: No action can be maintained against an attorney at law for words spoken to a jury, as in this case, without proof of actual malice, and it is incumbent upon the plaintiff to furnish such proof; whereas, when actionable words are spoken in private conversation, the law implies that the words were spoken maliciously, and it is not incumbent on the plaintiff to prove malice. The attorney at law is protected by his privilege, on account of words spoken in the discharge of his duty in the regular course of judicial proceedings in the courts, unless express malice is proved. If, however, an attorney at law avails himself of his position as an advocate maliciously to slander another by uttering words wholly unjustifiable, then he should be liable to an action, but not otherwise." A lawful occasion cannot be used by any one to whom the law accords a conditional privilege for the purpose of venting his malice; and, if he do so, he is bound to prove that his assertions are true. Taylor v. State, 4 Ga. 24. If the words complained of in the present case had been uttered by the attorney in open court during the progress of a trial in which he was representing his client, he would not be liable in damages to those about whom the words were spoken, unless the words were spoken as a consequence of express malice on his part. But it does not follow, because an attorney will be exempt from liability for words spoken in open court in the conduct of his case, that he would be likewise exempt when repeating the words on another occasion, when he was under no obligation either to the public or his client to speak in reference to the matter. While no malice would be implied, either from the character of the words or the falsity of the charge, when they were uttered in the course of a judicial proceeding, the repetition of the words, either in private conversation or in a published article in a newspaper at his instance, when no public or private duty required him to repeat them, would place him, as to such repetition, upon the same footing as any one who speaks of another, and he speaks then at his peril if the words are not true. See, in this connection, Townshend on Slander & Libel (4th Ed.) § 218, p. 327.

Among the communications enumerated as belonging to the class of conditional privilege are also found fair and honest reports of proceedings of legislative or judicial bodies. If a newspaper publishes a fair and honest report of a trial, stating what was the character of the controversy, and embracing the comments of counsel actually made during the progress of the trial, there could be no recovery for such publication, unless it was made to appear that the publisher was animated by express malice; and this would be true, notwithstanding there were contained in the publication, as a part of the comments of counsel, words which, if uttered elsewhere, would have rendered the speaker and the publisher liable in damages. Ordinarily the publisher of a newspaper is not privileged in the publications therein made, but is liable on account thereof in the same manner as other persons; and defama-

tory matter does not become privileged simply for the reason that it is published in the form of an advertisement, or as news, or is furnished by a correspondent, or is copied from other publications. Cox v. Strickland, 101 Ga. 493, 28 S. E. 655 (3). On the subject of privileged communications generally, see Newell on Slander & Libel (2d Ed.) 388 et seq.; Townshend on Slander & Libel (4th Ed.) 295 et seq.; Odgers on Libel & Slander (text-book series), top page 140 et seq. In an action for libel, that a writing constituted a privileged communication is generally a matter for plea. Holmes v. Clisby, 118 Ga. 820, 45 S. E. 684 (2); Flanders v. Daley, 120 Ga. 885, 48 S. E. 327 (4). But, if it appears upon the face of the petition that the communication was really privileged, there seems to be no really good reason why this might not be taken advantage of by demurrer. The petition in the present case distinctly alleges that the words complained of were not uttered by the attorney during the trial of the case which was reported, and therefore they were no part of any comments of counsel during the progress of a judicial trial. Hence the publication was not privileged as a fair and an honest report of the proceedings of a court. The publication of the article was a voluntary, gratuitous, and libelous statement by the defendant, purporting to have been made upon a judicial trial, when such was in fact not true. It was also distinctly alleged that the falsity of the statement must have been known to the defendant, for the attorney whose alleged remarks were reported was the president of the company. There was no error in overruling the general demurrer to the petition.

Those portions of the petition which were made the subject of special demurrer were allegations which were permissible as matter of inducement, or of aggravation, or by way of innuendo, and therefore were properly embraced within the pleading. The petitions were not subject to any of the criticisms raised in the special demurrers.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 850)

TIMMERMAN v. STANLEY.

(Supreme Court of Georgia. Aug. 5, 1905.)

1. CONTRACT — NONPERFORMANCE — RECOVERY OF CONSIDERATION.

If one agreed to teach another in certain lines of instruction until the pupil was proficient in them, and, after beginning the course and receiving payment in full, abandoned the contract and refused to teach the student longer, the latter would have a right to treat the action of the teacher as a rescission and bring suit for the amount which had been paid by him.

2. SAME—BREACH—REMEDIES OF PARTIES.

If one of two contracting parties claims that the other has committed a breach of the contract, he cannot, in the same action, both treat the contract as rescinded and sue for the amount paid by him to the other party, and at the same time rely on the contract as existing.

3. SAME—ACTION FOR BREACH—PLEADING.

The allegations of the declaration in this case make it a suit for the amount paid to the defendant by the plaintiff, treating the contract as rescinded. In addition, the plaintiff sought to recover certain damages resulting from a breach of the contract, treating it as of force. The latter claim should have been stricken on demurrer, as inconsistent with the former.

4. SAME—DEMURRER.

The demurrer was not general for misjoinder of causes of action, so as to put the plaintiff upon his election, but was for inconsistency in joining certain claims with another, which had first been made, and which it was claimed determined the character of the action.

5. SAME—RESCISSION—TENDER.

As a general rule, where one party asserts the right to rescind a contract for nonperformance by the other of his covenant, the party seeking rescission must restore or tender back to the other party what has been received from him, so as to restore the parties to the condition in which they were before the contract was made. But this rule has no application to a case where one agrees to teach another a certain thing, and, after beginning the course of instruction, refuses to proceed further, whereupon the other party treats the contract as rescinded, and brings suit to recover the amount which he has paid under the agreement.

6. SAME—DECLARATION.

Under the principles above announced, there was no error in striking from the declaration certain claims for expenses in attending school, expenses pending suit, and delay in being prepared for business; but the entire case should not have been dismissed.

7. SAME—EXHIBITS.

It does not appear that there was any contract in writing, and a demurrer on the ground that a copy of it was not attached as an exhibit was not well founded.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by W. L. Timmerman against G. W. H. Stanley. Judgment for defendant. Plaintiff brings error. Reversed.

Timmerman brought suit against Stanley, alleging as follows: On July 29, 1903, the plaintiff bought of the defendant a scholarship in Stanley's Business College, in the city of Macon, in the telegraphic department, which embraced a course in learning telegraphy in said college. On August 12, 1903, he bought of the defendant a scholarship in the shorthand department in said college, which embraced a course in learning stenography, typewriting, etc. "The said scholarships were delivered to petitioner under the contract that a full course might be taken by him until he was proficient in said lines selected, without a limit of time." Stanley is the proprietor of the college, and the scholarships were sold by him to the plaintiff for the sum of $64. On August 2, 1904, the plaintiff was expelled by the defendant from the college for no fault or cause on his part. He had violated no rules of the college, nor had he been guilty of any conduct to authorize the expulsion. He had not completed the courses prescribed by the scholarships, and

at the time of his expulsion was still pursuing his studies at the college. "Petitioner shows that said Stanley refuses to pay back to your petitioner the $64 paid for said scholarships, and to which your petitioner is entitled on account of said Stanley failing to carry out said agreement in said scholarships; and petitioner prays for a judgment against said Stanley for said sum." By the breach of the contract defendant has damaged plaintiff in the sum of $500. Plaintiff has paid out $300 for board and expenses in attending the school in order to qualify himself for business. By reason of the expulsion he cannot now finish his courses, so as to enter business, as other business colleges will not receive him after being expelled from this one. He is now at a monthly expense of $15, and will be so up to the time of the hearing of this action. "He prays for a judgment for said sum against the said Stanley." By reason of the breach of the contract defendant has delayed plaintiff in finishing his course so as to enter business for the current year, to his injury in the sum of $500. The defendant demurred to the declaration generally, and also specially. The demurrer to that part of the declaration which seeks to recover the price paid for the scholarships was based on the ground that such price was not the legal measure of damages to which the plaintiff was entitled, if entitled to anything under the declaration. The allegation as to the expenditure of $300 for board and expenses was demurred to on the ground that such items were not elements of damage for an expulsion from the college, and "because the plaintiff, having elected to disaffirm and rescind said contract by suing for recovery of the price paid for said certificate, cannot bring an action for a breach of said contract arising under said certificate"; because an action for said expenses was an action inconsistent with a suit for the recovery of the purchase price of said scholarship and cannot be joined in the same declaration. The allegation that the plaintiff could not enter any other business college was demurred to, because it did not constitute an element of damage, for the same reasons. The allegation as to the monthly expense of $15 was demurred to for the same reason, and also because expenses incurred by the plaintiff subsequently to the alleged breach of contract cannot be an element of damage therein. The allegation of damage by reason of delay in plaintiff's finishing his course was demurred to because the alleged damages were too remote and consequential, and not capable of exact computation; because they were not the legal and natural results of the alleged act; and because they are inconsistent with the damages laid in the paragraph seeking to recover the purchase prise of the scholarships, and cannot be joined in the same action. The declaration was also demurred to because no copy of the contract was set out as an exhibit. The demurrer was sustained, and the plaintiff excepted.

M. G. Bayne, for plaintiff in error. Davis & Miller, for defendant in error.

LUMPKIN, J. (after stating the facts). 1–5. Assuming the allegations of the declaration to be true, as we must do in considering the demurrer, each of the contracts evidenced by the two scholarships was entire, and when the defendant repudiated them the plaintiff had the right to treat his action as rescission and bring suit for the amount which had been paid by him. Supreme Council v. Jordan, 117 Ga. 808, 45 S. E. 33. Or he might sue for a breach of the contract. Alabama Gold Ins. Co. v. Garmany, 74 Ga. 51. In the latter event, that decision holds that in some cases the amount paid by the plaintiff may be considered in fixing the amount of the damages. In 8 Am. & Eng. Enc. Law (2d Ed.) 632, it is said: "As has been said more than once, the fundamental principle of damages is compensation to the injured party. This rule in the present connection is simply the application of the principle stated to contracts; that is, the measure of damages in such cases is the value of the bargain to the complaining party, or the loss which a fulfillment of the contract would have prevented or the breach of it has entailed. Or, as it has been said, the general intent of the law, which gives damages in actions for breach of contract, is to put the injured party, so far as it can be done by money, in the same position as if the contract had been performed. According to this principle, the measure of damages for breach of a contract is not, as a general rule, the consideration paid, but rather the value of the thing contracted for, unless, indeed, the plaintiff has, under the circumstances, a right to disaffirm the contract, and sue to recover the consideration paid." The plaintiff cannot in the same action both treat the contract as rescinded and rely on it. Harden v. Lang, 110 Ga. 392, 36 S. E. 100. It is not quite easy to determine whether this action is one for breach of the contract, or one for the recovery of the purchase price of the scholarships based on the idea of a rescission, coupled with an effort to sue for the breach of the contract in the same action. It has been held that suit to recover the purchase price is equivalent to an express disaffirmance, and that after such disaffirmance there cannot be a proceeding to enforce the contract, either by an equitable proceeding to compel specific performance or by an action for damages. 24 Am. & Eng. Enc. Law (2d Ed.) 645, note 5. The plaintiff alleged that the defendant refused to pay back to him the $64 paid for the scholarships, to which the plaintiff is entitled; and he prays for a judgment for that specific sum, not as damages, or as a part of his damages, or as throwing light on the amount of dam-

ages, but as a return of the purchase money. Taking the pleadings most strongly against the pleader, the statement that the defendant refuses to pay back the amount to him implied that a demand had been made. We are of the opinion, therefore, that this part of the declaration treats the contract as at an end, and seeks to recover the amount paid by the plaintiff to the defendant under it. Such being the case, the particular portion of the declaration which sues for the recovery of such amount is not subject to demurrer on the ground urged against it.

It is contended, in the brief of counsel for the defendant in error, that there can be no recovery of the amount paid, because, in order to rescind the contract, the plaintiff must restore the status, and must tender back to the defendant what he has received from him, and that this cannot be done in the present case. Civ. Code 1895, § 3712. This is a general rule where one party to the contract has received goods, money, or other thing of value, which is capable of being returned to the other party. But in a contract like that involved in the present case, where a person agrees to teach another a certain thing, or to qualify him for a certain position, if he gives the student some instruction and then refuses to complete his contract, there would be no possible way by which such instruction as he had given could be returned or tendered back to him; nor is the other party required to estimate value for what has been done and tender such amount. He cannot hold onto the amount paid, refuse to proceed with the contract, and defend against an action to recover the price paid on the ground that the plaintiff had not tendered back to him his instruction, and could not restore him to the status quo. He cannot by his own conduct place himself in a situation where restoration is impossible, repudiate the contract, and set up this situation as a defense to a suit for the amount paid. If he abandons the contract, he should not complain that the other party is willing to treat it as rescinded. The Code section cited has no application in such a case. Henderson Warehouse Co. v. Brand, 105 Ga. 217, 224, 31 S. E. 551. The cases of Alabama Gold Life Ins. Co. v. Garmany, and Supreme Council v. Jordan, supra, are also in point as to this contention.

It was argued that there was a misjoinder of causes of action; but the demurrer does not make this objection to the entire declaration. It attacks the effort to recover the money paid by the plaintiff to the defendant on the ground already considered. It then attacks other parts of the declaration on the ground that, the action being one based on a rescission of the contract, the items of damage claimed could not have been properly joined with the suit for the money paid. This contention, if sustained, would result in striking those particular items, but not in dismissing the entire action for a misjoinder of causes of action. It is not the same thing to say that a declaration contains two inconsistent causes of action, and to put the plaintiff on his election to dismiss one of them, or have the entire suit dismissed, and to say that the action is of a particular character, and that certain other claims cannot be added to it.

6. From what has been said it is evident that the claim for expenses in attending school, expenses pending the suit, and delay in being prepared for business cannot be joined with the action for the return of the purchase price, based upon a rescission of the contract. Moreover, the allegations of the declaration with respect to those items are quite vague and general, and a part of the damages would not be recoverable, even in an action based on a breach of the contract. The dismissal of the entire case was erroneous. The claim to recover the items of damage just referred to should have been stricken, and the case left to stand on the suit for the return of the price paid for the scholarships.

7. It does not affirmatively appear that there was a written contract, and the ground of the demurrer that no copy of it was attached as an exhibit is not well founded.

Judgment reversed, with directions. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 866)

TURNER v. WOODWARD.

(Supreme Court of Georgia. Aug. 5, 1905.)

1. INDEMNITY—RELEASE OF LEVY—LIABILITY TO CONSTABLE.

Where, by threats of imprisonment or promises to hold him harmless, A. induces a constable to deliver to him property which is in the possession of the officer by virtue of a levy, and the constable is subsequently ruled by the plaintiff in fi. fa., and compelled to pay to him the value of the property so relinquished, A. is liable to the constable for the loss or damage sustained by the latter by reason of such delivery of the property.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 323.]

2. TRIAL—INSTRUCTIONS.

In such a case, it was not error for the court, in instructing the jury, to use the words "loss" and "damage" interchangeably.

3. INDEMNITY—INSTRUCTIONS.

The charge of the court was full and fair; and the evidence, while conflicting, was ample to sustain the verdict.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action by N. W. Woodward against Paul Turner. Judgment for plaintiff, and defendant brings error. Affirmed.

M. W. Beck and E. M. Smith, for plaintiff in error. Jno. S. Gleaton, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 837)

LAMAR v. LAMAR.

(Supreme Court of Georgia. Aug. 4, 1905.)

NE EXEAT—WHEN GRANTED—APPLICATION OF WIFE FOR ALIMONY.

A writ of ne exeat may be granted in this state at the instance of a wife against her husband, pending an application for alimony, and prior to any decree therefor. The court, in determining the amount of bond to be required, will exercise a sound discretion under the special circumstances of the case, having due regard to the rank of the parties and the property of the husband, so as to prevent oppression or extortion.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Divorce, § 275.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by L. L. Lamar against Rufus Lamar. From an order granting a writ of ne exeat, defendant brings error. Affirmed.

L. L. Lamar brought suit against her husband, Rufus Lamar, for permanent alimony, and made application for temporary alimony. She also prayed the superior court for a writ of ne exeat, alleging that her husband was receiving a good income from his labor, amounting to about twenty dollars per month; that he had abandoned her by forcing her to leave his place of residence without cause; that she was without means of support; and that he was preparing and threatening to leave the state to avoid supporting her and their minor child. The application was duly verified, and the writ issued under the order of the judge. A motion was made to dismiss it, which was refused, and the defendant excepted.

Winfield Jones, for plaintiff in error. S. C. Crane, for defendant in error.

LUMPKIN, J. Under the English practice the writ of ne exeat regno was a prerogative writ which issued to prevent a person from leaving the realm. In America it has been treated, not as a prerogative writ, but as a writ of right in the cases in which it is properly grantable. In regard to alimony, the practice of granting the writ has sometimes been said to have arisen from compassion, and because the ecclesiastical courts could not take bail. But the truer ground on which equitable interference arose would seem to be that, although alimony was not strictly an equitable debt, yet the ecclesiastical courts were unable to furnish a complete remedy to enforce the duty of payment thereof; and therefore courts of equity ought to interfere to prevent the decree from being defeated by fraud. 2 Story's Eq. Jur. (13th Ed.) §§ 1465, 1469, 1471, 1472. As to whether the writ will be issued in cases of alimony until after alimony has been decreed, there has been some diversity of opinion. In New York, where the jurisdiction as to divorce and alimony was vested in the court of chancery, it was held by Chancellor Kent that he would pendente lite grant the writ of ne exeat republica against the husband upon proper application. Denton v. Denton, 1 Johns. Ch. 364, 441. On the other hand, in Michigan it was held that this would not be done. Bailey v. Cadwell, 51 Mich. 217, 16 N. W. 381. In 1813 an act of the Legislature was passed in this state which, among other things, declared that "the judges of the superior courts shall and they are hereby authorized to grant writs of ne exeat, as well in cases where the debt or demand is not actually due, but exists fairly and bona fide in expectancy at the time of making application, as in cases where the demand is due." Cobb's Digest of Laws, p. 525. In McGee v. McGee, 8 Ga. 295, 52 Am. Dec. 407, it was held: "A writ of ne exeat may be granted in this state prior to any decree for alimony. The court in making the writ will exercise a sound discretion, under the special circumstance of the case, having due regard to the rank of the parties and the property of the husband, so as to prevent oppression or extortion." This decision cited approvingly, and to a considerable extent followed, the decision of Chancellor Kent in Denton v. Denton, supra, so that this court at an early date appears to have adopted this view rather than that since announced by the Supreme Court of Michigan. The fact that the amount of alimony had not been fixed by decree was not considered an insuperable objection, as the court could use a sound discretion in fixing the bond or "marking the writ." In McGehee v. Polk, 24 Ga. 406, 411, it was said: "In bills for account and administration of assets no certain balance need be sworn to to entitle the complainants to the writ of ne exeat. It is sufficient if there is a clear affidavit of assets received." When the laws of this state were first codified in 1863 the grounds for the writ were stated in section 3147. It declared that "the writ of ne exeat issues to restrain a person from leaving the jurisdiction of the state, and may be granted in the following cases: (1) At the instance of a creditor whose debt is not due, or where, from some other cause, the ordinary process is not available or sufficient against his debtor, or against a third person secondarily or otherwise under any circumstances chargeable with the debt," after which follows several other grounds for the issuance of the writ. Subsection 1, just quoted, was carried forward in the Code of 1868, where it formed part of section 3159. In the Code of 1873 the grounds for the issuance of the writ are stated in section 3226. In that section item 1 of section 3159 of the previous Code was omitted by the codifiers, on the ground that by Const. 1868. art. 1, § 18, it was declared that there should be no imprisonment for debt; and this constitutional declaration has been continued in Const. 1877, art. 1, par. 21. This provision unquestionably prevents imprisonment for a mere ordinary debt, and the writ of ne exeat cannot be used for that purpose. But ali-

mony does not rank as a mere debt. A husband can be directed to pay alimony, and for a failure or refusal to comply with the order he may be imprisoned, and this has been held not to conflict with the constitutional provision above cited. Carlton v. Carlton, 44 Ga. 216; Lewis v. Lewis, 80 Ga. 706, 6 S. E. 918, 12 Am. St. Rep. 281. The striking of the first item of this section of the Code of 1863, referring to the writ of ne exeat, did not have the effect to restore the English rule that the claim must be due or reduced to judgment, if the case were one where the writ was properly grantable, and if that rule applied to alimony.

The question involved in the present case, however, is not left dependent upon reasoning or construction, but is practically decided in the case of Gibson v. Patterson, 75 Ga. 549, where it was said: "Where a bill was filed in aid of a libel for divorce, and the principal purpose of it was to secure the wife's alimony, with proper allegations and proof, the chancellor would have authority to order the arrest of the defendant, and to require him to give bond and security for his compliance with any order that he might grant in the divorce case then pending for the payment of alimony to his wife." In 1870 an act was passed which authorized a suit for alimony in cases where the husband and wife were living separately or were in a bona fide state of separation, and no action for divorce was pending. The proceeding provided for in this act was an equitable one, and authorized the judge to grant such order as he might grant if the application were based on a pending libel for divorce "to be enforced in the same manner, together with any other remedy applicable in a court of equity." Acts 1870, p. 413; Civ. Code 1895, § 2467. An application for temporary alimony under this section is to be based on an application for permanent alimony. Yoemans v. Yoemans, 77 Ga. 124, 3 S. E. 354. The rulings in regard to alimony pending divorce and the issuing of a writ of ne exeat apply as well to this case as to one where an application for divorce is pending.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(123 Ga. 739)

HENDERSON v. STATE.

(Supreme Court of Georgia. Aug. 4, 1905.)

1. CRIMINAL LAW — APPEAL — REVIEW — ASSIGNMENTS OF ERROR.

Where an assignment of error depends on a recital of facts, and it appears from a note of the presiding judge and also from another part of the bill of exceptions that such recital is substantially incorrect, such assignment will be disregarded.

2. SAME—MOTION FOR NEW TRIAL—BRIEF OF EVIDENCE—NECESSITY—DIRECT BILL OF EXCEPTIONS.

In any case where the judgment, decree, or verdict has necessarily been controlled by one or more rulings, orders, decisions, or charges of the court, and the losing party desires to except to such judgment, decree, or verdict, and to assign error on the ruling, order, decision, or charge of the court, he is not bound to make a motion for a new trial or file a brief of the evidence, but may present a bill of exceptions containing only so much of the evidence or statement of facts as may be necessary to enable the Supreme Court to clearly understand the ruling, order, decision, or charge complained of. But this rule does not authorize the segregation and bringing to this court, by direct bill of exceptions, of every alleged error committed in the course of a trial. It only authorizes this to be done by such direct and brief form of bill of exceptions in cases where the judgment, decree, or verdict has necessarily been controlled by such rulings, orders, decisions, or charges; and this must be made to appear. Except in such instances, the case should be brought up in the usual form, in order that this court may view the rulings complained of in the light of their context and surroundings.

(Syllabus by the Court.)

1. APPEAL—ASSIGNMENT OF ERRORS.

The assignment of error with which the majority of the court declines to deal would have been authorized according to the established common-law practice in courts which had jurisdiction to review decisions of other courts upon writs of error.

2. SAME.

The common-law practice in such cases was recognized in this state by a line of physical precedents, unquestioned by the bar and uncriticised by the bench from the time the Supreme Court was established in 1846 until 1898.

3. SAME.

The act of 1898 (Van Epps' Code Supp. § 6241) was held in Taylor v. Reese, 33 S. E. 917, 108 Ga. 379, to be merely declaratory of the existing common-law practice.

4. SAME.

The assignment of error is in accordance with the ruling of the majority in Cawthon v. State, 46 S. E. 897, 119 Ga. 395. No sufficient reason appears why that decision should not be followed.

5. SAME.

I concur in the ruling made in the first headnote.

6. SAME.

I dissent so far as the refusal to consider the other assignment of error is concerned.

Per Cobb, J., dissenting.

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

Homer Henderson was convicted of simple larceny, and brings error. Dismissed.

Homer Henderson was indicted for simple larceny. When the case was called for trial, a practicing attorney stated to the court that he wished his name to be marked for the state to assist the Solicitor General, as he had been employed by the prosecutor. Defendant's counsel objected to the appearance of the attorney on behalf of the state, claiming that he had disqualified himself from appearing for the state by reason of certain communications and negotiations which had passed between him and the defendant in regard to his representing the latter. The court overruled the objection, and the defendant assigned error on the ruling. The only other assignment of error is in the following words: "The following is a copy of the indictment, from which it will

appear that the defendant was not arraigned, and that he was not furnished a copy of the indictment, or a list of the witnesses sworn before the grand jury against him, nor did he waive the latter, to all of which defendant then and there excepted, and now assigns the same as error. Defendant insists that he should have been furnished with a copy of the bill of indictment, and should have been allowed to plead guilty or not guilty." The presiding judge added to this statement the following note: "Defendant's counsel was asked by the Solicitor General if he would waive arraignment and plead not guilty and sign the waiver. Defendant's counsel replied he would; and it was not known to the court that defendant's counsel did not sign the waiver of copy indictment and list of witnesses, as the matter was never again mentioned." The copy of the indictment contained in the bill of exceptions shows that there was on it the following entry: "The defendant, Homer Henderson, waives being arraigned and pleads not guilty. [Signed] F. A. Hooper, Solicitor General." There was also on the indictment an entry of the waiver of the copy of the bill of indictment and list of witnesses sworn before the grand jury. This was not signed.

Payton & Hay, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

LUMPKIN, J. (after stating the facts). 1. The assignment of error to the effect that the indictment showed that there was no arraignment, and that the defendant was not furnished with a copy of the indictment and list of witnesses, and did not waive this, cannot be considered. The assignment of error refers to the indictment for verification; but an examination of it shows that an entry was made by the Solicitor General of a waiver of arraignment by the defendant and the entering of a plea of not guilty. The presiding judge also adds a note in which he negatives the claim that there was no waiver of the copy of indictment and list of witnesses, and shows that the defendant was not in any way cut off from the right to plead, but, on the contrary, agreed, through his counsel, to plead not guilty and waive the copy of the indictment and list of witnesses. The assignment is not verified, but rather negatives. See McBride v. Beckwith, 67 Ga. 764; Fletcher v. Collins, 111 Ga. 253, 36 S. E. 646; Brice v. State, 117 Ga. 466, 43 S. E. 715; Adams v. State, 117 Ga. 302, 43 S. E. 703. As to waiving arraignment, see Hudson v. State, 117 Ga. 704, 45 S. E. 66.

2. In the case at bar it is not necessary to decide whether or not, under the evidence, the relation of the attorney to the defendant was such as to preclude him from appearing for the prosecution, or whether, under the circumstances, the court erred in allowing such appearance. No motion for a new trial was made; nor was the evidence introduced on the merits of the case brought up in the bill of exceptions; nor was any exception taken to any final judgment. Under these facts, we are unable to hold that the ruling of the court requires a new trial, whether it was correct or erroneous. In Brown v. Atlanta, 66 Ga. 76, it was said: "When plaintiff in error brings a case here, he must show error which has hurt him. This court is not an expounder of theoretical law, but it administers practical law, and corrects only such errors as have practically wronged the complaining party." In Smith v. Smith, 112 Ga. 351, 37 S. E. 407, it was said: "When there is no motion for a new trial, an erroneous or inapt charge to the jury, which did not necessarily control their verdict against the plaintiff in error, will not be treated by this court as affording cause for reversing the judgment of the court below." In Ocean Steamship Co. v. Hamilton, 112 Ga. 901, 38 S. E. 204, it was said: "A party dissatisfied with a verdict cannot, without filing a motion for a new trial, properly bring to this court for review any 'ruling, order, decision, or charge' of the court below which did not, either singly or in connection with another or others, necessarily control the finding against the plaintiff in error." In Ray v. Morgan, 112 Ga. 923, 38 S. E. 335, it was said: "As there was no motion for a new trial, and it plainly appears that none of the charges excepted to necessarily controlled the verdict against the plaintiff in error, these charges, even if for any reason inapplicable or erroneous, afford no cause for reversing the judgment of the court below." In Darien Bank v. Clarke Lumber Co., 112 Ga. 947, 951, 38 S. E. 363, the same ruling was made. In Cable Co. v. Parantha, 118 Ga. 913, 45 S. E. 787, it was said: "The charges of the court complained of by direct exceptions in this case, when considered in connection with the entire charge, the evidence, and the verdict rendered, do not appear to have been necessarily controlling." See, also, Price v. High, 108 Ga. 145, 33 S. E. 956; Johnson v. Willingham, 110 Ga. 307, 35 S. E. 117; Benton v. Singleton, 114 Ga. 548, 40 S. E. 811; Parker v. Medlock, 117 Ga. 813, 45 S. E. 61.

In Cawthon v. State, 119 Ga. 395, 46 S. E. 897, the practice in regard to carrying cases to the Supreme Court by direct bills of exceptions was discussed. The majority of the justices, as the court was then constituted, thought that the exceptions made in that case were reviewable by direct bill of exceptions. Fish, P. J., and Candler, J., dissented. The positions of the majority are learnedly and forcibly set out in the opinion of Mr. Justice Cobb. The positions of the minority are clearly stated by Mr. Presiding Justice Fish in a headnote, and Mr. Justice Candler in an opinion. A few suggestions will suffice to show some of the reasons which incline the writer to the view then entertained by a minority of the justices,

and convince him that the ruling excepted to in the present case cannot be cause for reversal, in the absence of a motion for a new trial or the bringing before this court of the evidence in the case. In the first place, the decisions already cited are directly in point, and at least two of them (Smith v. Smith, 112 Ga. 351, 37 S. E. 407, and Cable Co. v. Parantha, 118 Ga. 913, 45 S. E. 787) were concurred in by a full bench of six justices, and have never been overruled or modified. It was said by Mr. Justice Cobb, in the Cawthon Case, that if anything said or ruled in the two cases last named was in conflict with Taylor v. Reese, 108 Ga. 379, 33 S. E. 917, the latter decision must yield to the earlier ruling. I do not think that there is any essential conflict. In Taylor v. Reese an application for mandamus was made to compel the presiding judge to certify a bill of exceptions, which he had refused to do on the ground that, in the absence of a motion for a new trial, he had no authority to do so. It appeared that the presiding judge cut the defendant off from the contention that, if any offense was committed at all, it was not murder, but a lower grade of homicide. An examination of the bills of exceptions (two cases being heard together) will show that the evidence was brought before this court, and that exceptions were taken to certain rulings which entirely excluded a substantial part of the defense, and thus controlled the case to the extent of preventing the jury from considering the question of whether the homicide was manslaughter or not, which was the only real issue; the killing not being denied. The mandamus was granted. It was said that the court would not consider the merits of the questions presented, or whether there was in fact reversible error, on the application for mandamus. Lumpkin, P. J., who wrote the opinion, said: "Such a practice would not only be anomalous, but, as a result thereof, it would frequently happen that cases of the utmost importance would, for all practical purposes, be finally determined before they reached this court in the manner prescribed by law, and that, too, without even notice to parties vitally interested." The report of the cases when heard on their merits (Taylor v. State, 108 Ga. 384, 34 S. W. 2) will show how entirely different were the bills of exceptions then under consideration from that now before the court. In the opinion it was said: "In view of Taylor's admission on the trial that he did the killing, and of the fact that he did not ask for a verdict of not guilty, but only that his offense be graded, the refusal of the judge to charge upon the law of either voluntary or involuntary manslaughter was, under the circumstances, equivalent to an adjudication from the bench that Taylor was guilty of murder, and the charge given amounted to an instruction to the jury to convict him of that offense." The same justice who prepared the opinions in the cases of Taylor v. Reese and Taylor v. State also wrote the opinion in Smith v. Smith, supra. In the course of the latter opinion he used the following language: "It is in this connection to be noted that no motion for a new trial was filed in the court below, but that the defendants by a direct bill of exceptions complain of rulings made during the progress of the trial. While the act of December 20, 1898, expressly authorizes such a practice, it in terms provides that such rulings only as necessarily controlled the verdict or judgment rendered can in this manner be properly brought under review in this court." And in support of this statement he cited Acts 1898, p. 92, and Taylor v. Reese, 108 Ga. 379, 33 S. E. 917. Evidently the court did not think the two adjudications were in conflict.

The mere fact that an examination of the records of this court will show a number of instances in which cases were thus brought up for review, and in which no point was made or decided in reference to the method of exception, is of little force. I venture the assertion that a careful scrutiny would discover hundreds of records in which there were defects or lack of technical accuracy, but where no question was made or decided on the subject. A single illustration will suffice. In the case of Allen v. Allen, 63 Ga. 732, a demurrer was overruled, and after verdict a motion for a new trial was made, one of the grounds of which alleged error in the overruling of the demurrer. No objection was raised to this mode of procedure, and the judgment was reversed because the demurrer should have been sustained. The learned Chief Justice mentions in the opinion that the overruling of the demurrer was made a ground of the motion for a new trial. This is what is sometimes called a "physical precedent," and yet it has been held that the overruling of a demurrer does not furnish a proper ground for a motion for a new trial, but that a bill of exceptions pendente lite or a direct bill of exceptions should be filed thereto. Griffin v. Justices, 17 Ga. 96; S., F. & W. Ry. v. Renfroe, 115 Ga. 774, 42 S. E. 88. In very truth the expression "physical precedent" merely indicates that a thing has been done, but not that it has been decided to have been rightly done. Of course, this said with entire respect for the great judges who have presided on this bench, and the many great lawyers who have practiced at this bar. Prior to the Code of 1895 the provisions for excepting in civil and criminal cases were included in the same section of the Code. It declared that "either party in any civil case, and the defendant in any criminal proceeding in the superior courts of this state, may except to any sentence, judgment, decision or decree of such court, or of the judge thereof, in any matter heard at chambers," etc. Code 1863, § 4160; Code 1882, § 4251. In the Code of 1895 the same provision is made in Civ. Code, § 5527; and

in the Penal Code it is also inserted, omitting the words, "either party in any civil case, and," and the word "decree." Pen. Code 1895, § 1070.

Decisions on this point in civil cases are therefore applicable also in criminal cases. Under that broad statement it was nevertheless considered necessary that there should have been some ruling or decision of a vital or controlling character, in order to furnish ground for direct exception. Thus, in Miller v. Speight, 61 Ga. 460, it was said: "When the court has erroneously ruled out evidence without which the plaintiff could not possibly recover, his failure to go on and prove other essential facts will not cure the error and sanctify a judgment of nonsuit." And this was reaffirmed in Vaughn v. Burton, 113 Ga. 103, 38 S. E. 310 (3). Even under the language of the act of 1845 (see 1 Ga. vi, vii, § 4) there must have been a decision, sentence, judgment, or decree, which, quoad the subject-matter of it, must not have been inchoate or interlocutory, but final. In some cases the judgment might have been interlocutory as to the cause, as orders to dissolve injunctions and upon motions for new trials. As said by Nisbet, J. (Johns v. Fuller, 13 Ga. 508), "We are not willing to entertain a writ of error where no result follows our judgment beneficial to either party." For decisions prior to the Code of 1863, see Carter v. Buchanan, 2 Ga. 337; Jones v. Dougherty, 11 Ga. 305; Van Ness v. Cheeseborough, 11 Ga. 377; Evans v. Adams, 12 Ga. 44; Jones v. Fuller, 13 Ga. 507. In Code 1863, § 4250, it was declared that "no cause shall be carried to the Supreme Court upon any bill of exceptions so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause." Exceptions pendente lite could be filed to rulings pending the cause, and upon exception to the Supreme Court, after final judgment, error could be assigned thereon, "and a new trial may be allowed thereon when it is manifest that such an erroneous decision of the court has or may have effected the final result of the case." This was carried forward in the Code of 1882, and with a slight amendment in the Code of 1895. Code 1882, § 4250; Civ. Code 1895, § 5526; Acts 1890-91, p. 82. Decisions since the Code of 1882 have been cited above. See, also, Harrell v. Tift, 70 Ga. 730, and dissenting opinions in Cawthon v. State, 119 Ga. 395, 46 S. E. 897, and citations.

In 1898 an act was passed with the following caption: "An act to dispense with a motion for a new trial and filing brief of the evidence, and to authorize a direct bill of exceptions in certain cases." The act declares that "in any case now or hereafter brought where the judgment, decree, or verdict has necessarily been controlled by one or more rulings, orders, decisions, or charges of the court, and the losing party desires to except to such judgment, decree, or verdict, and to assign error on the ruling, order, decision, or charge of the court, it shall not be necessary to make a motion for a new trial, nor file a brief of the evidence, but the party complaining shall be permitted to present a bill of exceptions containing only so much of the evidence or statement of facts as may be necessary to enable the Supreme Court to clearly understand the ruling, order, decision, or charge complained of." Acts 1898, p. 92. An inspection of this act seems to indicate that its language is stronger than that previously employed in the Code. It distinctly declares that exception may thus be taken "where the judgment, decree, or verdict has necessarily been controlled by one or more rulings," etc. Moreover the language used in the caption, where the act is described as one to "dispense with a motion for a new trial and filing brief of the evidence, and to authorize a direct bill of exceptions, in certain cases," might well be urged as indicating that in the mind of the Legislature it was necessary to dispense with something which could not previously be dispensed with, and to authorize something which needed authorization, and that the dispensing and the authorizing were applicable only in certain cases of the character described in the act. What the decision in Taylor v. Reese was has been referred to above. If a sentence in the opinion is to be treated as a decision that this act was merely a declaration of the law as it already existed, on its face it appears to be a very plain declaration. The only difficulty arises in its practical application, in determining what rulings, orders, decisions, or charges are such as fall within its descriptive terms as necessarily controlling the judgment, decree, or verdict. In some cases it is clear and easily determined. In others a decision of the question is attended with more difficulty. Thus (if the act be treated as declaratory) before 1898 it was held that the direction of a verdict or the grant of a nonsuit was such a ruling. Haskins v. Throne, 101 Ga. 126, 28 S. E. 611. If the striking of a plea cut off a legal and valid defense which constituted the real merit of the defendant's contention, whereby a verdict for the plaintiff resulted, this was held to be a controlling ruling. Haskins v. Bank, 100 Ga. 216, 27 S. E. 985. In Wright v. Hollywood Cemetery Co., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621 (decided in 1900), it was said: "When, upon the hearing of a demurrer to a petition, the court passed an order in effect striking a portion thereof, and limiting the plaintiff's right of recovery to specified items, their right to except to such order was not lost because they consented to so much of a verdict which the court directed in their favor as related to the amount they were entitled to recover upon such items." In the case of Taylor v. Reese, as already noted, the charge

excluded from the jury the real ground of defense. These instances are merely illustrative. Generally, although errors in practice, or in the admission or rejection of evidence, or in similar rulings pending the trial, may have been made, yet if they do not necessarily control the result, but merely go in to partly make up the aggregate of the case, upon the whole of which a verdict or judgment is reached, they cannot be selected and made the subject of direct exception and assignment of error requiring a reversal. This is especially true in the absence of the evidence introduced on the trial. Rulings on evidence may possibly be of a controlling character. Thus, if suit be brought based on a note, and the note be ruled out of evidence, or on a deed, and it be rejected, so that the case is substantially cut off by the ruling, and an adverse judgment necessarily results as in Miller v. Speight, supra, this may be controlling. Erroneous rejection of a piece of evidence indispensable to the making out of any case at all by a plaintiff, or without which there cannot possibly be a recovery. and the rejection of which, ipso facto, results in an adverse judgment, may stand on this basis; but the rejection of merely additional or cumulative rebutting or impeaching evidence will not do so.

Where a case is brought up, not as a whole, or after a motion for a new trial, but by direct exception, assigning error in a particular ruling, the controlling character of that ruling must be made to appear. In very many long and hotly contested cases, some errors are committed in rulings on evidence, in certain expressions in the charge, or in like rulings in the progress of the trial, and yet, in the light of the whole case, they are corrected or explained, or do not furnish ground for reversal. The reports teem with such decisions. No longer ago than July 17th, in the case of Allams v. State, 123 Ga. 500, 51 S. E. 506, it was held that there was error in a certain charge, but in view of the whole case it did not necessitate a reversal. See, also, Perry v. State, 102 Ga. 365, 30 S. E. 903. All rulings are controlling on the identical point ruled, but this is not what is meant. It is when "the judgment, decree, or verdict has necessarily been controlled"—not possibly effected, but necessarily controlled—that reversal may be had in this mode. If every slip of the tongue, or every erroneous ruling made by a judge pending a trial, can be segregated from its surroundings and other parts of the case, without showing its controlling character, and a reversal can be had on account of it, regardless of whether the evidence may have demanded the verdict or judgment, it would amount at times almost to the trial judge passing on one case and this court on another. The present case emphasizes the rule. None of the evidence introduced on the trial is brought to this court, nor even the statement of the accused. Suppose the evidence had showed conclusively and without conflict that the defendant was caught flagrante delicto, or suppose that his own statement showed beyond question that he was guilty; of what avail would it be to direct a new trial because of some error which might not, and possibly could not, have affected the result? The supposition that the defendant's statement may be sufficient to warrant a conviction is not strained. Thus, in Wood v. State, 119 Ga. 426, 46 S. E. 658, it was held that a verdict for assault with intent to murder was demanded by the defendant's own statement, "without regard to any of the rulings of the court of which complaint was made." See, also, Luby v. State, 102 Ga. 633, 29 S. E. 494; McKinley v. State, 121 Ga. 193, 48 S. E. 917. In the absence of the evidence, it is not practicable in many cases for this court to determine whether an error complained of was such as to cause injury or not. If it be suggested that the ruling in regard to the attorney tainted the whole trial, it may also be said that any error taints a trial to some degree; but, to have a reversal by this mode of exception, it must be to a degree which necessarily controls.

There are two ways by which a case may reach this court: One is by the usual and ordinary methods of procedure. The other, for convenience, may be called the short form. It is stated in the second headnote. But, to pursue this course successfully, he must make it appear to this court that the judgment, decree, or verdict was necessarily controlled by such ruling or rulings, order, decision, or charge, and not merely that, standing alone, it or they may appear to be erroneous. It is not every error, but only necessarily controlling rulings, which may be segregated from the case, stripped from their surroundings, and brought to this court alone as successful grounds for a reversal. We are therefore of the opinion that, whether the court ruled correctly or not in regard to permitting the attorney to take part in the trial, in the absence of the evidence, it cannot be held that the ruling will require a reversal. Speaking for myself, it is not perfectly clear to me whether the result should be a judgment of affirmance or one of dismissal; but my Brethren think the latter the more logical sequence. The practical result is the same.

Writ of error dismissed. All the Justices concurring, except SIMMONS, C. J., absent, and COBB, J., who dissents.

COBB, J. (dissenting). "A writ of error is an original writ issuing out of chancery, and lies where a party is aggrieved by an error in the foundation, proceeding, judgment, or execution of a suit in a court of record, and is in the nature of a commission to the judges of the same or a superior court, by which they are authorized to examine the record, upon which judgment was given, and

on such examination to affirm or reverse the same, according to law." "A writ of error lies for some error or defect in substance, that is not aided, amendable, or cured at common law or by some of the statutes of amendments or jeofails." 2 Tidd's Pr. 1134, 1136; 3 Bacon's Abr. 320 et seq.; 9 Vin. Abr. 474. Upon a writ of error only those matters are brought up which are properly a part of the record, or which are placed upon the record pursuant to the statute which provides for bills of exceptions. Errors of the court only can be corrected upon writ of error. 2 Cyc. 512. An error of fact could not at common law be reviewed upon writ of error. 3 Bl. 406; Heard's Steph. Pl. 96, 118. Hence it followed that, when an error of fact was complained of in a motion for new trial, a judgment refusing a new trial could not be reviewed upon writ of error. See, in this connection, Van Stone v. Stillwell Mfg. Co., 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961; Wilson v. Everett, 139 U. S. 616, 11 Sup. Ct. 664, 35 L. Ed. 286; Moore v. United States, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996. Such was the origin, scope, and purpose of the writ of error under the common law. That provision of the Constitution under which the Supreme Court of this state was organized provided that that court should sit "for trial and determination of writs of error" from courts of a given class. Cobb's Dig. of Laws, p. 1120. The language quoted is preserved in the present Constitution. Civ. Code 1895, § 5835. In each of the Constitutions of this state the Supreme Court has been limited in its jurisdiction as a court for the correction of errors having no original jurisdiction. The writ of error had its origin in the common law, and became a part of the law of this state under the adopting statute, and is still effective in any case where it is appropriate as a remedy to be pursued, unless there has been a statute abolishing it or limiting it in its operation. The scope of the writ of error, as indicated in the above quotations, was recognized in Allen v. Savannah, 9 Ga. 286. See, also, Tarver v. Rankin, 3 Ga. 213; Harris v. State, 2 Ga. 211. In Gauldin v. Shehee, 20 Ga. 531, the constitutionality of the act declaring that the certificate of the judge to the bill of exceptions should be the writ of error was under consideration, and it was there held that it was competent for the Legislature to provide that the power formerly exercised by the king of England through the chancery courts in issuing writs of error might be delegated by the state to the judges of the superior court. Prior to the date of the act just referred to, the writ of error was issued by the clerk of the Supreme Court in the name of the Governor, bearing teste in the name of the judges. See Rule 24, 1 Ga. xv. See, also, Harris v. State, 2 Ga. 211. As said by Judge Lumpkin, the Constitution could not have intended that the writ of error should be the common-law writ, because there was no court of chancery in Georgia to issue it, and therefore it was within the power of the General Assembly to regulate the issuance of this writ and prescribe by whom it should be issued. But neither in that decision, nor in any other to which my attention has been called, has it been held that the writ of error under the Georgia practice, in its scope and purpose, was anything less than the writ of error of the common law issued out of chancery. See, in this connection, Harris v. State, 2 Ga. 211. The jurisdiction of this court has been so extended as to authorize a writ of error to review a decision granting or refusing a new trial upon the facts, a proceeding that was unknown to common law; that jurisdiction being upheld upon the broad language of the act establishing the court, which gave it jurisdiction to review any decision or judgment of the superior courts. This result was reached in the early history of this court by the application of a fiction, and has since been acquiesced in. See Kelly v. Strouse, 116 Ga. 887, 43 S. E. 280.

Under the common-law practice a reversal of the judgment under review was authorized upon a writ of error whenever there appeared upon the record an error of law which was substantial in its nature and by which the party complaining was or might have been prejudiced. A reversal would not result if the error was immaterial, and therefore not prejudicial, but upon the hearing of a writ of error, where exception has been taken to any decision on a question of law, it was not only the right of the party to demand a decision, but it was the duty of the court to determine whether the exception so taken was well founded. The court might hold, as it did in numerous cases, that the exception was without merit or was upon an immaterial point; but the court had no authority to refuse to consider the exception as made. At the time the Supreme Court of Georgia was established, and for more than a quarter of a century thereafter, the bench and the bar of the state were composed of men who were thoroughly conversant with the principles and practice of the common law, and the technical term of the common law used in the Constitution was undoubtedly therein placed to be interpreted in its common-law sense, subject only to such limitations as might be found in the statutes of this state. I am well aware that a single physical precedent is worth little as authority. I am free to concede that several physical precedents of the same nature will not carry controlling weight. But when for 25 years and more there is an accumulation of physical precedents which are in accord with common-law practice, and no criticism of any nature whatever upon these precedents is made by the bench or the bar, the former fully capable of detecting and criticising, and the latter not only capable of detecting,

but perfectly willing to take advantage of, any defects in practice that might exist, these precedents, even though they be merely physical, multiplied under such circumstances, piled one upon another mountain high, command my respect and control me in my views. If I were tempted to entertain other views, reverence for the unquestioned learning of those who for so long a time passed these precedents unchallenged would constrain me to surrender them. The act of 1898 has been held by a unanimous decision of this court to be only declaratory of existing practice (Taylor v. Reese, 108 Ga. 379, 33 S. E. 917); and later cases conflicting with it are required, under the statute, to yield to it. There can be no two opinions as to what was the common-law practice in reference to writs of error. Neither can there be any serious difference of opinion on the question as to whether this practice was recognized by the profession, both bench and bar of this state, for a long period of time. Treating this act as declaratory, a necessarily controlling decision under the act of 1898 would be a decision which was alleged to involve the commission of an error of law which was substantial in its nature. Such a decision was a necessarily controlling decision at common law, in the sense that a reversal upon writ of error would result, and such a decision is a necessarily controlling decision in Georgia. If the act of 1898 be interpreted as legislation introducing a new rule of practice having no reference to the past, it might be possible for the conclusion to be reached that the word "control" should be given the meaning that the decision under review must constrain a particular final judgment in the case. But, interpreting acts of the Legislature in reference to matters of substantive law, as well as of practice, it is neither right nor safe for the courts to shut their eyes to the history of the past in reference to the subject-matter of the legislation.

Usually it is with much hesitation that I place upon the records of this court an expression of my opinion when it is in conflict with that of a majority of the members of the court, and especially is this so when my views do not coincide with any of those who are participating in the decision of the case. I am not now altogether freed from this hesitancy, but nevertheless it does seem clear to me that I am merely contending for the recognition of a rule of practice that was well settled at common law, and recognized by the concurrent voice of the bench and bar of Georgia when each was made up of lawyers thoroughly trained in the principles controlling the practice at common law. I am also sustained by the unanimous decision of this court in the case of Taylor v. Reese, 108 Ga. 379, 33 S. E. 917, as I understand that decision. The views now expressed were authoritatively announced as the opinion of five justices at the time the decision in Kelly v. Strouse, 116 Ga. 872, 43 S. E. 280, was decided; and the identical question now involved was resolved, in the way it seems to me it ought to be resolved, by four justices in Cawthon v. State, 119 Ga. 395, 46 S. E. 897. Among them was the present Chief Justice and Mr. Justice Turner, each trained for the bar at a time when a knowledge of common-law practice was deemed necessary to the successful practice of the profession, and Mr. Justice Lamar, who was himself the author of the act of 1898. The assignment of error upon the refusal of the judge to prohibit the attorney to appear as counsel for the state should be considered by this court on its merits. It is not necessary for me, under the present status of the case, to intimate whether this assignment of error is meritorious; but it is before this court in due form, and is entitled to consideration and decision. What has been said, taken in connection with what is set forth in the majority opinion in the Cawthon Case, fully expresses my views in reference to this matter. The views expressed are due to a settled conviction, reached after a laborious and anxious investigation when the Cawthon Case was under consideration. If I could possibly view the question in any way where there was a doubt, I would gladly yield the doubt and let the practice be settled by a unanimous decision, notwithstanding what I have said on two former occasions. It is a matter of regret to me that my legal vision is so beclouded that I cannot see as the truth that which seems so clear to my Brethren. The scales may hereafter fall from my eyes, but until that time arrives I must adhere to the truth as it now appears to me.

(123 Ga. 787)

REID v. DE JARNETTE. SAME v. YOUNG. SAME v. LAWSON.

(Supreme Court of Georgia. Aug. 4, 1905.)

BANKS AND BANKING—LIABILITY OF STOCKHOLDERS.

A provision, in a charter granted prior to the act of 1893 (Acts 1893, p. 70; Civ. Code 1895, §§ 1903–1911) to the promoters of a banking enterprise, to the effect that "each stockholder in said corporation shall be individually liable for the debts of the corporation to the amount of his unpaid subscription to the capital stock of the corporation, and for an additional amount equal to his subscription," is, in view of the policy then adopted by our General Assembly of providing in each particular instance under what circumstances and to what extent the owners of stock in such institutions may be held liable for corporate debts, to be understood as imposing individual liability upon such stockholders only as became such by subscribing to the capital stock, and not upon shareholders who by way of succession from the original stockholders became owners of stock.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 70.]

(Syllabus by the Court.)

Error from Superior Court, Putnam County; H. G. Lewis, Judge.

Actions by A. S. Reid, receiver, against J. B. De Jarnette, against Robert Young, and against Thomas G. Lawson. Judgment for defendants, and plaintiff brings error. Affirmed.

The Putnam County Banking Company became financially embarrassed in the latter part of the year 1903, and at the instance of one of its creditors a receiver was appointed to take charge of its affairs and collect all debts due to it, as well as to institute legal proceedings against its stockholders to enforce for the benefit of its creditors the statutory liability imposed by the charter of the company upon subscribers to its capital stock. In March of the following year, the receiver, A. S. Reid, brought an action against J. B. De Jarnette for $600, alleging that, on the date of the failure of the Putnam County Banking Company, and at the time of the creation of its outstanding indebtedness to the creditors for whose benefit the suit was instituted, he was the owner of 12 shares of the capital stock of that company, of the par value of $50 each, and was therefore under a statutory liability to pay to the plaintiff, as receiver, the amount sued for, to be applied to the discharge of the company's indebtedness. The defendant filed a demurrer to the petition, one of the grounds of which was that no right to recover against the defendant was shown, for the reason that it was not alleged that he was at any time a subscriber to the capital stock of the bank, or what was the amount of his stock subscription, "but only that he owned, at the time certain debts were contracted by the bank and at the time of the failure thereof, 12 shares of the capital stock, which allegation, if true, would not, under the law, make him liable in any amount for the debts of the bank." The court sustained this ground of the demurrer, and dismissed the action. A like disposition was made by the court of another action which had been brought by the receiver against Robert Young to recover $1,150, whom the plaintiff alleged was the holder of 23 shares of the capital stock of the bank on the day of its collapse and during the period within which its outstanding indebtedness had been contracted. The case was dismissed on motion of the defendant's counsel, on the ground that the petition set forth no cause of action. Still another suit, based upon similar allegations of fact, was brought by the receiver against Thomas G. Lawson, as the owner of 137 shares of capital stock of the defunct bank. He filed an answer, in which he set up the special plea that he was not liable to the plaintiff, as receiver, for the amount sued for, or for any other amount, "on account of his being a stockholder in said Putnam County Banking Company, as he was never a subscriber to the stock of the said Putnam County Banking Company, and all the stock he ever owned in said bank was transferred to him by persons who had subscribed for the same and had paid up the full amounts of their subscriptions." The plaintiff moved to strike this special plea on the ground that it set forth no legal defense. The court overruled this motion, and the case proceeded to a trial on the merits. After the close of the evidence the court instructed the jury to return a verdict in favor of the defendant; he having fully established his defense that he had never been a subscriber to any of the stock issued by the bank, but had purchased the stock held by him from other parties, who had subscribed for the same and who had paid in full their stock subscriptions. The three cases were brought to this court for review by separate bills of exceptions sued out by the receiver, but were argued together, as the fate of each depends upon the determination of one and the same question of law.

Jos. H. Hall, for plaintiff in error. Turner & Adams, J. S. Turner, W. B. Wingfield, Hall & Wimberly, and Thos. G. Lawson, for defendants in error.

EVANS, J. (after stating the facts). The Putnam County Banking Company was organized under a special act of incorporation approved December 24, 1888. Acts 1888, p. 89. It provided that "each stockholder in said corporation shall be individually liable for the debts of the corporation to the amount of his or her unpaid subscription to the capital stock of the corporation, and for an additional amount equal to his subscription." The question presented for determination is: Was it the purpose of the General Assembly to impose this individual liability upon each and every person who might become a shareholder of the corporation by subscribing to its capital stock, or by purchase of shares issued to another, or otherwise succeeding to the holdings of a stockholder who had ceased to be a member of the corporation, or was the legislative intent to fix the statutory liability upon such stockholders only as became such by subscribing to the capital stock? The term "stockholder" is not synonymous with that of "subscriber." Each has a distinct, definite, technical meaning. The latter is employed to denote one who becomes bound by a subscription to the capital stock of a corporation. It is to be presumed that the members of the General Assembly knew what was an "unpaid subscription to the capital stock" of a corporation, when they declared that each stockholder could be called on by creditors to pay, not only his "unpaid subscription to the capital stock of the corporation," but also an "additional amount equal to his subscription." If effect be given to the letter of the act, then the liability imposed was upon those who became stockholders through their voluntary act in subscribing to the capital stock of the banking company and assuming responsibility for the payment of its debts, not only to

the extent of their respective stock subscriptions, but for double the amount thereof. The promoters of the enterprise asked for a charter, and it was granted to them upon the terms imposed in the act of incorporation. Upon these terms, and upon these terms only, could the enterprise be launched. The promoters and their associates, by acceptance of the charter, assumed the liability imposed upon them, and the public was given the assurance that they pledged themselves, if the fruition of their hopes to make the enterprise a successful one was not attained, to pay the debts of the banking company out of their own pockets, at least to the extent of putting into the proposed venture twice the amount of the stock subscriptions. The corporation itself was made primarily liable for the payment of its debts. Those who subscribed to its capital stock were called on by the General Assembly to be its backers, its guarantors.

The argument is advanced by counsel for the plaintiff in error that, unless all stockholders, however they may have acquired their holdings, be held liable for the debts of the corporation, its creditors may not be able to collect their demands against it, since many, if not all, of the subscribers to its capital stock may now be dead, and such estates as they left fully administered. Conceding that such may be the case, we do not feel justified in so stretching the words used in the act of incorporation as to bring within its operation all stockholders of the bank, whether they became shareholders by subscribing to its capital stock, or by way of succession from those who originally became bound to pay double the amount of their subscriptions, if necessity so to do should ever arise. We cannot assume that the General Assembly contemplated that those who accepted the charter and organized under it could relieve themselves of the liability they voluntarily assumed by subsequently transferring their stock to others, who might or might not be solvent and able to respond to the demands of debtors of the corporation. Nor does the act of incorporation provide any scheme whereby this liability might be shifted upon stockholders who purchased stock upon the faith that the act was to be understood as meaning neither more nor less than was said; nor is there any suggestion in the act of a compounding of liability, so that a creditor could treat each successive shareholder as an additional guarantor, and, at his election, call upon either past or present stockholders for payment of his demand, or enforce satisfaction from all as one collective body answering to the description of "stockholders." We try to construe, not to legislate. No good reason has been advanced why the words used in the statute under construction should not be given their usual signification, and the conclusion reached that, while an individual liability was imposed upon each of the original shareholders, no provision was made for any further protection of creditors, in the event the affairs of the bank might eventually be conducted by persons who succeeded to the right of the subscribers to its capital stock, and in this manner became stockholders.

An examination of the various charters granted to banking institutions prior to, at nearly the same time as, and subsequently to the passage of the special act incorporating the Putnam County Banking Company, satisfies us that the General Assembly had no settled policy with regard to the terms upon which such charters should be granted, or any formulated scheme looking to the protection of creditors of this class of institutions. The reported cases which involved a construction of acts imposing an individual liability upon holders of stock in banks bear out this statement, so far as early legislation is concerned. See Lane v. Morris, 8 Ga. 468; Id., 10 Ga. 162; Lane v. Harris, 16 Ga. 217; Thornton v. Lane, 11 Ga. 459; Neal v. Moultrie, 12 Ga. 104; Moultrie v. Smiley, 16 Ga. 289; Robinson v. Lane, 19 Ga. 337; Robison v. Beall, 26 Ga. 17. In 1880 the General Assembly passed an act incorporating the Commercial Bank of Savannah, and the only liability imposed upon its stockholders was for unpaid stock subscriptions. Acts 1880–81, p. 229, § 14. In the following year a charter was granted to another banking company, provision being made that "each stockholder shall be liable for the debts of the bank, created while he is a stockholder in said company, in proportion to the amount of stock held, owned, or subscribed for by him at the time the debt was created." Id. p. 197, § 10. At the same session of the Legislature a charter was granted to another institution, on condition that "the stockholders shall be bound and liable as sureties to contribute to the payment of the debts of the bank, each in an amount equal to the par value of the stock held by him at the time of the bank's failure or insolvency, or so much thereof as may be necessary." Id. p. 208, § 10. And, in amending the charter of a bank previously incorporated, provision was made that "the private property of each and all of the corporators of the said institution for the time being shall be liable for the payment of all deposits made with said institution [and for all debts contracted or incurred by said institution] during their membership therein, in the same manner as in ordinary commercial cases or cases of debt." Id. p. 209, § 4. Still another scheme of liability was adopted in incorporating the Citizens' Bank of Augusta. Id. p. 194, § 13. In 1886 a charter was granted to the Commercial Bank of Atlanta; the act of incorporation stipulating "that each stockholder in said corporation shall be individually liable for the debts of the corporation to the amount of his or her unpaid subscription to the capital stock of the corporation, and the stockholders of said

corporation shall be individually liable to creditors of said corporation to the amount of the capital stock subscribed or at any time held by them, respectively." During the same year other acts of incorporation were passed, in each of which special provision was made as to the liability of shareholders. Acts 1886, p. 65, § 8; Id. p. 70, § 16. In one of them the "individual property of the stockholder, at the time of suit," was declared to be subject to "the ultimate payment of the debts of the company in proportion to the amount of stock owned by each stockholder." Id. p. 78, § 2. Different terms of liability were imposed on the stockholders of other banking institutions chartered in 1887. See Acts 1886–87, pp. 333, 339, 341, 343, 360, 372. In the instance last noted the liability feature was the same as in the act now under consideration. During the session of the Legislature at which this act was passed no less than 20 other charters were granted to banking institutions to be located at various points in the state. See Acts 1888, pp. 56–135. An examination of these charters will disclose the fact that different terms of liability were imposed upon shareholders in each particular instance. The General Assembly seems not to have been at a loss for appropriate words with which to express the legislative will, and, where its intent was to make all classes of stockholders accountable for the debts of the corporation, the intention so to do was clearly conveyed in language indicating that the terms "stockholders," "shareholders," and "subscribers" were not understood as being synonymous, but as having each a precise and independent meaning. For illustration, the act incorporating the Merchants' & Farmers' Bank of Hogansville declared (page 63) "that each stockholder shall be individually liable for the debts and obligations of said corporation to the extent of his or her paid in stock, at its par value, and, in addition thereto, shall be liable for all debts and obligations of said corporation, to the extent of his or her capital stock, equally and ratably and not one for another." At the succeeding session of the Legislature as many as 55 new banking houses were incorporated, and amendments were made to a number of charters previously granted. See Acts 1889, pp. 452–664. Still the General Assembly pursued the policy of specifying, in each case, under what condition owners of stock might be held responsible for debts contracted by the corporation, and to what extent they would be liable therefor, if at all. And it was not until the act of 1893 (Acts 1893, p. 70), providing for the incorporation of banks (Civ. Code 1895, §§ 1903–1911), that the Legislature declared a settled policy as to liability of stockholders.

In view of all this legislation on the subject, we cannot but conclude that the General Assembly intended each act of incorporation to speak for itself, and to be construed in accordance with the cardinal rule of construction that words of ordinary significance are to be given their usual and customary meaning. The particular act we are now called on to construe has irreproachable letter, but is apparently devoid of deducible spirit. We cannot undertake to imbue it with this intangible attribute, without doing violence to what we conceive to have been the legislative will; and therefore we follow the letter, with the result above announced.

Judgment in each case affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(72 S. C. 290)

ROGERS et al. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Aug. 1, 1905.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—ACTION FOR DAMAGES.

Where a husband sends a telegram to his wife's mother, and it does not show on its face that it is for the benefit of his wife, and it is not alleged in the complaint that the telegraph company had notice that the telegram was sent for the benefit of the wife, the complaint fails to show that she was entitled to damages for failure to deliver.

Appeal from Common Pleas Circuit Court of Richland County; Purdy, Judge.

Action by Bertha A. Rogers and J. E. Rogers against the Western Union Telegraph Company. From order overruling demurrer, defendant appeals. Reversed.

This is an appeal from an order overruling a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. It will therefore be necessary to refer to the complaint, which alleges: "(1) That the plaintiff J. E. Rogers is the husband of the plaintiff Bertha A. Rogers, and is joined with her under section 135 of the Code of Procedure. (2) That the defendant is, and at the times hereinafter mentioned was, a telegraph company duly incorporated by and under the laws of the state of New York and doing business in South Carolina, having offices in the city of Columbia, S. C., and the town of Darlington, S. C., for the transmission of messages by wire between said points. (3) That on the 17th day of June, the plaintiff Bertha A. Rogers, being in the city of Columbia, S. C., was taken sick in childbirth, and at 8 o'clock a. m. on the said day her husband, J. E. Rogers, having had a prearrangement with her mother to be with her at such time, as was her custom theretofore, presented to and filed with the defendant, at its office in Columbia, S. C., the following message, to wit: 'Columbia, S. C., June 17, 1904. Mrs. L. M. P. Rogers, care of Hallie Blackwell, Darlington, S. C.: Mama. Come on first train. Answer message. J. E. Rogers.' (4) That the defendant at said time and place received said message, agreeing to deliver the same

promptly as directed, and in consideration therefor then and there was prepaid to the defendant its regular charges. (5) That at said time the plaintiff Bertha A. Rogers was grievously ill in bed and anxiously awaiting the arrival of her mother, and in immediate need of her help and attention. (6) That although Hallie Blackwell, in whose care the telegram was directed, was at his place of business not far from the office of the defendant in the town of Darlington, S. C., the defendant willfully, wantonly, recklessly, and negligently failed and omitted to deliver said message as directed, but mailed the same to 'Mrs. L. M. P. Rogers, by Rural Free Delivery, Darlington, S. C.,' in consequence of which willful, wanton, reckless, and negligent conduct of the defendant, its agents and servants, said message was not received by the said Mrs. L. M. P. Rogers until some days after it was delivered to said defendant for transmission as aforesaid. (7) That by reason of the defendant's said willful, wanton, reckless, and negligent failure to promptly deliver said message as directed, the plaintiff Bertha A. Rogers was deprived of the presence, aid, comfort, and attention of her mother, and subjected to great mental anguish and suffering, to her damage $1,950."

The defendant demurred to the complaint on the following grounds: "(1) Because the complaint fails to allege any duty owed by the defendant to the plaintiff Bertha A. Rogers, the real party in interest, and for whose benefit this action is brought, for the breach of which it is liable in damages, nor does it show that there was on behalf of said plaintiff any cause of action against the defendant. (2) Because it appears upon the face of the complaint that this action is brought solely upon the damages alleged to have been sustained by a stranger to the message, namely, Bertha A. Rogers, whose interest does not appear from the message itself, nor is it alleged in said complaint that it was otherwise disclosed to the defendant. (3) Because it appears upon the face of the complaint that the plaintiff Bertha A. Rogers is not entitled to recover for mental anguish, and that the action is brought for her benefit." The demurrer was overruled, and the defendant appealed.

Nelson & Nelson, for appellant. E. McC. Clarkson and D. W. Robinson, for respondents.

GARY, A. J. (after stating the facts). In section 823 of Joyce on Electric Law, it is said: "The rule established in Hadley v. Baxendale, and which has been continuously asserted and affirmed, is that the damages which a party to a contract ought to recover, in respect to a breach of it by the other, are such as naturally arise from the breach itself, or such as may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach. And it may be added that the damages must be certain, both in their nature and in respect to the cause from which they proceed. They must not be the remote, but the proximate, consequence of the breach of contract, and must not be speculative or contingent. Again, to continue the rule of the Hadley v. Baxendale case, if the special circumstances under which the contract was actually made were communicated to and thus known by both parties, the damages resulting from the breach of such a contract, which they could reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitudes of cases not affected by any special circumstances from such breach of contract; for, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case. This rule is applicable to the contracts of telegraph companies for the transmission of messages."

These principles are recognized in Arial v. Telegraph Co., 70 S. C. 418, 50 S. E. 6, in which the court uses this language: "The statute was not intended to make the company liable in all cases for mental anguish and suffering, where there was negligence in receiving, transmitting, or delivering messages. In order to render the company liable in damages for mental anguish, the suffering must have been the direct, natural, and proximate result of its negligence in receiving, transmitting, or delivering the message. The message must show upon its face, or the company must have knowledge of such facts as will enable it to foresee, that the failure to perform its duty may reasonably be expected to result in mental suffering. The company is not liable in damages for mental anguish, when it was merely incidental to the failure to perform its duty, as in such cases the suffering could not be reasonably anticipated, and was not a result which, it could be said, the parties had in contemplation in entering into the contract." See, also, Jones v. Telegraph Co., 70 S. C. 539, 50 S. E. 198. The case of Mood v. Telegraph Co., 40 S. C. 524, 19 S. E. 67, shows that special damages are not recoverable, unless expressly alleged, and that those damages are special that do not necessarily result from the wrongful act.

The plaintiff's name is not mentioned in the telegram. Therefore the message does not show upon its face that her suffering could have been reasonably anticipated, and

was a result which, it could be said, the parties must have had in contemplation in entering into the contract. Nor are there any allegations in the complaint that the defendant had notice that the telegram was sent for her benefit. The complaint fails to show that she was entitled either to damages as the direct and proximate result of the wrongful act or to special damages. His honor, the circuit judge, therefore, erred in overruling the demurrer.

It is the judgment of this court that the judgment of the circuit court be reversed.

(139 N. C. 540)

STATE v. MURRAY.

(Supreme Court of North Carolina. Sept. 19, 1905.)

1. CRIMINAL LAW — INSTRUCTIONS — POSITIVE AND NEGATIVE EVIDENCE—WEIGHT.

Where, on indictment for murder, it was material for the state to show that the prisoner fired the fatal shot, and several witnesses testified that when the fourth shot was fired the weapon was in the hands of the prisoner, while he introduced a number of witnesses who were present, but testified that they did "not see the pistol and did not know in whose hands it was," an instruction defining positive and negative evidence, and charging that positive evidence was entitled to greater weight than negative testimony, was not error; the court having also charged that the jury were the sole judges of the faith and credit to be given to the testimony of each of the witnesses.

2. SAME—CONSTRUCTION.

Where the court, after defining positive and negative testimony, stated that defendant had introduced a large number of witnesses, who testified that they saw the scuffle and the pistol, but that they did not know whether it was in the hands of defendant or another at the time the last shot was fired, and that such testimony was negative, and was not entitled to the same weight as positive testimony, the statement was not objectionable as leaving the jury to infer that the testimony of the state's witnesses was positive, and the testimony of "all" of defendant's witnesses was negative.

3. SAME—INADVERTENT ERROR.

Where accused was represented by able counsel, a conviction will not be reversed for a mere inadvertent error of the court in reciting the evidence, not called to the trial court's attention.

Appeal from Superior Court, Durham County; Peebles, Judge.

W. R. Murray was convicted of manslaughter, and he appeals. Affirmed.

Fuller & Fuller, Manning & Foushee, Boone & Reade, Winston & Bryant, and J. C. Biggs, for appellant. The Attorney General and Argo & Shaffer, for the State.

CLARK, C. J. This is an indictment for murder, and an appeal from a conviction and sentence for manslaughter. It was material for the state to show that the prisoner fired the fatal shot, and several witnesses were introduced who swore positively that when the fourth shot was fired the weapon was in the hands of the prisoner, while other witnesses testified that they did not see the pistol, and did not know in whose hands it was when the last or fourth shot was fired. Upon this point his honor instructed the jury as follows: "The law says that it is your duty to give to positive testimony greater weight than you give to negative testimony. The testimony of those witnesses who swore positively that they saw the pistol in the hand of the prisoner, and that he fired the fatal shot while the pistol was in his hand, is what the law terms 'positive testimony.' They swear positively that they saw the existence of a fact. The testimony of the witnesses who said that they saw the prisoner and the deceased in a struggle at the time when the last shot was fired, but they did not see the pistol, and did not know in whose hand the pistol was, is what the law terms 'negative testimony.' The reason the law gives greater weight to positive testimony than to negative testimony is because the witnesses who swore to positive testimony swore to what is a fact, an existing fact, or else they deliberately swore to a falsehood, while those who swore to negative testimony may be telling the truth, and yet the fact may exist which they did not see. If one witness swears that he saw Sheriff Markham in the court house in Durham on a certain date, the sheriff was there, or else the witness told a lie. Another witness might say: 'I was in the courthouse on that occasion, but I did not see Sheriff Markham in there.' That witness may be telling the truth and may be conscientious, and yet it may be a fact, notwithstanding, that Sheriff Markham was in the courthouse. And for that reason the law says you must attach greater weight to positive testimony than to negative testimony." This was excepted to, but is consonant with reason and the precedents.

In Henderson v. Crouse, 52 N. C. 623, the judge below told the jury that "positive testimony was entitled to more weight than negative." On appeal this court said: "The instructions as to the relative weight of positive and negative testimony is far from error. The rule as laid down has been long established and followed; that there is a difference, and that the positive is entitled to more weight than the negative, is not only an accepted legal maxim, but is founded, as we think, in truth and justice. The amount of difference the court did not undertake to decide, and could not as it was a question for the jury. In all cases force of testimony, whether positive or negative, must depend upon a variety of collateral facts and circumstances. For instance, the force of negative testimony must manifestly depend upon the opportunities of observation afforded to the witness. These opportunities might be so favorable and frequent as to approach in weight to a positive statement; yet we take it, when the positive is in conflict with nega-

tive under any ordinary circumstances, the witnesses being equally credible, the former should preponderate. Negative testimony assuredly might be accumulated from different quarters, and under circumstances countervail entirely positive testimony; but this is not the question. The question made is whether it be correct to declare as a naked proposition of law, stripped of matter that may affect the weight of either, that positive testimony is entitled to more weight than negative." This ruling has been cited and approved in Reeves v. Poindexter, 53 N. C. 311; State v. Horan, 61 N. C. 575 (in which Battle, J., a most careful judge, says: "Where there is affirmative and negative testimony, it must be left to the jury, with insructions that the former is entitled to more weight than the latter"); Smith v. McIlwaine, 70 N. C. 289; State v. Campbell, 76 N. C. 263 (in which the identical words stated by Battle, J., supra, are again used); State v. Gardner, 94 N. C. 957; and the late case of Cawfield v. Railroad, 111 N. C. 601, 16 S. E. 705, where Avery, J., says: "We concur with his honor in the opinion that the evidence * * * on the one side was positive, and was entitled to greater weight than that adduced by the other. There was no error in his reading, as he did from Henderson v. Crouse, 52 N. C. 624." In the present case the judge followed up the above instruction excepted to by adding: "The law says, also, it is your duty to reconcile an apparent conflict of testimony, if you can do it. If you cannot do it, it is then your duty to march up like men and pass upon the testimony, and to say which of the witnesses have told the truth and which have told a falsehood, and base your verdict accordingly."

The matter was thus left to the jury, in the last analysis, and the instruction as to the consideration to be given to positive and negative testimony was in accordance with the uniform rulings in this state. The same rule is laid down in Stitt v. Huidekoper, 84 U. S. 395, 21 L. Ed. 644; 3 Rice, Cr. Ev. § 266, and in a vast mass of cases to the same purport, from nearly all the states as well as federal courts collected. 20 Cent. Dig. pp. 3575–3583. The precedents are overwhelming, and the principle is too well based upon reason to be shaken. It is a reason and principle that any man would act upon in the ordinary affairs of life that, when there is positive and negative testimony, he will believe and act upon the former when the witnesses are of equal credibility, and his honor left the credibility of the witnesses absolutely to the jury, telling them "to reconcile the evidence if they could; if not, then to find who had told the truth." The jury came back after some hours' deliberation and informed the court that "some of the jurors seemed to have gotten mixed up as to positive evidence and negative evidence." To this the court replied: "I don't know whether I can give you any instructions on this subject that will make it any plainer. Positive evidence is where a man swears positively that he saw anything, or anything existed. Negative evidence is where a man says: 'I did not see anything.' The defendant introduces a large number of witnesses. I do not remember how many—16, I think—and they said they saw a scuffle, and the pistol was in the hands of Joe and Bob Murray; that they do not know who had the pistol when this last shot was fired. Now the court is of opinion that the main question is as to where the pistol was when it was fired the last time, and the court charged you before, and reiterates now, that if the pistol was taken away from Mr. Joe Murray by Mr. Bob Murray, and you find that to be a fact beyond a reasonable doubt, and he pulled the trigger and fired the shot that killed Joe Murray, then, as the court charged you before, he would be guilty, either of murder in the second degree or manslaughter, according as you find one or the other to have commenced the difficulty; that is, who commenced the fight, not the quarrel, but the fight. If the whole evidence leaves you in a reasonable doubt about who shot the pistol that killed Joe Murray, then it is your duty to give the defendant the benefit of that doubt, and say he is not guilty."

The prisoner insisted that the court charged that "the testimony of the state's witnesses was positive and the testimony of the defendant's witnesses was negative." This is not done in any part of the charge, nor is it a just inference from what was said by the judge. In stating the contentions of the parties, he mentions (as was proper) that the "state contends that it had produced nine witnesses who testified positively, as it claims, that the prisoner fired the fatal shot and they were not contradicted." Also, in the instruction above quoted, given on the return of the jury, and on their request for further instructions, his honor said that the "defendant introduced a large number of witnesses—I don't remember how many; 16, I think—and they said they saw a scuffle; * * * that they did not see the pistol when this last shot was fired." But he did not say that all of defendant's witnesses so testified, though in fact each of them did testify that they did not know who fired the last shot; nor does he contrast their testimony by saying that the testimony of all the state's witnesses was positive. Hertz, one of prisoner's witnesses, after testifying that he "did not know" who fired the pistol, further said that "he only saw two hands grabbing the pistol; that both had the pistol." Another of defendant's witnesses said in effect the same. This would hardly contradict the judge in a material particular, even if he had said (which he did not) that all of defendant's witnesses

testified that they did not know who had the pistol when the last shot was fired; for both these witnesses stated that they did not know who fired the last shot, which was the material point, and not whether one or both men had hold of it. But if it were conceded that there was a material inadvertence, it was certainly not an error of law, but an inadvertent error in reciting the evidence, which was cured by the failure of the counsel to call it then and there to the attention of the court and have it corrected. State v. Grady, 83 N. C. 646 (indictment for murder), in which Smith, C. J., says: "It was the duty of counsel, if evidence important to the defense had been overlooked, then to call it to the attention of the judge, and have the omission supplied. It would be neither just to him nor conducive to a fair trial to allow this neglect or oversight, attributable to counsel quite as much as to the judge, to be assigned for error entitling the accused to another trial, whatever force it might have in influencing the court in the exercise of an unreviewable discretion to grant it." This has been approved in State v. Reynolds, 87 N. C. 546; State v. Gould, 90 N. C. 662; State v. Debnam, 98 N. C. 717, 3 S. E. 742; Cathey v. Shoemaker, 119 N. C. 427, 26 S. E. 44.

It would be detrimental to the administration of justice if a serious trial, occupying probably many days and conducted at great expense, should be gone over again for a slight inadvertence of the judge in stating the evidence, when counsel could at once have had the error (if prejudicial) corrected upon the spot, by calling the matter to the attention of the court. The prisoner was not inops consilii, but was represented by nine of the ablest lawyers at one of the ablest bars in the state. If the recital of the evidence in this particular was erroneous and prejudicial, they would surely have noticed it, and asked its correction. Such request for correction of the statement should have been asked for then, when it could have been easily made, and not in this court on appeal. Besides, his honor told the jury that if their recollection differed from the evidence read over to them, or as detailed by counsel, that "the jury are the sole judges of what the witnesses said, and the sole judges of how much faith and credit should be put in the testimony of each and every witness who was examined before you."

The court also charged the jury, at the request of the prisoner: "The state must satisfy the jury beyond a reasonable doubt that the prisoner fired the shot which inflicted the wound upon J. S. Murray, from which he died. If the jury, considering all the testimony, are left in doubt whether the prisoner fired the fatal shot which killed J. S. Murray, the prisoner is entitled to the benefit of that doubt, and the jury will render a verdict of not guilty."

No error.

(139 N. C. 57)

MERRELL v. DUDLEY.

(Supreme Court of North Carolina. Sept. 19, 1905.)

1. MALICIOUS PROSECUTION—EVIDENCE—CORROBORATIVE DECLARATIONS—RES GESTÆ.

In an action for malicious prosecution, evidence of a declaration by defendant to a justice of the peace, on applying for a warrant for plaintiff's arrest for the larceny of a shovel, to the effect that, when defendant found the shovel in plaintiff's possession and asked him to return it, plaintiff said, "To hell with the shovel!" was admissible, both as corroborative and as res gestæ.

2. APPEAL—INSTRUCTIONS—PREJUDICIAL ERROR.

An instruction containing the expression, "if you believe from the evidence," though objectionable, is not ground for reversal, where it did not appear that prejudice probably resulted therefrom.

3. MALICIOUS PROSECUTION—MALICE.

In an action for malicious prosecution, malice may be inferred from a want of probable cause.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, §§ 67, 68.]

4. SAME.

In an action for malicious prosecution, an instruction that malice may be inferred from a want of probable cause, or from "other circumstances," was not objectionable as requiring both a total want of probable cause and corroborating circumstances to prove malice.

Appeal from Superior Court, Carteret County; Webb, Judge.

Action by C. A. Merrell, by his next friend, against Thomas Dudley, for malicious prosecution. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Chas. L. Abernethy, for appellant. D. L. Ward and L. I. Moore, for appellee.

BROWN, J. The evidence tends to prove that the defendant lost a shovel, and after looking for it for several days he was informed the shovel was in the possession of the plaintiff. He went to the plaintiff and asked him to bring the shovel back. The plaintiff used insulting language to the defendant and did not return the shovel. The defendant then went to Magistrate Springle and asked him what to do. After some preliminaries the magistrate advised the defendant to take out a warrant. At the time the defendant applied to the magistrate to know what to do, he stated that he had found the shovel in the possession of Merrell and asked him to bring it back. Merrell did not bring back the shovel until the day of the trial, when he produced the shovel, which was turned over to the defendant, and the case was dismissed. The magistrate wrote the warrant after advising the defendant to take that course. The justice of the peace, Springle, was permitted to testify over plaintiff's objection, upon cross-examination by defendant, that defendant had told him at the time he issued the warrant that he had found the shovel in the possession of Merrell and asked

him to bring it back, and Merrell said, "To hell with the shovel!"

1. It is generally true that the declarations of a party to an action are not competent in his own behalf. When they are corroborative, it is permissible to admit them; but the judge should explain to the jury the character of such evidence and the weight to be given to it. This was not done in this case; but no exception has been taken by the plaintiff to the omission. It appears from the record that the examination of defendant, Dudley, preceded this part of the cross-examination of Springle, and the testimony was properly admitted, both as corroborative and as a part of the res gestæ. This declaration is original evidence as part of the res gestæ. Declarations or acts, accompanying any act or transaction in controversy and tending to explain or illustrate it, are received in evidence as a part of the res gestæ. Doorman v. Jenkins, 29 E. C. L. 80; Trav. Ins. Co. v. Mosley, 8 Wall. 397, 19 L. Ed. 437. The act or transaction in controversy in this case is the wrongful, malicious suing out of the warrant of arrest without probable cause. The declarations of defendant at the time he sued out the warrant, and accompanying that act, are therefore a part of the "thing done." The circumstances, facts, and declarations which grow out of the main fact are contemporaneous with it, and serve to illustrate its character. This exception and the other exceptions to the evidence are untenable.

2. The plaintiff also excepts to certain expressions used by the judge below in charging the jury. "If you believe from the evidence" is an expression urged upon our attention by the plaintiff as erroneous and prejudicial. It is true that the language is inexact, and this form of expression should be eschewed by the judges in charging juries. This court has heretofore called attention to it in a number of cases. Barrett's Case, 123 N. C. 753, 31 S. E. 1005; Green's Case, 134 N. C. 661, 46 S. E. 761; Wilkie v. Railroad, 127 N. C. 203, 37 S. E. 204; Sossamon v. Cruse, 133 N. C. 470, 45 S. E. 757. In the latter case Mr. Justice Walker has pointed out with clearness the objection to this form of expression. We do not regard the use of such language as reversible error, unless it clearly appears that the appellant was probably prejudiced thereby, which does not appear to us in this case. We trust the judges of the superior court will in future be advertent to these views as repeatedly expressed by this court.

3. Malice may be inferred by the jury when a want of probable cause for the prosecution is shown to their satisfaction. Kelly v. Traction Co., 132 N. C. 369, 43 S. E. 923. His honor so charged the jury, and said, further, that malice may be inferred from "other circumstances." A jury is not compelled to infer malice from a want of probable cause. They may do it, and so they may look for other circumstances. In using the words "other circumstances" in the same sentence and connection in the charge, we do not think his honor should be interpreted as meaning that both a total want of probable cause and corroborating circumstances are required to prove malice.

The several exceptions set out in the record have been carefully examined, and we find nothing in them which renders a new trial necessary.

The judgment is therefore affirmed.

(139 N. C. 49)

JOYNER v. EARLY.

(Supreme Court of North Carolina. Sept. 12, 1905.)

1. PLEADING—AMENDMENT.
Where, in replevin for a mule, plaintiff simply alleged ownership and wrongful detention by defendant, but offered evidence that defendant obtained possession by false representations, it was not error to permit plaintiff, after motion for nonsuit, to amend his complaint to conform to the proof by setting up allegations of fraud and deceit, on payment of the costs.

2. EXCHANGE OF PROPERTY—FRAUD—REPUDIATION—REMEDIES.
Where defendant obtained possession of plaintiff's mule in a trade by false and deceitful representations, plaintiff could sue for damages for breach of the alleged warranty, or repudiate the trade and sue to recover the specified property.

3. APPEAL—DISCRETION—REVIEW.
The allowance of a trial amendment to conform to the proof is a matter of discretion, and not reviewable.

4. EVIDENCE—DECLARATIONS—HEARSAY.
In replevin to recover a mule, declarations of a third person to defendant in plaintiff's absence were properly excluded.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1174, 1175, 1178.]

Appeal from Superior Court, Hertford County; E. B. Jones, Judge.

Action by W. M. Joyner against J. C. Early. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Francis D. Winston and John E. Vann, for appellant. Winborne & Lawrence, for appellee.

BROWN, J. The plaintiff sued out claim and delivery proceedings for the mule, and filed the ordinary complaint, alleging simply ownership upon the part of the plaintiff and wrongful detention by the defendant. On the trial the plaintiff offered evidence tending to prove that the defendant obtained possession of the mule in a trade with the plaintiff by false, fraudulent, and deceitful representations. At the conclusion of the plaintiff's evidence the defendant moved to nonsuit. The court denied the motion and permitted the plaintiff to amend his complaint by setting out the allegations of fraud, misrepresentation, and deceit, upon the payment of costs, "and the trial proceeded without objection by the defendant." In his brief the defendant reviews the ruling of the court. Waiving the fact that the defendant did not

except to the allowance of the amendment, we sustain the ruling of the judge below. It was in no sense the introduction of a new cause of action, nor is it prohibited in Ely v. Early, 94 N. C. 1. The mule was the property in controversy. The amended complaint simply set out in full the allegations of fraud and deceit.

Under the facts testified to by the plaintiff he had the right to sue for damages for the alleged false warranty, or repudiate the trade and sue to recover the specific property. This is well settled. Des Farges v. Pugh, 93 N. C. 31, 53 Am. Rep. 446; Wilson v. White, 80 N. C. 280; Wallace v. Cohen, 111 N. C. 103, 15 S. E. 892; Bishop on Contracts, § 667; Benjamin on Sales, § 656, and note; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Blake v. Blackley, 109 N. C. 262, 13 S. E. 786, 26 Am. St. Rep. 566. The allowance of this amendment was a matter in the sound discretion of the court, and not reviewable.

In his brief the defendant's third exception states that "the court refused to allow the defendant to testify to a conversation had with him and the plaintiff by one Sessoms." The record shows that the plaintiff was not present. The declarations of Sessoms to the defendant were properly excluded.

We have examined the other exceptions, and fail to find that the court below erred in any particular. Affirmed.

(139 N. C. 1)

DAVIDSON et al. v. BARDIN.

(Supreme Court of North Carolina. Sept. 12, 1905.)

WITNESSES—TRANSACTIONS WITH DECEDENTS—COMPETENCY.

The testimony of one suing an administrator for caring for his intestate that she gave the intestate medicine, prepared his food, and cared for him generally, he being altogether helpless, is testimony of "personal transactions" with the intestate, and is inadmissible, within Code, § 590, prohibiting parties in interest from testifying to "communications and transactions" with deceased persons, as against their personal representative.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 664.]

Appeal from Superior Court, Perquimans County; Long, Judge.

Action by Mary E. Davidson and another against J. D. Bardin, administrator of Richard Bardin, deceased. From a judgment for plaintiffs, defendant appeals. Reversed.

Pruden & Pruden, for appellant. Aydlett & Ehringhaus, for appellees.

CLARK, C. J. This is an action to recover against the administrator of a deceased person for labor alleged to have been performed for seven years prior to his death in waiting upon, caring for, and nursing the defendant's intestate and his wife, both of whom were very old and feeble, and not related to the plaintiffs. The feme plaintiff was allowed to testify as a witness in her own behalf, over defendant's objection and exception, that she "gave him medicine, prepared his nourishment, kept him clean, and cared for him generally. He was helpless altogether. We had to do all the services and wait on him." This was clearly a "personal transaction" with the deceased, and the witness was incompetent, under Code, § 590. It is true that his honor excluded any conversation, but the statute excludes, not merely any "communication," but also any "personal transaction."

The cases relied upon by the plaintiff merely sustain the proposition that the witness would have been competent to testify to any "substantive and independent fact" that was not a "communication or personal transaction" with the deceased, as, in Gray v. Cooper, 65 N. C. 183, that the deceased had possession and use of the slaves; or, in March v. Verble, 79 N. C. 19, that the deceased had owned but one bull since the war, and what he was worth; or, in Cowan v. Layburn, 116 N. C. 526, 21 S. E. 175, that the plaintiff carried provisions to the deceased at her house, and that she had no other provisions, the court being careful to add that it did not appear whether the deceased accepted or refused the provisions, thus excluding any "personal transaction," the actual delivery. In all these cases, the possession of the slaves and of the bull, and carrying provisions to the house of defendant's intestate, were independent, substantive facts, like proving the value of an article sold to the intestate, the sale and delivery being proven by another (March v. Verble, supra), and that witness saw the book in hands of intestate, but not that she handed him the book, which last was held incompetent (Lane v. Rogers, 113 N. C. 171, 18 S. E. 117), or the numerous cases (Clark's Code [3d Ed.] p. 845) that the plaintiff can prove the handwriting of defendant's intestate, but not that he saw him sign the paper sued on.

Under these decisions the plaintiff was competent to testify that she went to the house of defendant's intestate, and his condition, and what she saw or heard, so long as these were independent facts, and did not tend to show a "communication or personal transaction" between her and the deceased, whereby a liability to her, express or implied, would accrue. His mouth being closed by death to deny the contract, the law enforces equality of condition by forbidding her to prove an express contract by showing a "communication," or an implied contract by showing a "personal transaction," as the rendition and acceptance of services, which was the object of the evidence here admitted. The witness "may testify to any fact which does not include a personal transaction or communication." McCall v. Wilson, 101 N. C. 598, 8 S. E. 225; Johnson v. Rich, 118 N. C. 268, 23 S. E. 1007.

Error.

(139 N. C. 9)

LATHAM et al. v. ROANOKE R. & LUMBER CO.

(Supreme Court of North Carolina. Sept. 12, 1905.)

1. TRESPASS—POSSESSION.
A person having neither possession nor the right thereto cannot maintain an action for trespass.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, §§ 32-39.]

2. WASTE—CONTINGENT REMAINDERMAN.
One entitled to a contingent remainder cannot maintain an action for damages for waste.

3. WILLS—CONSTRUCTION—CONTINGENT REMAINDERS—RIGHT OF REMAINDERMEN.
Testator devised certain land, with the timber in controversy, to his daughter for life, and provided that after the daughter's death the land should go to the daughter's children and the children of such as were dead. *Held*, that the children of a deceased daughter of the life tenant had only a contingent remainder in such land.

Appeal from Superior Court, Washington County; Ward, Judge.

Action by Thomas H. Latham and others against the Roanoke Railroad & Lumber Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

William Alsbrook devised the land from which the timber in controversy was cut to his daughter, Sabra Harrison, for life, concluding with the words: "And after her death the said land and negroes are to go to the children of my said daughter and the children of such as are dead." Sabra Harrison, who is living, had 13 children, one of whom intermarried with B. D. Latham and died, leaving the plaintiffs the issue of such marriage. During the year 1892 a special proceeding was instituted in the superior court of Washington county by said Sabra Harrison and her then living children, including the mother of plaintiffs, and the children of such as were dead, for the purpose of procuring an order for the sale of the timber on said land. At said sale by a commissioner appointed in said proceeding the defendant corporation purchased, paid for, and took a deed for said timber. The mother of plaintiffs received her share of the purchase money therefor. The plaintiffs were not parties to said proceeding. Mrs. Latham died prior to the commencement of this action. They sue for one-thirteenth of the value of the timber—found by the jury to be $159, less $43.65, the value of the life estate of Mrs. Harrison. His honor, being of the opinion upon the foregoing facts that the plaintiffs were not entitled to recover, rendered judgment accordingly, and they appealed.

H. S. Ward, for appellants. A. O. Gaylord, for appellee.

CONNOR, J. The plaintiffs, having neither the possession nor the right thereto, cannot maintain an action for trespass. The authorities cited by their counsel in his well-considered brief amply sustain the right of the owner of the inheritance, either by way of reversion or vested remainder, to sue for waste and recover the damage to the inheritance. Burnett v. Thompson, 51 N. C. 210; Wall v. Williams, 91 N. C. 477; Dorsey v. Moore, 100 N. C. 41, 6 S. E. 270. It is equally well settled that one entitled to a contingent remainder cannot maintain an action to recover damages for waste. Hunt v. Hall, 37 Me. 363. That was "an action on the case in the nature of waste." The land upon which the timber was cut was devised to the wife of the testator for life, remainder "after her death" to the children of testator and "the heirs of such as may then be deceased." It was held that the plaintiffs, children of the deceased daughter, could not maintain the action during the life of the first taker. This case is cited with approval by Mr. Justice Walker in Bowen v. Hackney, 136 N. C. 193, 48 S. E. 997; Mayo v. Feaster, 2 McCord, Eq. (S. C.) 137; 30 Am. & Eng. Enc. 275. The interest of a contingent remainderman in the timber will be protected by a court of equity by injunction. University v. Tucker, 31 W. Va. 621, 8 S. E. 410, It therefore becomes necessary to consider and decide the question whether plaintiffs took under the will, upon the death of their mother, a vested or contingent remainder.

Their counsel contends that the mother took but a contingent remainder, dependent upon her surviving the life tenant. His view is thus clearly stated in his brief: "If one of the children of Sabra Harrison die before she does, the remainder is at an end and can never vest, and another remainder to her children is substituted, who can take nothing from their parent but under the will." After further discussion he says: "It is made clear, we think, that the time at which the limitation should take effect in interest, and not merely in enjoyment, was at the death of Sabra Harrison. The will expressly says so." The authorities cited sustain his contention. Whitesides v. Cooper, 115 N. C. 570, 20 S. E. 295; Bowen v. Hackney, 136 N. C. 187, 48 S. E. 997, in which cases are cited and reviewed by Mr. Justice Walker; Irvin v. Clark, 98 N. C. 444, 4 S. E. 30; Hunt v. Hall, supra; Olney v. Hull, 21 Pick. 301. It being conceded that only those children of Mrs. Sabra Harrison who are living at the time of her death can take the land, why is it not equally true that only those of her grandchildren who are living at that time can take under the will, and that until such time the remainder is contingent? How is it to be known until that time whether the plaintiffs, or any of them, will ever take any estate in the land? If all recover the value of the timber, and one or more of them die before the death of Mrs. Harrison, is it not manifest that such as may die before her death have never sustained any damage by the act of defendant in cutting the timber? What is to

prevent those who may survive recovering the share which would have vested in those who have died? The death of either will disturb the share or proportion of the survivors. If all should die, it may be that, as those who would in that event take were parties to the special proceeding, they would not be entitled to recover for the share which would have accrued to plaintiffs. Without deciding any of these questions, it is clear that plaintiffs, during the life of Mrs. Harrison, have but a contingent remainder, which may never vest.

The plaintiffs' counsel insist that, although they have sought to recover only one-thirteenth of the value of the timber upon the theory that plaintiffs will at the death of Mrs. Harrison take by substitution the share which would have vested in their mother if she had survived, they are in fact entitled to share equally, when the life estate falls in, with all of the children and grandchildren, upon a per capita basis of division. If he is correct in this view, it is manifest that they may not recover in this action, for it is impossible to say now what amount they may then be entitled to. No one can foresee how many deaths may occur during Mrs. Harrison's life, or how such deaths would affect the rights of the plaintiffs, if they survive her. It is possible that by the death of several of the children, leaving a number of grandchildren, the share upon a per capita division would be materially diminished. These are contingencies which obstruct the plaintiffs' right to recover in this action. It would seem, therefore, that for the purpose of disposing of this appeal it is immaterial whether the plaintiffs, or such of them as may then be in esse, will upon the death of Mrs. Harrison take by substitution or per capita. The question is not free from difficulty. As the conclusion to which his honor arrived puts an end to this action, it is not necessary to decide the other interesting questions discussed by counsel.

The judgment of his honor must be affirmed.

(139 N. C. 3)

BONNER v. STOTESBURY et al.

(Supreme Court of North Carolina. Sept. 12, 1905.)

1. WITNESS — COMPETENCY — TRANSACTION WITH DECEDENT.

Under Code, § 590, providing that a person interested shall not be examined as a witness against the administrator of a decedent as to a transaction with decedent, one is not disqualified as a witness for plaintiff administrator, though he may be liable over to defendant if plaintiff succeeds.

2. APPEAL—REVERSAL.

A nonsuit, to which plaintiff was driven by erroneous exclusion of evidence, will not be sustained on the ground that he had stated no cause of action, and, if he had, it was barred by limitations, where plaintiff had moved to amend his complaint, and the court intimated that it would allow it, if his evidence was sufficient.

3. LIMITATIONS—FRAUD.

The provision of Code, § 155 (9), declaring a three-year limitation for actions for relief on the ground of fraud or mistake, that the cause of action shall not be deemed to have accrued till discovery by the aggrieved party of the facts constituting such fraud or mistake, applies only when the "ground" of the action for relief is fraud or mistake; and the statute runs from the discovery of the facts constituting the fraud or mistake, and not from the discovery by a party of rights theretofore unknown by him.

4. APPEAL—PLEADINGS—AMENDMENT.

Amendment of the complaint will not be allowed on appeal, where the amendment would present a case substantially different from the one tried, and raise a question of law not involved in the appeal.

Appeal from Superior Court, Hyde County; Ward, Judge.

Action by Selby Bonner, administrator, against C. A. Stotesbury and others. From a judgment of nonsuit, plaintiff appeals. Reversed.

Plaintiff alleges that his intestate deposited with one Benson a certain sum of money subject to her order, and that from time to time Benson on her demand made payments to her, having at her death in his hands as her depositary a balance of $260; that immediately after her death, and presumably in September, 1898, defendant C. A. Stotesbury received said money from Benson without having taken out letters of administration, and immediately paid over to R. B. Stotesbury, his testator, a considerable portion of the same, the amount not being known to plaintiff. Plaintiff also alleges the death of Mary E. Bonner and the qualification of plaintiff, on the 18th day of February, 1905, as her administrator, and the death of R. B. Stotesbury in 1904 and the qualification of the defendant C. A. Stotesbury as his executor. Defendant, in his answer, denied the allegations of the complaint and pleaded the statute of limitations. At the trial the court submitted two issues to the jury, which are as follows: "(1) Are the defendants indebted to the plaintiff, and, if so, in what sum? (2) Is the plaintiff's claim barred by the statute of limitations?" Plaintiff introduced C. F. Benson as a witness, and asked him what funds of Mrs. Bonner he had in his hands at her death. Defendants' counsel objected, and the witness then stated, in answer to a question of defendants' counsel, "that he knew nothing about the funds, except what Mrs. Bonner told him and put in his hands." The objection was sustained, and plaintiff excepted. Plaintiff's counsel also asked the witness if he had paid any money to C. A. Stotesbury since the death of Mary E. Bonner, plaintiff's intestate. The question, on objection by defendants' counsel, was excluded by the court, and plaintiff excepted. The witness was then asked by plaintiff's counsel if Mary E. Bonner had deposited any money with him prior to her death, and, if so, how much? This question was also excluded, on objection by defend-

ants' counsel, and plaintiff excepted. It was stated by counsel in this court, and not denied, that the plaintiff moved in the court below to amend his complaint by alleging a conspiracy between Benson and the Stotesburys to defraud the estate of plaintiff's intestate out of said fund so deposited with Benson, and the court stated that it would first hear the testimony of plaintiff and then pass upon the motion to amend. In the brief of defendants' counsel it is admitted that "the court permitted the plaintiff to amend his complaint." We take it that this admission refers to what the judge said, as stated by plaintiff's counsel, when the motion to amend was made. No amendment was actually made in the superior court. The court intimated that it would charge the jury that, if they believed the evidence, they should answer the first issue "No," and the second issue "Yes." Plaintiff thereupon, in deference to the intimation, submitted to a nonsuit, and appealed.

S. S. Mann, for appellant. H. S. Ward and Aydlett & Ehringhaus, for appellees.

WALKER, J. (after stating the case). It was admitted here that the court excluded the testimony of the witness Benson as being incompetent under section 590 of the Code. In this, we think, there was error. Benson was not asked to testify against the representative or assignee of a dead person as to any transaction or communication between himself and the person deceased, but in favor of such a representative, and the transaction between him and Stotesbury was, of course, confined to living persons. The proposed testimony, as to the transactions between him and Mrs. Bonner, was offered by the party to the suit who represented the dead person. Such testimony does not fall within the inhibition of section 590 of the Code. That statute was intended to protect the deceased person's representative or assignee, who is suing or being sued in the action, and for the reason that the living party to the transaction or communication, who is a party to or interested in the event of the action, or the person under whom he claims, should not, in all fairness, be permitted to speak concerning it, when the other party, who is dead, cannot be heard in reply. McCanless v. Reynolds, 74 N. C. 301. It was said on the argument that, if the plaintiff recovered of Stotesbury, the witness Benson will be liable over to him. Not conceding that this would be so under the facts and circumstances of this case, we are unable to see, if we admit the correctness of the proposition, how it affects the question one way or another. In the cases cited by counsel, the witness, who was liable over, was introduced to testify against the representative of a deceased person as to a transaction or communication between him and the testator. Lyon v. Pender, 118 N. C. 147, 24 S. E. 744; Fertilizer Co. v. Rippy, 123 N. C. 656, 31 S. E. 879; Id., 124 N. C. 643, 32 S. E. 980. But not so here, as we have seen. The testimony ruled out by his honor is within neither the letter nor the spirit of the statute, and was, therefore, improperly excluded. The two cases of Bunn v. Todd, 107 N. C. 266, 11 S. E. 1043, in which the present Chief Justice analyzes section 590 with great clearness, and Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782, are decisive authorities against the ruling. The court said in the last case, referring to that section: "It is there provided that an interested witness, or a person from, through, or under whom a party to be affected by the event of the action claims, shall not testify concerning a personal transaction or communication between the witness and a person then deceased, under whom the party against whom he is introduced as a witness claims." We see, therefore, that the witness must be introduced to testify against the representative or assignee of the deceased person.

It was contended by the defendants' counsel that, even if the witness Benson was competent, the plaintiff had stated no cause of action, and, if he had, that it is barred by the statute of limitations. It was admitted in this court by counsel that the plaintiff moved below to amend his complaint, and the court intimated that it would allow the amendment if the plaintiff's evidence was sufficient to warrant it, and it would therefore hear the evidence before ordering the amendment. In the brief of defendants' counsel it is stated that "at the hearing the court permitted the plaintiff to amend his complaint." As the ruling of the court upon the competency of the witness Benson was erroneous, and by reason thereof the plaintiff was prevented from developing his whole case and was driven to a nonsuit, we would not be willing to dismiss his action or to sustain the nonsuit on the ground stated by the defendants' counsel, even if we should hold the complaint to be defective.

This ruling also applies to the contention that the plaintiff's cause of action as now stated is barred by the statute of limitations. The plaintiff has not had a fair opportunity to amend his complaint in order to avoid the operation of the statute, no more than he has had a fair chance to perfect the statement of his cause of action, if in either case it requires amendment, which we do not decide. Plaintiff's counsel stated here that he would allege in his amended pleading a fraudulent concealment by Benson and Stotesbury of the fact that they had the money of his intestate and a conspiracy between them to cheat and defraud plaintiff out of said money. It was not made clear to us in what the alleged combination to defraud consisted, nor how in a legal sense it injured the plaintiff. But we may be enlightened as to this by counsel when the amendment is made, if the case should come

back to us. Upon the question of fraudulent concealment, it may be said that Code, § 155 (9), applies only when the "ground" of the action for relief is fraud or mistake, and the statute runs "from the discovery of the facts constituting the fraud or mistake," and not from "the discovery by a party of rights hitherto unknown to him." Dunn v. Beaman, 126 N. C. 766, 36 S. E. 172.

Plaintiff moved in this court to amend his complaint. As the amendment would, perhaps, present a case substantially different from the one which was tried below, and raise a question of law not involved in the present appeal, we could not allow the motion, if in other respects we had the power to do so. Whitehead v. Spivey, 103 N. C. 66, 9 S. E. 319; Howard v. Association, 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853. This court undoubtedly has the power of amendment, but this is not a case which calls for its exercise. There must be a new trial because of the error committed by the court in rejecting testimony which was offered, and the plaintiff may amend below by permission of the court, if so advised.

New trial.

(139 N. C. 54)

PRITCHARD et al. v. MITCHELL et al.

(Supreme Court of North Carolina. Sept. 12, 1905.)

1. NONSUIT—PARTIES—MISJOINDER—COSTS.

Where a party was erroneously joined as a party plaintiff, and a demurrer was filed to the complaint for misjoinder of parties, as authorised by Clark's Code 1900, § 239, subsec. 4, it was proper for the court to grant such party's motion for a nonsuit, taxing him with such costs as were incurred by the misjoinder.

2. ASSIGNMENT FOR CREDITORS—DEBTS—MATURITY—STATUTES—APPLICATION TO SURETIES.

Laws 1893, p. 433, c. 453, § 1, providing that, on the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once, applies to sureties on a note of the assignor; the contract of suretyship being measured by or coextensive with the liability of the principal.

Appeal from Superior Court, Bertie County; E. B. Jones, Judge.

Action by William Pritchard and another against G. H. Mitchell and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This action was instituted July 5, 1904, by Wm. Pritchard and C. W. Mitchell for the recovery by said Pritchard of the amount of a note executed by the defendants Carter, Matthews & Co., J. H. Mathews, deceased, and Geo. H. Mitchell to C. W. Mitchell. The complaint set out the note, by which it appears that J. H. Matthews and Geo. H. Mitchell were sureties; that the note was due and payable January 1, 1906, and was for value assigned to the plaintiff William Pritchard; that the defendants Carter, Matthews & Co., the principal debtors, because insolvent, and prior to the institution of the suit made a general assignment for the benefit of their creditors; that on June 10, 1904, the defendant Geo. H. Mitchell, one of the sureties on said note, served notice on the plaintiffs, Pritchard and C. W. Mitchell, to bring suit on said note; that, before bringing suit, the plaintiff Pritchard offered to assign said note to the surety, which offer was declined. The plaintiff Pritchard demanded judgment for the amount of the note. The defendants Geo. H. Mitchell and Mrs. Maggie Matthews, administratrix of J. H. Matthews, demurred, assigning as grounds therefor, first, misjoinder of parties plaintiff and causes of action; second, that as to the sureties the note was not due and payable. The other defendants demurred for the misjoinder. Before the hearing of the cause was begun, C. W. Mitchell was, upon his own motion, permitted to submit to a judgment of nonsuit, and the defendants excepted. The cause was thereupon heard upon complaint and demurrer. The court below overruled the demurrer, and proposed to render judgment giving the defendants time to file answers, which they declined, stating that they would stand by their demurrer. Judgment was thereupon rendered, and the defendants excepted and appealed.

Winborne & Lawrence, for appellants. Francis D. Winston, for appellees.

CONNOR, J. (after stating the facts). His honor properly allowed the plaintiff C. W. Mitchell to submit to a nonsuit. The complaint did not set out any cause of action in which he was interested or entitling him to any relief; nor did he ask for any judgment. It seemed to be assumed that he indorsed the note. It does so appear from the complaint; the allegation being that he assigned it. This, however, is not material, as in no aspect was he entitled to any relief. It is simply a case of misjoinder of parties plaintiff, and upon demurrer or motion may be corrected by taxing the plaintiff with such costs as are incurred by the misjoinder. Clark's Code 1900, § 239, subsec. 4, and cases cited. The complaint stated no cause of action in favor of C. W. Mitchell. Therefore it was only necessary to move the court for judgment against him for costs. This result was anticipated by him, and he was permitted to take a nonsuit. There was no cause of action to be nol pros'd. His retirement from the record did not necessitate any change in the complaint. The case is in this respect distinguished from Mitchell v. Mitchell, 96 N. C. 14, 1 S. E. 648, and Cromartie v. Parker, 121 N. C. 199, 28 S. E. 297. It is like Green v. Green, 69 N. C. 294, in which Pearson, C. J., says: "As to the unnecessary parties plaintiff, it is their own concern to be made liable for costs."

The serious question presented by the demurrer is whether Laws 1893, p. 433, c. 453, § 1, which enacts "that upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once," applies to the sureties upon a note of the assignor. It is an elementary principle that every contract is made with reference to the existing law; hence the principal debtor, at the time he executed the note promising to pay the sum named on January 1, 1906, made it a part of his contract that, if he made an assignment for the benefit of his creditors, the debt would become due and payable at once. It is equally well settled that the contract of suretyship is measured by and is coextensive with the liability of the principal. The law as held by this court is stated by Ruffin, C. J., in Shaw v. McFarlane, 23 N. C. 216: "If two persons are bound by a bond or a judgment for the payment of a sum of money, the one is liable to the creditor in the same manner and to the same extent as the other, although as between themselves they stand as principal and surety. In respect to the creditor, they are joint debtors, fixed with the same obligation." In this respect the contract of the surety is distinguished from that of a guarantor. 27 Am. & Eng. Enc. Law, 432; 1 Brandt on Suretyship, 2. It would seem, therefore, that when, by the terms of the contract interpreted in the light of the statute, the principal is bound, in the event of his making an assignment, to pay at once or accelerate the maturity of the debt, the surety is bound in like manner. This does not involve any change in the contract, but incorporates the provision of the statute into it.

We have examined the cases cited by the defendants' counsel, and we do not think they conflict with the conclusion which we have reached. The judgment must be affirmed.

(139 N. C. 29)

JOHNSON et al. v. WESCOTT.

(Supreme Court of North Carolina. Sept. 12, 1905.)

VACANT LANDS — ENTRY — PROTEST — DISMISSAL.

Proceedings under Acts 1903, p. 447, c. 272, protesting entry of vacant lands, are properly dismissed; plaintiffs admitting they cannot show any papers for the land, except deeds not connecting them therewith, or any possession, except for two years long past.

Appeal from Superior Court, Dare County; Ward, Judge.

Proceedings by M. L. Johnson and others against George T. Wescott, protesting entry of land. From a judgment of dismissal, plaintiffs, the protesting parties, appeal. Affirmed.

B. G. Crisp, for appellants. W. M. Bond, for appellee.

BROWN, J. These proceedings were instituted under chapter 272, p. 447, Acts of 1903, amending the laws relating to the entry of vacant lands. The protesting parties moved the court that on the face of the record the burden of proof was on defendant (Wescott) to open the case and show cause why his entry should not be declared void. Overruled, and plaintiffs excepted.

This was the first exception. This motion was based upon the wording of section 3 of the act. It is plaintiffs' contention that, under the wording of this law, the burden is on the one making an entry of land under it, when protest is filed, to at least make out a prima facie case that the land is subject to entry, and that he has complied with the requirements of law in laying it. The plaintiffs further contend that, if an individual is permitted to lay an entry and rest on his oars with no other proof than his entry, no better field for speculation can be imagined, and that by shifting the burden on the occupant or owner in many instances he could by this technicality become possessed of lands to which the title is now considered settled. The plaintiffs contend it was doubtless with this in view that the Legislature requires the enterer to come into court and "show cause why his entry shall not be considered inoperative and void." The argument is interesting to us, but the court is of opinion that it is not necessary to decide that question on this appeal; so we forbear giving a decision upon it.

Unfortunately for the plaintiffs, they admit enough upon the face of the record to put them out of court. "It was admitted by the plaintiffs that they could not show any paper writing to any person for any part of the land covered by said entry, except the three deeds or papers referred to above, or any possession of any part of the land by any person, except during the years 1874 to 1876 and no further." The record gives the dates of the three deeds and names of the parties. They fail, so far as record discloses, to connect plaintiffs in any way with the land. This admission appearing in the record in the superior court, his honor very properly dismissed the protesting proceedings at cost of protestants.

Affirmed.

(139 N. C. 31)

STATE BOARD OF EDUCATION et al. v. MAKELY.

(Supreme Court of North Carolina. Sept. 12, 1905.)

1. APPEAL — HARMLESS ERROR.

Where plaintiff sought to cancel a grant on the ground that the land was swamp land and not subject to entry, he was not prejudiced by the cross-examination of a witness who stated, in answer to a question with reference to the drainage of the land, that other land adjoining the tract in controversy lay between it and a creek, which was the natural drainage of all the

land, and that only such part of the adjoining tract as constituted a ridge was susceptible of cultivation.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 4158.]

2. QUIETING TITLE—BURDEN OF PROOF.

Where, in a suit to set aside a grant of land as a cloud on title, plaintiff based his right to recover on the ground that the land was swamp land and not subject to entry, but belonged to the board of education, as provided by Rev. Code, c, 66, Const. art. 19, § 10, and Code, § 2506, the burden was on plaintiff to establish that the land was in fact swamp land.

3. SAME—PEREMPTORY INSTRUCTION.

Where a suit to set aside a cloud on title depended on whether the land was swamp land, and there was evidence that the land was not of the kind generally called and known as swamp land, it was proper for the court to refuse a motion for a peremptory instruction in favor of plaintiff.

Appeal from Superior Court, Hyde County; Hoke, Judge.

Action by the state board of education and others against M. Makely. From a decree in favor of defendant, plaintiffs appeal. Affirmed.

This suit was brought for the purpose of having vacated and canceled a grant issued by the state to the defendant in 1888 for 176½ acres of land, upon the ground that the land was not the subject of entry and grant, as it was swamp land and was vested in the plaintiff, the state board of education, who had conveyed the same to its coplaintiff, the Alleghany Company, and therefore the grant was a cloud on the title of said company. Issues were submitted to the jury, which with the answers thereto are as follows: "Are plaintiffs the owners and in possession of the land set out and described in the complaint and referred to in the answer as the land contained in an alleged grant to defendant? No. (2) Does defendant wrongfully assert title to said land under a grant from the state of date 1888, thereby putting a cloud on plaintiff's title? No. (3) Is the defendant the owner and in possession of said land? Yes. (4) Do plaintiffs wrongfully assert title to said land under the deeds exhibited from Clark to Brooks and Leach, and from the Scranton Company to the Alleghany Company, thereby putting a cloud on defendant's title? and also under deed from state board of education to Alleghany Company? Yes."

Plaintiffs opened the case and introduced much evidence tending to show that the land in controversy is swamp land, and some of the defendant's witnesses testified to the same effect. Charles Polson, one of plaintiffs' witnesses, testified that it was low, boggy swamp, covered with water moss, and, in order to contradict him and also, perhaps, to show that it was not swamp land, the defendant's counsel was permitted on cross-examination to ask the witness if the land in dispute was not naturally drained through the Bishop tract, which lay between it and the creek, and which is high and dry land, and cultivated as a farm. The answer of the witness tended to show that the Bishop land adjoined the tract described in the complaint, and lay between it and Broad Creek, and that a ridge of that tract is under cultivation, that it is high land and tillable, and only that part of it is dry and used as a farm, and the ridge is the only part that could be cultivated. The other facts are stated in the opinion.

Small & McLean and Rodman & Rodman, for appellants. W. M. Bond, for appellee.

WALKER, J. (after stating the facts). Whether it was not relevant for defendant to show by the witness Polson the general topography of the country immediately surrounding the tract in dispute, or the conformation of contiguous tracts, as bearing upon the character of the tract in question, and whether this evidence is of the same class as that excluded in Warren v. Makely, 85 N. C. 12, Bruner v. Threadgill, 88 N. C. 365, and Waters v. Roberts, 89 N. C. 145, where a comparison was attempted to be made between the tract in suit and other adjoining tracts for the purpose of determining the value of the former, we need not decide, as it is quite sufficient to hold, as we do, that, if the evidence was irrelevant, it was harmless. Indeed, all the advantage of the answer to the question was with the plaintiffs. It is apparent from the form of the question the defendant's counsel was attempting to prove that the natural drainage of the land in dispute was over the Bishop tract, as plaintiffs' own witness, J. H. Wahab, had previously testified. But defendant's counsel got, as an answer to his question, not only what he did not want or expect, but something quite the reverse of it, and therefore the evidence made in favor of the plaintiff. Besides, it would seem relevant to the issue to show that the Bishop tract lay between this land and the creek, the natural outlet for the drainage of lands in the vicinity, and that on it there was arable land or a farm. It may not have been conclusive, or even strong, evidence as to the true character of the land in dispute; but as a circumstance it perhaps constituted some evidence tending to show that it was not swamp land. We put our decision, however, on the ground that the evidence was harmless, and overrule the exception.

The plaintiffs assign as error his honor's instruction that the jury must be satisfied by the greater weight of the evidence that the land described in the complaint is "swamp land" before they could find for the plaintiffs, thereby placing the "burden of proof" upon them. We think this was a proper instruction under the pleadings and the facts of this case. Plaintiffs allege that they are the owners of this tract, because it is swamp land. The board of education, as successor to the president and directors of the literary fund (Const. art. 9, § 10; Code § 2506), could not

establish any right or title to the land by virtue of the statute (Rev. Code, c. 66; Const. art. 9, § 10; Code, § 2506) investing it with the title to the "swamp lands" in the state as a part of the trust property to be held by it for the benefit of education, unless it could show that the lands claimed by it were of that description. Could a plaintiff, resting his right to the title or possession of land on a deed conveying or a will devising to him the swamp land in a certain larger tract described therein, recover any part of the land without showing that it comes within the particular description of the deed or will? The board does not acquire title by virtue of the statute to all of the lands of the state, but only to its "swamp lands." It is alleged in the complaint and virtually admitted in the answer that the plaintiff, the Alleghany Company, is in possession of the land claiming under a deed from the board of education, who asserted title to the land, under the statute, as swamp land. Assuming that this possession is presumed to be rightful, and is sufficient, generally, to present a prima facie case, and to compel the defendant "to go forward" with his proof or take the risk of an adverse verdict of the jury or an adverse ruling of the court as to the law, we yet think, as the plaintiffs further allege that they derived title to the land under the statute by reason of the fact that it is swamp land, and in no other way, they should be required to take the burden of establishing this fact, so essential to the successful maintenance of their suit.

This is not an action to recover the realty, but is brought for the avowed purpose of removing a cloud from the plaintiffs' alleged title, and for that purpose to have vacated and canceled the grant issued by the state to the defendant. Plaintiffs are therefore, as we have said, the actors, and they allege the affirmative of the issue to be the truth of the matter. McCormick v. Monroe, 46 N. C. 13. The mere fact that plaintiffs had possession of the land when the suit was commenced does not materially affect the question under discussion. The burden of the issue was upon them from the beginning to the close of the case, although the burden of proof may have shifted during the trial from one side to the other, and even repeatedly back and forth. The distinction between the burden of the issue and the burden of proof is thus stated by an eminent law writer: "The burden of the issue—that is, the burden of proof in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence—never shifts; but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a prima facie case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a prima facie case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail, if upon the whole evidence he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party, or because the scales are equally balanced." 1 Elliott on Ev. § 139. In the next section (140) Judge Elliott illustrates the doctrine by putting the very case we have here, and citing Fitzgerald v. Goff, 99 Ind. 28, in which it appeared that the plaintiff below (defendant in error or appellee), Eliza Goff, brought the suit for the purpose of removing a cloud from her title, alleging that she was the owner of the premises under a good and perfect title, but that the defendant claimed an interest and estate therein adverse to hers, and praying that they be compelled to show it and that the same be declared void. Defendant Fitzgerald answered, admitting that Eliza Goff once had the title, but alleging, by cross-bill, that she had conveyed it by deed to defendant's assignor, and praying that the title so acquired be quieted. Plaintiff Goff, in her answer to the cross-bill, denied the execution of the deed, and the issue tried was whether the deed had been executed. It was held that the burden of the issue was on the defendant, the cross-complainant, throughout the trial, as he was the actor and alleged the affirmative and as the form of the issue so placed the burden. That is in effect and in principle our case, although the position of the parties on the record is reversed, which, however, can make no practical difference. It was also held in that case that the prima facie case made by the defendant, by the introduction of proof as to the execution of the deed which authorized it to be read as evidence, did not change the burden of the issue, though it may have affected the burden of proof.

In our case the defendant denies the plaintiffs' assertion of title, and it therefore was incumbent upon the plaintiffs to establish it by a preponderance of evidence for the reasons already given. A full discussion of the subject will be found in 4 Wigmore on Evidence, c. 36, §§ 2486, 2488, 2489, having special reference to the point under discussion. While he says that there is no general solvent for all cases, and no one principle which affords a sure and universal test for determining where the burden rests, which, in a general sense, must be decided by the nature of the pleadings and form of the issue and the facts peculiar to the case in hand, yet he further says that what he calls the first burden of proof or risk of nonpersuasion of the jury rests upon the party who must, by proving

the essential fact involved, ultimately establish the issue in order to succeed in the action. 4 Wigmore on Ev. §§ 2488, 2489. It may be added that the defendant, who is not the actor, relies upon a state grant regularly issued, and the presumption must be that it passed a good title to the grantee until the contrary is shown. It comes from the sovereign, the origin and source of all titles in this state, and conveyed at least a prima facie title; nothing else appearing. Holloran v. Meisel, 87 Va. 398, 13 S. E. 33; Clay v. White, 1 Munf. 162; Wool v. Saunders, 108 N. C. 729, 13 S. E. 294. We do not mean to say that a grant cannot be attacked collaterally in ejectment, nor directly in a proceeding to have it vacated, upon the ground that the lands described in it were not "vacant or unappropriated" at the time it issued; but, when a person asserts its invalidity by reason of that fact and asks that it be vacated, claiming the land by virtue of a special grant or donation confining the bounty to lands of a special description, such as "swamp or unappropriated lands," it is incumbent on the donee to show that his grant or donation is for land within the particular description. Stanmire v. Powell, 35 N. C. 312. Indeed, in actions of ejectment, it has been said that the fact the lands are not vacant or unappropriated "may be shown," which clearly implies that the proof must come from the party impeaching the grant. (Lovinggood v. Burgess, 44 N. C. 407; Strother v. Cathey, 5 N. C. at page 164, 3 Am. Dec. 683; Stanmire v. Powell, supra); for the court could hardly have referred to the burden or duty of "showing" as being upon the grantee, when the fact, if shown, would invalidate his own title.

It is not necessary in this connection to discuss the difference between a case where the grant can be assailed collaterally in ejectment, because the land was not vacant at the time it issued, and the court merely declares that it transfers no title (University v. Sawyer, 1 N. C. 159 [Taylor, 114]), and one where it can be attacked only by a direct proceeding, formerly scire facias or suit in equity, if any defects or irregularities in the preliminary proceedings or other sufficient and like ground is alleged. Stanmire v. Taylor, 48 N. C. 210. It is enough to declare that, the plaintiffs having alleged title in themselves and that defendant's grant is a cloud upon it, because, on account of some extrinsic fact, it is void, they must show it; and the ruling of his honor in this respect was right.

The last objection of the plaintiffs is equally untenable. They requested the court to charge the jury that, if they believed the evidence, they should answer the issues "Yes," or in favor of the plaintiffs. The evidence as to the character of the land was not all one way. When such an instruction is requested, the adverse party is entitled to have the evidence considered most strongly in his favor, and all facts which it reasonably tends to prove for him must be considered as established, and any part of the evidence which tends to disprove the plaintiffs' contention must be taken as true, as in case of a demurrer to evidence or motion to nonsuit. The testimony of Makely, Manning, Bishop, and Spencer, especially that of the last-named witness, tended to show that the land was not of that kind generally called and known as swamp land. The proposed instruction, therefore, was not a proper one.

It is unnecessary to decide whether Acts 1891, p. 254, c. 302, applies to the defendant's grant which was issued prior to its passage, as plaintiffs' counsel conceded that the court had charged the jury in accordance with the provisions of that act. The provisions of section 2527 of the Code did not apply to the case, unless the plaintiffs showed that the land was a swamp, for the section refers only to that kind of land. His honor charged correctly in regard to the presumption created by that section of the Code, and we can discover no error in the remaining portions of the charge to which the plaintiffs' other exceptions were taken. They are covered by what has already been said and require no separate discussion, except the one relating to the manner of answering the issues. This depended, as his honor told the jury, upon how they should answer the first issue. If they found that the land was swamp land when the grant was taken out, and consequently answered the first issue "Yes," it followed logically that they should answer the other issues in favor of the plaintiffs; but, if they found the other way and answered the first issue "No," they should for the same reason answer the other issues, as they did, in favor of the defendant, and the court so instructed them. The charge was very full and clear, and the law applicable to the different aspects of the case was in every particular correctly stated.

No error.

HOKE, J., did not sit on the hearing of this appeal.

(139 N. C. 44)

HINTON v. MOORE.

(Supreme Court of North Carolina. Sept. 12, 1905.)

1. EJECTMENT—EQUITABLE TITLE—TRESPASSER.

Where plaintiff was a grantee from the trustee in a deed of trust on certain land, and the grantor in such deed was the holder of the legal title, plaintiff, as the owner of an equitable interest, was entitled to recover as against defendant, a mere trespasser.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 56, 57.]

2. DEEDS—DESCRIPTION—DEFINITENESS.

Where a deed of trust described the land as 60 acres lying on "Mill Pond Road," and being the same as set over to the grantor in the division of his father's land, and the partition proceedings disclosed that a certain lot 3 was

awarded to the grantor and contained a plat of that lot giving proper metes and bounds, the description in the deed was complete.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 65–76, 84.]

3. PAROL EVIDENCE — IDENTIFICATION OF PROPERTY.

Where a deed from a trustee under a deed of trust not only referred to the deed as containing the land the trustee sold, but further described the same as a tract of land on "Mill Pond Road of 60 acres, more or less," being all the land owned by the grantor of the deed of trust adjoining lands of certain others, the description was sufficient to authorize the introduction of parol evidence to identify the property.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2121-2123.]

4. BONA FIDE PURCHASERS — LOST DEEDS — REGISTRATION.

Where, in ejectment, there was neither allegation, claim, nor evidence tending to connect defendant with an alleged lost deed from plaintiff's prior grantor, and the deed, though alleged to have been dated in 1891, had never been registered, evidence of its execution and loss was inadmissible as against plaintiff, claiming as a purchaser from the trustee in a deed of trust executed by the holder of the legal title, under Laws 1885, p. 233, c. 147, providing that no conveyance of land shall be valid against purchasers for a valuable consideration, except from the registration thereof.

Appeal from Superior Court, Pasquotank County; Long, Judge.

Ejectment by John L. Hinton against Acom Moore. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The ordinary issues in ejectment were submitted. Evidence was introduced by the plaintiff tending to establish his claim. The defendant offered no testimony. The court charged the jury that the affirmative of all the issues was on the plaintiff, and he must satisfy the jury by the greater weight of the testimony as to his allegations on each and all of the issues, and that, if the jury believed the evidence, they should answer the first and second issues "Yes." The defendant in apt time excepted, and noted other exceptions on the trial, to which reference will be made. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Aydlett & Ehringhaus, for appellant. Pruden & Pruden and Shepherd & Shepherd, for appellee.

HOKE, J. (after stating the case). There was evidence to the effect that the title to the land in dispute was in one J. L. Williams. The plaintiff claimed to derive his title from said Williams in two ways: First. (a) Deed of trust from J. L. Williams to C. Guirkin, dated February 23, 1887; (b) deed from M. L. Guirkin, administratrix of C. Guirkin, dated October 2, 1889, recorded March 11, 1904. Second. (a) Deed of trust from J. L. Williams to C. L. Hinton, dated October 30, 1897; (b) deed from C. L. Hinton to the plaintiff, dated October 22, 1899, recorded January 15, 1901. This action was commenced September 2, 1903.

It is not necessary to pass upon the objections made by defendant to the first line of deeds offered and relied upon by plaintiff, because, in the opinion of the court, the plaintiff has made out his case under and by virtue of the deed from the trustee, C. L. Hinton, bearing date October 22, 1899, and duly registered January 15, 1901. If, as defendant contends, there has been no proper foreclosure of the Guirken deed of trust, then the deed from C. L. Hinton, trustee, if valid, would convey to plaintiff an equitable interest in the property, which would give him the right to recover against a wrongdoer. Murray v. Blackledge, 71 N. C. 492; Arrington v. Arrington, 114 N. C. 116, 19 S. E. 278; Watkins v. M'fg. Co., 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617.

Defendant contends that the deed from C. L. Hinton, trustee, is defective, because the description is too vague and indefinite to permit the introduction of parol testimony to identify the property, and objected to the introduction of the deed on that account, and the evidence offered and admitted in aid of the deed. The court is of opinion that the objection is not well taken. The deed from the original owner, J. L. Williams, to C. L. Hinton, trustee, describes the land as 66 acres of land, more or less, lying on "Mill Pond Road," and being the same set over to him (J. L. Williams) in the division of his father's land.

The partition proceedings of his father's land show lot No. 3 awarded to J. L. Williams, and contains a plat of this lot of land, giving proper metes and bounds. The description in this deed is complete. The deed from C. L. Hinton, trustee, not only refers to the deed of trust as containing the land the trustee sold, but goes on with a fuller description as follows: "A tract of land up the Mill Pond Road of 60 acres, more or less, being all said J. L. Williams owned adjoining Ivey Roach and other's lands." The language of the deed was such as to permit parol evidence in aid of the description, and the evidence offered was sufficient, if believed, to identify the property. Perry v. Scott, 109 N. C. 374, 14 S. E. 294; Wilkins v. Jones, 119 N. C. 96, 25 S. E. 789; Sherman v. Simpson, 121 N. C. 129, 28 S. E. 186.

Defendant further offered parol evidence to show that J. L. Williams, under whom plaintiff claimed, conveyed the land in controversy to one T. J. Williams by deed bearing date 1891, and that said deed had been lost before registration and had never been registered. On objection, this evidence was excluded, and defendant excepted. There is neither allegation, claim, nor evidence tending to connect defendant with this alleged lost deed, and the evidence, if competent, must be so declared, on the ground that the same tends to show that J. L. Williams, under whom plaintiff claims, had no title at the time he attempted to convey same to C. L. Hinton, trustee. Under our present registra-

tion laws (chapter 147, p. 233, Laws 1885) registration is not necessary to the validity of a deed for valuable consideration, effective under the statute of uses, as between the parties. In cases where livery of seisin was formerly required, registration still supplies the place of that ceremony. Laws 1885, p. 233, c. 147, § 3. The registration law (chapter 147, p. 233, Laws 1885) commonly known as the "Connor Act," expressly repeals section 1245 of the Code, and provides that no conveyance of land, etc., shall be valid to pass property as against creditors or purchasers for valuable consideration, etc., but from the registration. The act simply applies to deeds after a certain date; the law which then existed as to mortgages and deeds of trust being section 1254 of the Code. If plaintiff was claiming the land otherwise than as a creditor or purchaser for valuable consideration, the position taken by defendant could be sustained, and the ruling of his honor in rejecting the proposed evidence would be erroneous. The alleged lost deed, however, has never been registered. The plaintiff is a purchaser of the title of James L. Williams under registered conveyances and for valuable consideration, and by the very terms of the registration act the lost deed could not avail to defeat plaintiff's title, even if established. The proposed evidence was therefore immaterial, and there was no error in rejecting it.

The court is referred to the case of Jennings v. Reeves, 101 N. C. 447, 7 S. E. 897, as authority against the position here declared. In Jennings v. Reeves both the language of the headnote and of the opinion would seem to permit the interpretation claimed for them by defendant, but the facts of the case show that the unregistered lost deed which was there upheld bore date in 1860, and by one of the provisos of the Connor act that act, under certain circumstances, was not to apply to deeds bearing date prior to December 1, 1885. The decision in Jennings v. Reeves was no doubt made on the facts of that case as applied to deeds executed prior to the date stated, and will not sustain defendant in the case we are now considering. In the present case all of the deeds relevant to this controversy are dated since December 1, 1885. They are governed by the express and direct regulations in the body of the Connor act, and the terms of the provisos in no way affect them. If, however, the interpretation put upon the authority cited by defendant be the true one, the court would not hesitate to declare that the case in this respect is not well decided. It would go far to destroy the beneficent effects contemplated and resulting from the Connor act to establish as a general principle the exception that said act did not apply to lost deeds. No doubt, if a claimant should lose his deed before registration, he might protect his title by action properly commenced and filing notice of lis pendens. But under all ordinary circumstances, and in the absence of some such procedure as suggested, the registration laws will apply both to lost and unlost deeds executed after the date stated, December 1, 1885. The alleged lost deed, therefore, would not avail the defendant if it were established, because same had never been registered, and there was no error in rejecting the evidence offered on that question.

There is no error, and the judgment must be affirmed.

(139 N. C. 13)

PITCHFORD et al. v. LIMER.

(Supreme Court of North Carolina. Sept. 12, 1905.)

1. WILLS—CONSTRUCTION—RULE IN SHELLEY'S CASE.

A devise for life, and after devisee's decease to his lawful heirs, forever, conveys a fee under the rule in Shelley's case.

2. SAME—CONDITIONAL DEVISE.

Where testator gave to his son the privilege of selecting a specified tract of land in full right and title, to him and his heirs, forever, on condition that he reside on the place, and the will provided that, in case he should not do so, other provision should be made for him, the devise was based on a condition precedent, and never vested on the devisee's refusal to perform the condition, which could not be construed as a void condition in restraint of alienation.

Appeal from Superior Court, Warren County; E. B. Jones, Judge.

Ejectment by T. J. Pitchford and others against Jane Limer. From a decree construing a will in favor of defendant, both parties appeal. Affirmed.

Thomas J. Pitchford, Sr., died, leaving a last will and testament, and the rights of the parties to this controversy depend on the correct construction of the following clause in said will: "As I have heretofore given my son John C. Pitchford nothing, or nearly so, I hereby give him the privilege of selecting tract No. 1, containing the dwelling house, in full right and title, to him and his heirs, forever, on this condition, however, that he reside on the place. If he refuse this offer, as I trust he will not, then the same offer is hereby made to my son Thomas J. Pitchford, on condition that he resign fully all claim, if any he may think he has, to tract No. 2, and on the further condition that he is hereby given a life interest therein, and after his death to his heirs (lawful), forever." John C. Pitchford, referred to in the clause, did not elect to take the property therein described, but received other benefits under the will, given him in case he determined not to accept the property. The defendant holds his title under deeds in fee from both John C. and Thomas J. Pitchford, Jr., mentioned in this clause of the will. The plaintiffs are the children and heirs at law of this Thomas J. Pitchford, Jr., now deceased, and maintain their right to recover on the ground that, John C. Pitchford having elected not to take the tract of land in controversy,

nothing passed to the defendant by his deed, and that under this clause of the will their father (Thomas J. Pitchford, Jr.) took a life estate, and, he having died, the plaintiffs, who are his children and heirs at law, own and have a present right to recover the property.

On the facts agreed the court below adjudged as follows: "The construction of the will of Thomas J. Pitchford, Sr., touching the rights of plaintiff and defendant, having upon a written statement of facts agreed been submitted to the court, the court files the following judgment: The court is of opinion, and so holds, that John C. Pitchford, having failed to reside upon tract No. 1 as designated in clause 3 of the will, did not take title in fee to said tract No. 1; but the court is further of opinion, and so holds, that Thomas J. Pitchford, under clause 3 in the will, took title in fee to tract No. 1, under the rule in Shelley's Case, and Thomas J. Pitchford, Jr., having joined with his wife in the conveyance to A. C. Cook, trustee, the title in fee by mesne conveyances passed to the defendant. It is therefore ordered and adjudged that the plaintiffs recover nothing by this suit, and that the defendant go without day and recover his costs." Both plaintiffs and defendant excepted and appealed.

Pittman & Kerr, for plaintiffs. T. T. Hicks and Tasker Polk, for defendant.

Plaintiffs' Appeal.

HOKE, J. (after stating the facts). The plaintiffs excepted to that portion of the judgment which held that Thomas J. Pitchford, Jr., by the terms of the will took an estate in fee simple under the rule in Shelley's Case. There is no error in this ruling. By the clause in question the property is given to Thomas J. Pitchford "for life, and after his decease to his heirs (lawful), forever." Such words have been generally held to convey a fee simple, and there is nothing in this will which makes or tends to make this an exception to the general rule. Edgerton v. Aycock, 123 N. C. 134, 31 S. E. 382; Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785, 67 L. R. A. 444; Ex parte Cooper, 136 N. C. 130, 48 S. E. 581; Britt v. Lumber Co., 136 N. C. 171, 48 S. E. 586.

The court is referred by the plaintiff to the case of Bird v. Gilliam, 121 N. C. 326, 28 S. E. 489 (overruled in 123 N. C. 63, 31 S. E. 267, but not on this point), to Rollins v. Keet, 115 N. C. 68, 20 S. E. 209; and some other authorities of like kind; but these cases were decided on the ground that, by reason of certain qualifying and explanatory words or clauses of the will, the terms "heirs or heirs of the body" could not be given their simple and ordinary import, carrying the estate to the whole line of heirs of the sort described to take in succession as such heirs," but were to be considered in a different or more restricted sense, by which they were changed from words of limitation to words of purchase. There are no such qualifying or explanatory words in the clause we are now considering, and the general rule of construction must prevail.

There is no error.

Defendant's Appeal.

The defendant excepted to that part of the judgment which holds that John C. Pitchford took nothing under this clause of the will by reason of not complying with the condition imposed, and seeks to sustain his position on the ground that the condition, requiring in effect that John C. Pitchford should remain upon the property, is one in restraint of alienation, and therefore the condition is void, and the estate is good. It is true that, where an estate has vested, a condition in general restraint of alienation, or entirely repugnant to its nature, will be declared void. The doctrine is sound, but there is nothing in this case which permits its application. The will simply gave to John C. Pitchford, who resided in Mississippi, the privilege of coming back to North Carolina and taking the property, or of remaining where he was and receiving other benefits under its terms. He preferred, it seems, to remain in Mississippi, and elected to take other property bestowed upon him by the will. The estate, therefore, never vested in him. This would seem to be an executory devise, dependent on a contingency which did not occur. Even if the qualifying clause should be correctly construed as a condition in restraint of alienation, it would be a condition precedent, and in such case the doctrine contended for by the defendant would have no application. Reeves on Real Property, §§ 418-420.

The question is no longer of moment to the parties, as the opinion of the court on the plaintiffs' appeal decides that the defendant is the owner of the property.

There is no error.

(139 N. C. 17)

WILLIAMS v. HUGHES et al.

(Supreme Court of North Carolina. Sept. 12, 1905.)

COSTS—LIABILITY OF UNSUCCESSFUL PLAINTIFF.

Under Code, § 525, allowing costs to plaintiff on a recovery; section 526, allowing costs to defendant, unless plaintiff be entitled to recover them; section 527, authorizing the court in its discretion to allow costs of an appeal to either party, when a new trial shall be ordered, etc.; and section 540, providing that, if appellant recovers judgment in the appellate court, he shall be allowed the costs of that court and such costs as should have been recovered in the court below, had the judgment below been correct—a plaintiff who is unsuccessful on a trial after a reversal by the appellate court of a judgment in favor of defendant is liable for all the costs of defendant in the action, except the costs of the appeal.

Appeal from Superior Court, Camden County; Long, Judge.

Action by P. F. Williams, administrator of D. L. Pritchard, deceased, against J. G. Hughes and others. There was a judgment for defendants, and plaintiff appeals from the taxation of costs. Affirmed.

At the first trial of the case, judgment was entered for the defendants upon a verdict in their favor, and plaintiff appealed. This court granted a new trial for error in the refusal of the judge to give instructions. 136 N. C. 58, 48 S. E. 518. At the second trial the defendants again recovered, and in the judgment the court taxed the plaintiff with all the costs of the defendants in the action, except the costs of the appeal to this court, which included the cost of the transcript and certificate. Plaintiff excepted, and appealed upon the ground that he was not taxable with any of the costs of the first trial.

Pruden & Pruden and J. Heywood Sawyer, for appellant. Aydlett & Ehringhaus, for appellees.

WALKER, J. (after stating the facts). The contention of the plaintiff is that, as a new trial was granted in his first appeal, he cannot be taxed with any of the costs of the former trial. The matter of costs is regulated solely by the statute, and the correctness of plaintiff's contention depends, therefore, upon what is its true construction, and must be determined by its meaning. By section 525 of the Code, costs are allowed of course to the plaintiff, upon a recovery, in cases of which a justice of the peace has no jurisdiction. This action was of that character; it being one brought for the purpose of subjecting land to the payment of intestate's debts. By section 526, costs are allowed of course to the defendant, unless the plaintiff be entitled to recover them. These are the general provisions of the statute relating to the taxation of costs. Sections 527 and 540 provide for the costs in appellate courts, and give the court a discretion in respect to the taxation of such costs, when a new trial is ordered or the judgment of the lower court is not wholly reversed. These provisions need no special consideration in this case, as plaintiff has been allowed all the costs of his first appeal. It will be observed that by section 525 the condition precedent to the plaintiff's right to costs is that he shall recover in the action. It is perfectly clear that this recovery, in a case like the one under consideration, refers to a final determination upon the merits. The plaintiff has never "recovered" in this action in any sense. He was successful in this court to the extent of obtaining a new trial, but that by no means was equivalent to a recovery in the court below. This court merely ordered a new trial, and in that state of the case neither party had "recovered" in the action, and the question of costs was left open, to be settled by the result of the final trial of the case.

Plaintiff relies on a provision of section 546 of the Code to the effect that, if the appellant recovers judgment in the appellate court, he shall be allowed the costs of that court and such costs as he should have recovered in the court below, had the judgment of that court been correct, and he shall have restitution of any costs of the lower court which he shall have paid under its erroneous judgment. The first part of this provision manifestly refers, not only to a reversal of the judgment below, but to a judgment in favor of the appellant on the merits and not merely to an order for a new trial. Ellert v. Kelly, 4 E. D. Smith (N. Y.) 12. The trial court cannot ordinarily tax the costs of an action in favor of either party, unless there is a judgment; costs being an incident of the judgment. What is said by the court in Dobson v. Railroad, 133 N. C. 626, 45 S. E. 958, and quoted by plaintiff's counsel in their brief, refers to the latter branch of section 540, relating to restitutions of any costs which have been actually paid by the appellant in the court below. The hypothetical question there stated is not even now presented. We are not to decide whether, if plaintiff had paid any of the costs in the lower court, he was entitled to have the amount so paid restored to him when the new trial was ordered, but whether his liability for all of defendant's costs is to be determined by the result of the action. We think the view we have taken of the statute is sustained by the authorities. In State v. Horne, 119 N. C. 853, 26 S. E. 36, the defendant was convicted and appealed. A new trial was ordered, and he was acquitted. There was an appeal by the county commissioners from so much of the judgment of the court as taxed the county with the costs of the trial in which the defendant was convicted. In passing upon the exception to the judgment, the court, by Clark, J., says: "There is no exception in state cases to the rule prevailing in civil cases, that the costs follow the result of the final judgment." That case is in principle like ours. It declares the true and only test of liability for costs to be the nature of the final judgment; the party cast in the suit being the one upon whom the costs must fall. The same rule was stated and enforced in Kincaid v. Graham, 92 N. C. 154. The defendant claimed a credit of $50 on the debt, the subject of the action, which, if applied, would still leave a balance due the plaintiff. The sole issue in the justice's court was based upon this claim. Defendant lost in that court, and appealed. He won in the appellate court, but this court held that he must nevertheless pay the costs of that court, and the decision was reached by a construction of section 540, upon which plaintiff in this case relies, namely, "if the appellant shall recover judgment in the appellate court, he shall recover the costs of that court and those he ought to have recovered below, had the judgment of that court been correct." As the defendant did not recover in the action, though he succeeded upon the only issue raised in the

appeal, the court held the plaintiff, in whose favor final judgment was rendered, was entitled to his costs. Indeed, in Dobson v. Railroad, a case cited by the appellant and already referred to by us on another point, it is laid down as the rule that costs of the lower court abide the final result in that tribunal, with a few exceptions not embracing our case.

It may be taken as settled, therefore, by this court that no part of the costs of an action can be taxed against the party recovering judgment, save in a few exceptional instances not within the general principle which governs this case. Wall v. Covington, 76 N. C. 159; Horton v. Horne, 99 N. C. 219, 5 S. E. 927; Field v. Wheeler, 120 N. C. 264, 26 S. E. 812. In Bruner v. Threadgill, 93 N. C. 225, plaintiff's action was to redeem a mortgage by a sale of the premises, and certain disputed matters of account were referred, upon all of which decision was given in favor of defendant by the referee. Plaintiff mortgagor was held entitled to recover his costs, although a balance was found due the defendant mortgagee. To the same effect are Patterson v. Ramsey, 136 N. C. 561, 48 S. E. 811; Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736; Ferrabow v. Green, 110 N. C. 414, 14 S. E. 973. The same construction has been placed upon similar statutes in the courts of other states. In Ellert v. Kelly, 4 E. D. Smith (N. Y.) 12, the very point made in this case was presented, and the court held that, where judgment was reversed in the appellate court, the appellant was not entitled to any of the costs in the lower court not relating to the appeal, without an award, in addition to the reversal of judgment for him upon the merits. The result of the case is thus stated: "There has been no final determination between the parties. It does not appear that the appellant has lost the costs, which he incurred in the court below, by reason of the erroneous judgment. Non constat that he would have recovered those costs, if the error had not been committed. The judgment might have been against him, if the errors had not occurred. The fact that errors were committed was a sufficient reason for relieving him from the judgment itself; but the reversal did not adjudge directly, nor by implication, that the defendant was not liable at all." This accords precisely with our present view of the matter and the principle settled by our former decisions.

In the following cases the identical question was presented and decided in the same way, with this added observation, that, if there is no judgment on the merits directed in favor of the plaintiff in error (appellant under our system of pleading and practice), but the original action, in any form, is still to go on, the costs of the court below must abide the final issue of the cause. Gosling v. Acker, 2 Hill, 391; L. V. R. R. v. McFarland, 44 N. J. Law, 674; Byrnes v. Hoyt, 12 Me. 458. In the case last cited the court said: "The plaintiff in error, then, by the reversal, is entitled to be restored to what he lost directly by the judgment, which he succeeded in reversing, and not to his costs in the original suit, to which he would have been entitled if judgment had been rendered in his favor. This is the measure of relief which our law allows to a defendant aggrieved by an erroneous judgment." The rule is stated in Cartwright v. Sole, 16 Ohio, 316, with special application to facts such as we have in this case: "The judgment of reversal or affirmance only embraces the costs made under the proceeding or writ of error. In case of affirmance, there has already been a judgment for the costs of the original proceeding. On reversal, the costs of the original proceeding must abide the event of the suit." Where a judgment was reversed and the case remanded, with an unconditional mandate for a new trial, it was held erroneous to allow appellant, afterwards, any part of the costs of the former trial. Garrison v. Singleton, 5 Dana (Ky.) 160. Authorities are quite abundant to the same purport. 5 Enc. Pl. & Pr. 122, and notes. Applying to the facts of our case this familiar rule, that costs follow the judgment and are to be taxed against the defeated party, we can find no error in the judgment of the court.

We have discussed the question more at length than we would otherwise have done, because of the strenuous insistence of learned counsel that the meaning of the statute is the reverse of that we have adopted. It is proper, though, that we should remove doubts which seem to exist with some as to what costs are taxable in cases like this by declaring the rule which should govern, with a full statement of our reasons therefor, so that the practice may be clearly settled, if possible, once for all, as the question may be one of frequent recurrence.

No error.

(139 N. C. 155)

W. T. HUGHES & CO. v. PEPER TOBACCO WAREHOUSE CO.

(Supreme Court of North Carolina. Sept. 26, 1905.)

GUARANTY—CONSTRUCTION OF CONTRACT.

A letter stating, in answer to an inquiry as to the general standing of a certain person, that the writer regarded him as reliable and trustworthy, with whom the samples and sales of the addressee of the letter would be entirely safe, especially as all goods that might be shipped would come direct to the warehouses of the writer, and payment for such goods would be made by the writer to the addressee, did not constitute a guaranty by the writer of payment for goods which the addressee might ship to the person as to whose standing inquiry was made.

Appeal from Superior Court, Franklin County; Moore, Judge.

Action by W. T. Hughes & Co. against the Peper Tobacco Warehouse Company. From a judgment for defendant, plaintiff appeals. Affirmed.

F. S. Spruill and W. H. Ruffin, for appellant. T. W. Brickett and S. P. Galt, for appellee.

CLARK, C. J. This action is upon an alleged guaranty, as proof of which the plaintiff relied upon the following letter:

"St. Louis, Mo., 19 Mar., 1897.

"Gentlemen: Your letter of the 11th inst. making inquiry about the general standing of J. E. M. Walker, received. We regard him as a perfectly reliable, trustworthy gentleman, with whom your samples and sales would be entirely safe, and doubly so, as all tobacco of yours that might be shipped would come direct to the Peper Tobacco Warehouse Co., and the payment of all such tobacco would be made by us to you for all sales. Yours truly,

"Nicholas N. Bell, Manager,
"Per Hall.

"Mess. W. T. Hughes & Co., Louisburg, N. C."

Bell was manager of the defendant company. The defendant demurred, giving as its first ground that the letter did not constitute a guaranty, and hence the plaintiff's complaint did not set forth a cause of action, and the court below so held.

We do not think that this letter constituted a guaranty by the defendant to Hughes & Co. of payment of all tobacco which they should ship J. E. M. Walker. A guaranty is a contract—an "aggregatio mentium." This letter is on its face merely a response to a letter of inquiry to ascertain the general standing of J. E. M. Walker, and not to a request for them to guaranty purchases made by him. The reply contains what was asked for—information, and nothing more. This reply states that the defendant "regarded" Walker as a reliable and trustworthy gentleman, with whom Hughes & Co.'s samples and sales would be entirely safe, and doubly so because Hughes & Co.'s tobacco would come direct to the defendant's warehouse, and payment for all sales of such tobacco would be made by the defendant to the plaintiffs. This was merely a statement of the defendant's opinion of Walker's reliability, and of the manner in which the defendant would handle the tobacco, and the additional safety this method would be to the plaintiff. There was no consideration for the guaranty. The tobacco was already being shipped to the defendant for Walker, as it would seem from the letter, and there certainly is no agreement shown to so ship, nor an indication of any benefit to accrue to the defendant. Neither in the letter nor in the attendant circumstances is there anything to justify holding this letter to be a guaranty. The purport of the letter depends upon its intent, as derived from its perusal; and cases cited upon the construction of other papers, differently worded, could be of no assistance to us.

As the letter is not a guaranty, it becomes entirely unnecessary to consider the other exceptions.

The judgment sustaining the demurrer is affirmed.

(139 N. C. 126)

NORTH CAROLINA CORP. COMMISSION v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Sept. 26, 1905.)

RAILROADS — POWER OF CORPORATION COMMISSION—TRACK SCALES.

Under Laws 1899, p. 291, c. 164, creating the Corporation Commission, giving it general control and supervision of all railroads, providing in section 17 (page 303) that all railroad companies shall issue duplicate freight receipts, in which shall be stated the class or classes of freight shipped and the freight charges, and declaring by section 2, subsec. 12 (page 293), that the commission may require depot accommodations commensurate with the business and revenue, the commission has authority to require the railroad company to install track scales at points where the business justifies it.

Appeal from Superior Court, Wilson County; Justice, Judge.

Petition by the state, on the relation of the North Carolina Corporation Commission, against the Atlantic Coast Line Railroad Company. From a judgment for defendant, petitioner appeals. Reversed.

The Attorney General and F. A. Woodard, for appellant. Junius Davis and Pou & Fuller, for appellee.

CLARK, C. J. A petition was filed before the Corporation Commission by the Dennis Simmons Lumber Company, whose plant is located at Elm City, asking that the defendant be required to put in track scales for weighing lumber shipped in car load lots from that point. It was in evidence that the defendant had such scales at 21 other points on its North Carolina and Virginia division, at which there were saw-

mills, among them Weldon, Tillery, Parmelee, Washington, and Rocky Mount; that on the lumber shipped by the plaintiff at Elm City it paid $30,385 freight in 1903, being more freight than was paid on car load shipments at several points where the defendant had put in such scales; that the scales, if put in, would cost the defendant about $1,000; that the defendant offered to put in such scales if the plaintiff would add one-fourth of a cent per 100 pounds to its present rate of eight cents, which would cost the plaintiff very nearly $950 additional per annum; that there was very little car load freight requiring the use of such scales shipped from Elm City, except that shipped by the petitioner; and that the plaintiff had now to ship its lumber unweighed, and would pay freight upon its estimated weight, which would be corrected when the lumber was later weighed at Rocky Mount or Pinner's Point, at which places en route the defendant had track scales. The plaintiff objected to this latter arrangement, because it gave it no opportunity to see to the correctness of the weighing, and gave in evidence of serious inaccuracies in the weights as thus made elsewhere and reported to them. Upon the above evidence the Corporation Commission found the facts in accordance therewith, and ordered that "the defendant furnish track scales at Elm City for the purpose of weighing all car load shipments from that point."

Upon appeal by the defendant to the superior court, the evidence was substantially the same, except the additional fact that the petitioner expected to get through cutting timber at Elm City in two years, when its plant would be removed to Kenly, another point on the defendant's road, where it would have ten years' cutting, and the scales could be removed to that point for the same use. The plaintiff tendered the following issues: "(1) Is it reasonable that the Atlantic Coast Line Railroad Company be required for the convenience of shippers of freight to put in track scales at Elm City? (2) Are tract scales a necessary convenience for the use of shippers of freight at Elm City?" At the close of the plaintiff's evidence the defendant offered no evidence, but demurred to the plaintiff's evidence. The plaintiff asked the court to instruct the jury to answer both issues "Yes." To the refusal of the court to submit the issues tendered, and also to the refusal to instruct the jury as prayed, the plaintiff excepted. The court held with the defendant, on the ground, as stated in the judgment, that the Corporation Commission "had no power under the law to make the order appealed from, sustained the demurrer on that ground, and reversed the judgment" of the Corporation Commission.

There was error in the judgment that the Corporation Commission "had no power under the law to make the order appealed from." The power of the Legislature to supervise, regulate, and control the rates and conduct of common carriers has come down to us from the remotest times of the common law, and that this regulation may be exercised, either directly or through a commission, has been repeatedly held by this court and by the Supreme Court of the United States. Railroad Connection Case, 137 N. C. 15, 49 S. E. 191, and cases there cited. The contest here is simply and substantially a reiteration of the issue in that case, which is whether the state, through its Corporation Commission, has power to exercise a "general control and supervision of railroads" within this state in their dealings with the public. Section 1 of the act creating the commission (Laws 1899, p. 291, c. 164) provides that it "shall have such general control and supervision of all railroad * * * companies or corporations engaged in the carrying of freight or passengers * * * necessary to carry into effect the provisions of this act." Section 2 (page 292) empowers and directs the commission "to make just and reasonable rules and regulations for the handling of freight and baggage at stations." Section 17 (page 303) provides that "all railroad companies in this state shall on demand issue duplicate freight receipts to shippers, in which shall be stated the class or classes of freight shipped and the freight charges over the road giving the receipt." A literal compliance with the last clause would require, on demand of the shipper, that the articles shipped be weighed in every instance, that the shipper may see for himself what he must pay. But, inasmuch as at many stations the quantity of freight shipped in car load lots would make it an unnecessary burden to require at such points means of weighing car loads to ascertain the freight to be charged, the Corporation Commission, under the further clause (section 2, subsec. 12, p. 293), to "require depot accommodations commensurate with the business and revenue," has not required track scales at all points, but has made reasonable rules for regulating, by a standing estimate, the weight in car load lots of different articles shipped from such stations. But this is not in derogation of the right and duty of the commission to require track scales or other proper facilities for weighing car load freight to be put in at such points as the quantity of business may justify it. The commission can order new depots (Laws 1899, p. 293, c. 164, § 2, subsec. 12) established wherever they are needed (Railroad Co. v. Minnesota, 193 U. S. 63, 24 Sup. Ct. 396, 48 L. Ed. 614), and of course has the lesser power to require proper facilities at those already established. This subsection provides that the commission may require "the erection of depot accommodations commensurate with such business and revenue."

The traffic manager of the defendant, on the trial before the corporation commission, in his evidence rested his opposition largely upon the ground that he "did not wish a precedent set that the Corporation Commission could order track scales put in anywhere, because they might order them at points where the business would not justify it." His defense and the judgment below are to the same effect; i. e., a denial of the power of the Corporation Commission to require such accommodations to be rendered the public. But this is error. The power does exist. It cannot be unreasonably exercised, and such orders are subject to review by the superior court and by this court. The court should have left the reasonableness of the order to the jury upon proper instructions as to the law. The ruling that the commission "had no power" to make such orders deprived the complainant of any opportunity of presenting his contentions as to the reasonableness of the order for review. The traffic manager's view (which was sustained by the court below) leaves such orders absolutely to the railroad's own will and pleasure, and if its refusal is unreasonable and unjust there would be no correction. It was precisely for this reason that the Corporation Commission was created, an impartial body representing neither the shipper nor the railroad, to supervise and control the operations of these great corporations, that justice may be done shippers and the public by reasonable orders and requirements; such orders being subject, if unreasonable, to review by the same tribunals which protect and safeguard the lives, the liberty, and the property of every citizen in the land—the courts, with their juries and judges. It is in this way that a demand like that made by the petitioner in this case shall be held reasonable or unreasonable, and not by the arbitrary and irreviewable decision of the defendant. It would be as just to place the granting of the demand in the irreviewable power of the shipper as to give the refusal of the request to the other party. The Corporation Commission was created as an impartial tribunal to decide such matters, "to have general control and supervision of all railroad * * * companies or corporations, and of all other corporations engaged in carrying freight or passengers." "Track scales" are not specifically mentioned in the act, but there is the power to "require depot accommodations commensurate with the business and revenue" at the respective stations, and to require "repairs or additions" to any station, "the removal or establishment of a station," the raising or lowering the tracks, etc., to promote the "convenience or accommodation of the public." There was no intention to give a schedule of the thousands of appliances used in handling the business of common carriers, nor to enumerate the countless dealings between them and their patrons, which such commission should supervise. The clearly declared purpose was to put the control and supervision of the whole matter in the hands of an impartial commission, with power to make reasonable rules and orders, subject to the right of appeal by either party, the shipper or the carrier, to the courts, instead of leaving such dealings to the unrestricted will of one party—the carrier.

This appeal rests solely upon the denial of power to make any order in the premises. It cannot be said that there was no evidence tending to show that the order was reasonable. The defendant had put in track scales at other points where fewer car loads were shipped. It offered to put in the scales if the petitioner would pay higher rates (amounting annually to nearly the full cost of scales and of putting them in) than were paid by shippers at points where such scales had been put in. Indeed, this was a discrimination against the petitioner. The petitioner had for five years been denied its request for like facilities with the stations shipping less lumber, and it should not be deemed unreasonable per se to order such facilities because only two years remained. Besides, the defendant could remove the scales when no longer needed. At least, there was evidence to submit the reasonableness of the order to the jury. Under the statute "depot accommodations should be commensurate with the business and revenue." Certainly it would have been a discrimination to have required, as the defendant proposed, that the defendant would put in the scales in consideration of adding one-fourth cent to the rate of eight cents now charged the petitioner, being about $950 per year, for weighing (as was the defendant's duty) the petitioner's lumber. The petitioner was not unreasonable in asking that the lumber be weighed there, instead of at Pinner's Point, especially in view of the admission that the weights at the latter point, as reported thence, had varied near 25 per cent. per car load on the same class of lumber.

The defendant pressed the point that this petition "affected only one point and one shipper," and was therefore a discrimination. All such petitions and orders must necessarily apply to the one station where the additional facility is demanded. If the defendant itself was passing upon the application, it would only consider the necessity for it at that point. It would be unreasonable to the defendant to apply such order to all stations. Nor is it material to the defendant that the $30,385 freight was paid on car load lots shipped by one shipper; there being only 42 car loads shipped by others. It is not the number of shippers, but the number of car loads to be weighed, which is the test whether it is reasonable to have facilities for weighing car loads upon track scales at that point. The petitioner itself consists of several persons. It is not

to be discriminated against because it is a corporation.

We were more inclined to be impressed with the argument that the petitioner would only cut lumber two years longer at that point; but, on the other hand, the petitioner had already shipped lumber from that point for five years, during much of which time they had been in vain asking this facility, that they might see their lumber weighed, and the freight for the two years to come to be paid by the petitioner would be over $60,000, which would well seem to justify furnishing track scales at a cost of $1,000 (which the defendant had put in at several points making smaller shipments), especially taken in connection with the further evidence that the petitioner has 10 years' cutting at Kenly, another station on the defendant's road, to which the track scales can then be moved, if the car load shipments at Elm City will not justify keeping them there.

It was error to hold that the Corporation Commission "had no power" to make the order, and it was also error to refuse to submit to the jury the issues tendered by the plaintiff as to the reasonableness of the order and the necessity for such appliances for shippers of freight at Elm City. Not only was the plaintiff's request to submit issues as to the reasonableness and necessity for the order refused by the court, but the court did not pass upon them itself; for, instead of ruling upon the defendant's demurrer to the evidence upon its merits, the court held ex mero motu that the commission had no jurisdiction of such cause of action and no cause of action was stated, for it reversed the order on the ground, as stated in the judgment, because "the Corporation Commission had no power to make the order applied for." If such ruling was error, we must so hold; for it is the only question presented by the appeal, and the case must go back, that the court, or the jury upon proper instructions, as the case may be, may pass upon the reasonableness and necessity of the order in controversy. This is not the case where a demurrer to the evidence is sustained on the merits; but here the ruling that the Corporation Commission had no jurisdiction, because of want of power, in fact cut the court off from any ruling upon the demurrer to the evidence.

It may be that, upon the reinstatement of the case and trial, the defendant may be able to put in evidence presenting sufficient reasons why the order sought is not reasonable and just, or in the lapse of time since the timber may have been cut off, so that the scales are not needed (if so, of course, a nonsuit will be taken); or it may be that the petitioner or others at that station may have acquired timber making the scales necessary. These will be appropriate matters to put in evidence at such trial (if the application for the order is not withdrawn), but do not affect the sole point before us, which is as to the power of the Corporation Commission to make the order. The ruling in effect was that there was a defect of jurisdiction, in that the Corporation Commission had no power to make such order, and was error.

(139 N. C. 51)

MOORE et al. v. FOWLE et al.

(Supreme Court of North Carolina. Sept. 12, 1905.)

1. ACTIONS FOR DAMAGES FOR CUTTING TIMBER—TEMPORARY INJUNCTIONS—RIGHT OF COURT TO CONTINUE—STATUTORY PROVISIONS.

Acts 1901, p. 900, c. 666, providing that in actions to try titles to timber lands the court, on finding that there is a bona fide contest on both sides based on evidence constituting a prima facie title, shall make no order permitting either party to cut the timber, except by consent, is intended to preserve the timber on lands in litigation pending suit; and where a plaintiff, in an action for cutting timber on land in litigation, satisfies the court that his claim is bona fide, and that he can show an apparent title to the timber, the court should continue an injunction enjoining defendant from cutting the timber until the title can be determined.

2. DEEDS—VALIDITY—FAILURE TO DESCRIBE ANY LAND.

Acts 1891, p. 524, c. 465, making parol evidence admissible to identify the land sued for in actions for the possession of or title to real estate, does not render valid a deed failing to describe any land.

3. SAME—DESCRIPTION—SUFFICIENCY.

A deed conveying land "lying and being on the south side of Pamlico river and the south side of Blount's creek, containing 75 acres, * * * it being the same land that P. conveyed to E. by deed, which deed will more fully show the courses and distances, reference being had to the said deed, and deeded by E. to S.," is not void, for it calls for the land conveyed by the deeds mentioned, which deeds will locate the land.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 84; vol. 20, Cent. Dig. Evidence, § 2123.]

4. INJUNCTION—TRESPASS—CUTTING TIMBER—EVIDENCE.

In an action for cutting timber on land in litigation, plaintiff showed a deed conveying land, referring to other deeds for a description thereof, without offering the deeds referred to. He proved that the land was well known by name, and that the boundaries were well known. *Held*, sufficient to warrant a continuance of the injunction, enjoining defendant from cutting timber on the land until the determination of the cause.

Appeal from Superior Court, Beaufort County; Ward, Judge.

Action by M. Moore and others against Samuel R. Fowle and another. The court granted a restraining order enjoining the defendants from cutting timber upon the land, and on the hearing continued the injunction. From this order, defendants appealed. Affirmed.

Small & McLean and A. O. Gaylord, for appellants. Nicholson & Daniel for appellees.

BROWN, J. It is contended by the defendants that the evidence offered by the plain-

tiffs did not show a bona fide claim based upon evidence sufficient to constitute a prima facie title in accordance with the terms of the statute (Acts 1901, p. 900, c. 666), and therefore the injunction should have been dissolved. We have examined all the affidavits and deeds set out in the record, and have concluded that his honor properly continued the injunction. The act of 1901 is not a limitation upon the power of the courts to continue injunctions until the controversy can be tried by court and jury. Section 1 specifies certain conditions when the injunction shall not be dissolved, and when the court shall not permit the timber to be cut, except by consent. Section 2 specifies a contingency when the court may permit one of the parties to cut the timber, and prescribes the conditions necessary to be complied with. This act was evidently intended to preserve the timber upon lands in litigation pending the suit. Section 2 was intended to regulate the practice of giving bonds, which had obtained since Lumber Co. v. Wallace, 93 N. C. 22, and similar cases. The rapidly increasing value of timber trees doubtless prompted the Legislature of 1885 to enact chapter 401 (Acts 1885, p. 664); but the efficacy of this act was diminished by the general practice of permitting the defendant to give bond and to cut the timber pendente lite, or otherwise to appoint a receiver and permit the rental value or stumpage to be paid to him. The legislature of 1901 has thrown greater safeguards around the rights of such litigants, and now, when the plaintiff satisfies the judge that his claim is bona fide, and that he can show an apparent title to the timber, the judge should not dissolve the injunction, but continue it until the title can be finally determined.

The plaintiffs offer in evidence a deed from Gustavus Dupey to Samuel Moore, purporting to convey "a certain piece or parcel of land, lying and being on the south side of Pamlico river and the south side of Blount's creek, containing 75 acres, be the same more or less, it being the same land that James Peele conveyed to Hiram Edgerton by deed, which deed will more fully show courses and distances, reference being had to the said deed, and deed by Hiram Edgerton to William E. Shaw." It is contended that this deed is void for uncertainty of description. The plaintiffs, in addition to the general principles of law, rely on Acts 1891, p. 524, c. 465, in support of this deed. It is unnecessary to consider the value of such act as an aid to the plaintiffs' case. It is not probable that the General Assembly intended to repeal the section of the statute of frauds requiring conveyances of land to be in writing. A deed which fails to describe any land is as void now as it was before the passage of the act of 1891. It is plain that the deed is not void, for it calls for the same land conveyed by James Peele to Hiram Edgerton, and by Edgerton to Wm. E. Shaw. These latter deeds can be offered in evidence on the trial, and the land probably be located. "Id certum est," etc. The fact that they were not offered at the hearing before the judge does not compel a dissolution of the injunction. On such hearings, the title is not required to be proved with that strictness and certainty of proof as upon the trial.

The plaintiffs offer affidavits tending to prove that the land is well known by name, to wit, as the "Peele Land," or "Sam Moore Land," and that the boundaries are known to witnesses and can be easily located. Description by name, where lands have a known name, is sufficient, and a tract of land may then be located by its name. Scull v. Pruden, 92 N. C. 168, citing many cases. As we understand the case, the defendants do not claim this James Peele or Sam Moore land, and they express a desire to keep off of it. It is therefore proper for the plaintiffs to point out to the defendants immediately the boundaries of the James Peele land as claimed by them, so the defendants' agents may not unwittingly trespass, pending the trial of the title.

The order of the judge below is affirmed.

(139 N. C. 40)

WILKINS et al. v. NORMAN.

(Supreme Court of North Carolina. Sept. 12, 1905.)

DEEDS—REPUGNANT CLAUSES.

A deed, after reciting the consideration, contained the usual operative words of conveyance, unto the grantee, "to him and his heirs, forever," to have and to hold the premises, to him and his heirs and assigns, free and discharged of any and all incumbrances, in fee simple, forever; but after the covenant of warranty was a clause providing that, after the death of the grantee and his wife, the land should descend to their heirs, specified, to be equally divided between them. *Held*, that such clause was repugnant to the fee conveyed, both in the premises and the habendum of the deed, and was therefore void.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 267-273, 436-447.]

Appeal from Superior Court, Washington County; Ward, Judge.

Action by L. Wilkins and others against Anna Norman. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Benj. Phelps on October 2, 1872, executed a deed conveying the land in controversy to Berrick Norman. Following the recital of the consideration, etc., the deed contains the usual operative words of conveyance, "unto the said Berrick Norman, to him and his heirs and assigns, forever," etc., "to have and to hold the said land and premises above described * * * to him, the said Berrick Norman, to him, his heirs and assigns, free and discharged of any and all incumbrances, in fee simple, forever." Following the usual covenant of warranty are the words, "and after the death of Berrick Norman and Moseller Norman, his wife, the lands and premises to descend to their heirs, Lad Wil-

kins, Ellick Wilkins, and Susan Norman, and to be equally divided between the three heirs above mentioned." Berrick Norman and his wife, named in the deed, are dead. The plaintiffs are the same persons named in the last clause of the deed. The defendant is in possession. His honor, upon the foregoing facts, was of opinion that plaintiffs were not entitled to recover, and rendered judgment accordingly.

A. O. Gaylord, for appellants. H. S. Ward, for appellee.

CONNOR, J. (after stating the case). We concur with his honor. The entire estate, in unmistakable terms, is given the grantee, both in the premises and the habendum. The warranty is in harmony with the preceding parts of the deed. Following the warranty there is introduced two entirely new clauses, both repugnant to the estate and interest conveyed. It is sought to make the wife of the grantee a tenant in common, and limit the estate to the life of the grantee and his said wife, and the survivor, giving, by way of remainder the fee, which had already been conveyed to the grantee, to the plaintiffs. The principle upon which such repugnant clauses in deeds have been disposed of by this court, following the most approved text writers, is thus stated by Daniel, J., in Hafner v. Irwin, 20 N. C. 570, 34 Am. Dec. 390: "In the case before us the whole interest in the property is granted and conveyed to the plaintiff in the premises of the deed. The same interest, being afterwards limited in the habendum to Curry, makes that part of the deed repugnant to the premises, and therefore void." That case was cited with approval by Faircloth, C. J., in Blackwell v. Blackwell, 124 N. C. 269, 32 S. E. 676, saying: "In the premises the fee is conveyed to the plaintiff, and afterwards a life estate to the defendant in the same lands. If the first intent, expressed in apt language and repeated in the warranty clause, is to be observed, then there is nothing left to satisfy the intent in the last clause."

It is an elementary maxim that, when there are repugnant clauses in a deed, the first will control and the last be rejected. In the case of Blair v. Osborne, 84 N. C. 417, it will be noted that the introduction of the children in the habendum did not affect the estate or interest conveyed in the premises. Judge Ashe says that it is clear that the mother, grantee, took only a life estate by the language in the premises. It was sought to so construe the habendum that the children, introduced for the first time, should be adjudged tenants in common with her. This the court declined to do, but permitted the children to take in remainder after the expiration of the mother's life estate. In our case the plaintiffs can take only by rejecting the words of inheritance in the premises and habendum, thus cutting down the estate of the grantee from a fee simple to a life estate. The authorities are uniform that this cannot be done. The learned counsel for the plaintiffs cites Rowland v. Rowland, 93 N. C. 214. In his well-considered opinion, Mr. Justice Ashe puts our case, saying: "Blackstone, in his Commentaries (volume 2, p. 298), has said that the office of the habendum is to lessen, enlarge, explain, or qualify the premises, but not to contradict or be repugnant to the estate granted in the premises." And, to illustrate what is meant by the repugnancy which will render the habendum nugatory, he puts the case: When, in the premises, the estate is given to one and his heirs, habendum to him for life; for an estate is vested in him before the habendum comes, and shall not afterwards be taken away and divested of it." The deed in that case upon which the decision is based, is essentially different from ours.

We have considered the case upon the assumption that the clause under which plaintiffs claim contains apt words to convey an estate in remainder. This, however, is by no means clear. While we are advertent to the general rule that the court will by an examination of the entire deed seek, and, if found, effectuate, the intention of the grantor, we must keep in view the other rule that, when rules of construction have been settled, it is the duty of the court to enforce them; otherwise, titles are rendered uncertain and insecure. Merriam, J., in Leathers v. Gray, 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30, gives expression to the principle and the reason upon which it is based: "When a testator employs words and phrases to express his intention in the disposition of his property by will that have a well-known legal or technical meaning, he must be deemed to have used them in such sense in defining and limiting the estate disposed of, unless he shall, in some appropriate way, to some extent, to be seen in the will, have qualified or used them in a different sense. And so, also, if the use of such words bring his intention so expressed within a settled rule of law, the latter must prevail, although the effect may be to disappoint the real intention of the testator. Otherwise, technical words would have no certain meaning or effect, and the rule of law would be subverted, in order to effectuate the real intention of the testator, unexpressed or imperfectly expressed. It is said, however, that the real intention of the testator must have effect, and so it must; but the real intention recognized and enforced by the law is that expressed in the will, and this is to be ascertained by a legal interpretation of the language employed to express it."

The judgment must be affirmed.

Affirmed.

(139 N. C. 23)

JENNINGS et al. v. WHITE.

(Supreme Court of North Carolina. Sept. 12, 1905.)

1. ACTION FOR POSSESSION OF LAND—DEEDS—CALLS—INSTRUCTIONS.

Where, in a suit for the possession of real estate, a call in a deed relied on by a party was a specified number of feet to a designated line, the omission of the court to charge that the call should not exceed the specified number of feet, unless the jury fixed the designated line at some other point, in which event they should extend the call to the line, was error.

2. ADVERSE POSSESSION—TACKING SUCCESSIVE POSSESSIONS.

Where the deed to one claiming title to land by adverse possession did not cover the land, the possession thereof by his grantor could not be tacked onto his possession for the purpose of showing a continuous adverse possession for the statutory period.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 213–228.]

3. APPEAL — INSTRUCTIONS — PREJUDICIAL ERROR.

Where, in a suit for the possession of land, the court on appeal could not determine whether the verdict of the jury was based on its establishment of a line designated in a deed after disregarding the distance called for in the call, or whether it was based on a finding of title by adverse possession, an error in an instruction as to title by adverse possession was prejudicial.

Appeal from Superior Court, Pasquotank County; E. B. Jones, Judge.

Action by W. M. Jennings and another against W. H. White. From a judgment for plaintiffs, defendant appeals. Reversed.

W. M. Bond and C. E. Thompson, for appellant. Aydlett & Ehringhaus, for appellees.

CONNOR, J. Plaintiff alleged that he was the owner and in possession of a lot in Elizabeth City, on Road street, beginning at the north east corner of Scott's lot, and running at a right angle with Road street, along the fence of said Scott, 410 feet to Commander's line; thence northwardly, parallel with Road street, about 56 feet, to W. K. Carter's line; thence eastwardly, with Carter's line, parallel with the first line, to Road Street; thence, with said street, about 56 feet, to the beginning. The defendant admitted that he was in possession of a part of said lot, denying plaintiff's alleged title thereto, and alleged that he was the owner thereof. Plaintiff introduced several deeds executed prior to October, 1876, which defendant conceded covered the lot described in the complaint. Plaintiff introduced a deed from G. F. Steel to Sarah Gaskins, bearing date October 16, 1876, conveying a lot "beginning on Road street, at the northeast corner of Charles' lot; running thence with said street 56 feet to the Colored Odd Fellows' lot at a large elm tree; thence north, 82½ degrees west, 410 feet, to Thomas Commander's line; thence south, 4 degrees west, 18 feet, to W. F. Martin's line; thence south, 82½ degrees east, along Martin's and Mrs. Dashiell's line, 115 feet; thence south, 11 degrees east, 88½ feet, to said Dashiell's line; thence along her line and Charles' line south, 82½ degrees east, 295 feet, to the beginning." A deed from Sarah Gaskins to G. W. Cobb, dated September 1, 1887, conveyed by the same description the lot conveyed to her. Cobb conveyed by the same description to plaintiff July 8, 1889.

It is contended by defendant that for some reason Steel, who it is conceded was the owner of the parallelogram described in the complaint, in conveying to Sarah Gaskins retained the southwestern corner of the lot. The plaintiff says that, while it is true that the third call is "south, 4 degrees west, 18 feet," it is also to "Col. W. F. Martin's line," and that the last part of the call will control, by invoking the well-settled principle that, where the call is for a certain distance to a natural object, or a known and fixed line of another tract, the distance will be disregarded, and the natural object or line control. This principle is conceded. The court was not requested to instruct the jury upon this view. His honor simply told the jury to inquire whether the deed under which plaintiff claimed covered the land in dispute. The court should instruct the jury, as a question of law, what the boundaries are, leaving to them the question where they are. Under the description contained in the plaintiff's deed and those of Gaskins and Cobb, the third call should not exceed 18 feet, unless the jury fixed "Col. W. F. Martin's line" at some other point, in which event they would extend the call to such line. His honor inadvertently omitted to give the jury any guide by which they could be governed in answering the question submitted to them. No special instructions were asked, and it may be that defendant is not in a position to avail himself of the failure to so instruct the jury. If the grantor in the deed to Sarah Gaskins intended to make the third line 56 feet, instead of 18, he has made a break in the side line, running into another lot 38 feet, which would prevent him from reaching the beginning point by the calls in the deed at the end of the line of 295 feet. It would seem difficult to reconcile the calls in the deed from Steel to Gaskins and those leading up to and including plaintiff's deed, so as to include all the original lot, being a parallelogram, with two sides of 410 feet and two ends of 56 feet each.

The plaintiff, however, contends that, if it be conceded that the deeds under which he claims do not cover the locus in quo, he and those under whom he claims have been in possession of the disputed portion for more than 20 years, and have thereby acquired title. There is evidence tending to show that the original lot was inclosed by a fence, and that it continued so until changed by defendant, who purchased the adjoining lot during the year 1903, and that the successive owners of the original lot occupied the locus

in quo. His honor instructed the jury that if they should find that plaintiff and those under whom he claimed had been in the exclusive, open, continuous, and adverse possession of the land in controversy up to the said fence, and that the possession had been continuous from 1880 to the bringing of the action, they should answer the issue for the plaintiff. Defendant excepted. The difficulty which the plaintiff encounters in sustaining this instruction is found in his failure to show any privity in respect to the locus in quo between himself and those whose possession preceded his. If the deed under which plaintiff claims had covered the disputed land, although his grantor may have had no title, he could have tacked his possession with that of his grantor and built up title based upon a disseisin of his grantor. It cannot be that several disseisins having no privity can be tacked, so as to vest title. The law in this respect is thus stated in 1 Cyc. 1007: "The general rule is that possessions cannot be tacked to make out title by prescription, when the deed under which the last occupant claims title does not include the land in dispute. It must clearly appear in the deed that the particular premises were embraced in the deed or transfer in whatever form it may have been made." Of course, if it be shown that there was a mistake in the deed, a different principle applies. "To make a disseisin effectual to give title under it to a second disseisor, it must appear that the latter holds the estate under the first disseisor, so that the disseisin of one may be connected with that of the other. Separate successive disseisins do not aid one another. Where several persons successively enter on land as disseisors, without any conveyance from one to another, or any privity of estate between them, other than that derived from the mere possession of the estate, their several consecutive possessions cannot be tacked, so as to make a continuity of disseisin of sufficient length of time to bar the true owners of their right of entry. To sustain separate successive disseisins as constituting a continuous possession, and conferring a title upon the last disseisor, there must have been a privity of estate between the several successive disseisors. To create such privity there must have existed as between the different disseisors, in regard to the estate of which a title by disseisin is claimed, some such relation as that of ancestor and heir, grantor and grantee, or devisor and devisee. In such cases the title acquired by disseisin passes by descent, deed, or devise. But if there is no such privity, upon the determination of the possession of each disseisor the seisin of the true owner revives and is revested, and a new distinct disseisin is made by each successive disseisor." Sawyer v. Kendall, 64 Mass. 241; Hollingsworth v. Sherman, 81 Va. 681; Sherin v. Brackett, 36 Minn. 152, 30 N. W. 551; Ward v. Bartholomew, 23 Mass. (6 Pick.) 409; Humes v. Bernstein, 72 Ala. 546; Atwell v. Shook, 133 N. C. 387, 45 S. E. 777.

It does not very clearly appear in what manner Steel delivered the possession to Sarah Gaskins in 1876. If he put her in possession of the entire lot, including the portion not included in the deed, she in respect to such portion became his tenant at will. She certainly acquired no title to the portion not included in the deed, nor was there, in that view of the case, any disseisin. There is evidence on the part of the witness Raper that Mrs. Gaskins was in possession in 1880. If such possession was permissive, the statute did not run. If it was adverse to Steel, in whom the title remained, as we have seen, it did not inure to the benefit of her grantee, or the subsequent grantee, because it was not covered by any of the deeds made subsequent to the one from Steel to Gaskins. This court held in Blackstock v. Cole, 51 N. C. 560, that the mere fact that one who had purchased a tract of land went into possession of another adjoining tract not covered by the deed is no evidence that he claimed such tract under the person from whom he purchased. In Bryan v. Spivey, 109. N. C. 67, 13 S. E. 766, cited by counsel for plaintiff, the plaintiff, by showing that possession of the land in controversy had been held for more than 30 years, availed himself of the presumption that a grant had issued from the state. To do this it was not necessary to show any connection between the successive occupants. See cases cited by Shepherd, C. J., who says: "If the title was out of the state, the law would also presume that a deed had been executed by the true owner to the parties under whom the plaintiff claims; they having had continuous adverse possession of the same, succeeding each other as privies, for 20 years." The original possession being shown in Richard Dobbs Speight, a continuous possession in those succeeding as his heirs at law was shown. The distinction between that case and the one before us is obvious. The same is true of Alexander v. Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757.

The title was directly put in issue, and the burden was upon the plaintiff to show title in himself. We are unable to say whether the jury were of opinion that the "Col. W. F. Martin line" was established, and that, disregarding the distance called for in the third call, the plaintiff's deed and those to Gaskins and Cobb covered the disputed land, or whether they were controlled by the contention that the plaintiff had acquired title by adverse possession upon the principle laid down by his honor.

For the reasons given, we are of the opinion that the charge in that respect was erroneous, and for this the defendant is entitled to a new trial.

(139 N. C. 537)

STATE v. ARCHBELL.

(Supreme Court of North Carolina. Sept. 12, 1905.)

1. CRIMINAL LAW—REMARKS OF PROSECUTING ATTORNEY—SEASONABLE OBJECTION.

That denunciation of defendant by the prosecuting attorney may be complained of, attention of the court should be called thereto at the time, that it may have opportunity to correct the effect thereof.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2645.]

2. ASSAULT — DEADLY WEAPON—QUESTION FOR JURY.

So far as defendant is concerned there is no error in submitting to the jury the question whether his assault on his wife was with a deadly weapon; he being very strong, large, and robust, she being very frail and weak, and sick at the time of the assault, and he having violently assaulted her with a buggy trace 2½ feet long.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, § 141.]

Appeal from Superior Court, Beaufort County; Ward, Judge.

W. J. Archbell, the defendant, was indicted for an assault upon Jessie Archbell, his wife, with a deadly weapon, and tried at May term of Beaufort superior court, and convicted. From the judgment and sentence of the court, he appealed. Affirmed.

E. S. Simmons, for appellant. The Attorney General, for the State.

BROWN, J. The testimony relied upon by the state tended to prove that the defendant assaulted his wife by severely beating her with a large leather strap, being part of a buggy trace, about 2½ feet long. There was also testimony tending to prove that at the time the wife was very sick. These charges were all denied by the defendant on the stand, and he offered other evidence tending to discredit them. In the very able brief of Mr. Simmons, counsel for defendant, it is contended with much feeling and eloquence that the defendant was greatly prejudiced by the alleged vehement denunciation of the solicitor in his argument to the jury, and the able counsel presents authority to sustain his position. It is admitted in the brief that no objection was made at the time, and that the court was not asked to interfere and correct the effect of the solicitor's denunciation. No such exception appears in the record. This necessarily precludes us from considering it. The matter should have been called to the attention of the court at the time, in order that the judge might have an opportunity to correct the solicitor, in case he should think the language was not warranted by the testimony. State v. Suggs, 89 N. C. 530; State v. Lewis, 93 N. C. 582.

The court submitted to the jury, with appropriate instruction, the question whether the instrument used was a deadly weapon, to which the defendant excepted. The court also properly instructed the jury to render a verdict of simple assault, or assault, as charged, with a deadly weapon, or not guilty, as they should find the facts after fully satisfying themselves as to the truth of the matter.

We find no error in the instructions given by his honor below. The charge is full and clear, and supported by authority. Some weapons are per se deadly, and others, owing to the violence and manner of use, become deadly. In the latter class of cases, where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used, it is proper and necessary to submit the matter to the jury with proper instructions. State v. Huntley, 91 N. C. 621. The uncontradicted testimony shows that the defendant is "a very strong, large, and robust man," and that the wife is a "very frail and weak woman." There is also evidence that at the time of the assault she was sick. Under such circumstances, for the husband to violently assault his weak, frail, and sick wife with part of a buggy trace, 2½ feet long, is not only brutal, but calculated to produce serious injury, and possibly death. If His Honor erred in submitting the question of the deadly character of the weapon under the circumstances to the jury, we have no hesitation in holding that they solved it correctly upon the theory that the state had proved its contentions to their full satisfaction. State v. Craton, 28 N. C. 181. A deadly weapon is not one that must or may kill. It is an instrument which is likely to produce death or great bodily harm under the circumstances of its use. The deadly character of the weapon depends sometimes more upon the manner of its use and the condition of the person assaulted than upon the intrinsic character of the weapon itself. State v. Sinclair, 120 N. C. 603, 27 S. E. 77; State v. Norwood, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498. An instrument which might be harmless when used upon a strong man may become deadly when used upon a very frail and delicate woman.

We have considered every exception taken by the defendant, and examined every authority referred to in the carefully prepared brief furnished us by his counsel. We are unable to find any error.

No error.

(139 N. C. 60)

STOCKS v. CANNON et al.

(Supreme Court of North Carolina. Sept. 19, 1905.)

1. WITNESSES — COMPETENCY — TRANSACTION WITH DECEASED PERSON—EVIDENCE.

Where plaintiff sued to recover for services rendered to defendant's testator, and testified over objection that during the period in controversy he worked on the public road a little and in the field, attending to business of some one other than himself, that the value of his services was not less than $2,000, in which he used his own team, and had received for his services in all $309, such evidence, though not expressly disclosing that the services were rendered to testator, was incompetent, as disclosing a transaction between plaintiff and decedent, in violations with decedent, was irrelevant and prejudicial.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 625–630.]

2. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST DECEDENT'S ESTATE.

The testimony, if not relating to transactions with decedent, was irrelevant.

Appeal from Superior Court, Pitt County; Webb, Judge.

Action by S. A. Stocks against Jesse Cannon and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

This is an action to recover for services alleged to have been rendered to the testator of the defendants.

Plaintiff was introduced as the first witness for himself, and testified as follows: "Q. You are the plaintiff in this action? A. Yes. Q. Where did you work from April 1, 1901, to April 27, 1904, and what class of work did you do? (Defendant objected to the witness speaking about any work upon land belonging to deceased within the time stated. Objection overruled, and defendant excepted.) A. I was on the public road a little and in the field, if I am not to speak about the time I was at work on the land of the deceased. Q. What was your business on the road? A. Attending to business. Q. Attending to business of some one else than yourself? A. Yes. Q. What was the value of those services rendered during that time? A. They could not have been less than $2,000. (Defendant objected. Objection overruled, and defendant excepted.) Q. What services did you render T. C. Cannon from April 1, 1901, to April 27, 1904? (Excluded.) Q. In these services for three years, mention whose team you used. A. My own. Q. How much have you received for your services all that time? A. $309." There was other testimony as to the services rendered by plaintiff to the testator and their value, but it is not necessary to state it, as the decision of this court is confined to the competency of that already set out.

Skinner & Whedbee, for appellants. Fleming & Moore, for appellee.

WALKER, J. (after stating the case). The testimony of the plaintiff to which the defendant objected was incompetent. It is clear to us that it related to a transaction, and perhaps to a communication, with the deceased. It is true the witness did not state in so many words that he had rendered services to the testator, but that he had is plainly implied in the questions and answers. It would have been futile to ask the witness about services he had not rendered to the deceased, as the question being tried was whether he had rendered services to him, and the value of any services so rendered, and not whether he had rendered services to some one else. The examination, as was said in the argument, was very adroit and skillful; but we do not think the plaintiff succeeded in avoiding the prohibition of the statute. Code, § 590. We must construe and enforce that wise and salutary provision of the law, so as to effectuate the evident intention of the Legislature, which is to exclude even the indirect testimony of an interested witness as to a transaction or communication with the deceased, as the latter cannot be heard in reply. Besides, there is a striking correspondence between the value of the services described in the witness' answers and the amount of the payment made by the deceased, on the one hand, and the allegations of the complaint relating to those matters, on the other. In his complaint the plaintiff values the services rendered to the deceased at $1,900, and alleges that he has already received for them $309. In his answer to the following question: "In these services for three years, mention whose team you used. A. My own"—the witness refers unmistakably to services performed for the testator; and when, in the last question, he is asked as to the amount received for his "services all that time," and answers $309, which is the very amount paid by the deceased, how can we escape the conclusion that in his testimony he was referring to services rendered to the deceased? The context discloses that the witness meant, when answering the questions to which objection was taken, to refer to services he had rendered to the testator. When a witness is asked and testifies as to the value of services "rendered," he necessarily speaks, though perhaps indirectly, of a transaction or communication, as he could not well have rendered services to the deceased without having had some sort of transaction or communication with him, the exact nature of which depends upon the kind of services rendered. Davidson v. Bardin (at this term) 51 S. E. 779; McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27. If the testimony did not have reference to services rendered to the deceased, it was irrelevant, and under the circumstances it was calculated, in our opinion, to mislead the jury and to prejudice the defendant. We conclude that the testimony was objectionable, within the spirit

and meaning of section 590 of the Code, as well as within its letter, and should have been excluded on that ground, and, if not on that ground, then it should have been rejected for the other reason assigned. For the error in admitting it, a new trial is ordered.

The other exceptions are not passed upon, as the case may be differently presented at the next trial. It may be well, though, for the defendant's counsel to consider whether the rule he invokes—that a legacy to a creditor is presumed to be in satisfaction of his debt—should be applied to a case where the amount of the creditor's claim is not fixed. In this case the jury found it to be much larger in amount than the legacy. Bispham, in his Principles of Equity (6th Ed.) p. 664, § 538, says: "Where one person is under some legal or moral obligation to another, and under those circumstances makes a gift of such a nature that it operates as an exact fulfillment of the obligation, there arises a presumption that it was the intention of the donor to discharge the obligation by making the gift; in other words, the gift is presumed to be in satisfaction of the obligation, and hence this presumption, which had its origin in courts of chancery, has given rise to what is known in equity as the doctrine of satisfaction." He further says, on the same page, that the doctrine has frequently been regarded with no little disfavor, and the presumption of the testator's intention, upon which it is founded, can be rebutted by slight circumstances, evidence of his express intention being admissible, and that presumptions may be drawn from surrounding circumstances, by which the supposed intention that the gift should operate as a satisfaction may be contradicted or controlled. He further says: "It is a general rule, both in England and in this country, that a legacy given by a debtor to his creditor, which is equal to or greater in amount than the debt, shall be presumed to be intended as a satisfaction of the debt; but it must be, not only equal in amount, but equally beneficial and of the same nature exactly. It will be observed that this statement of the rule both indicates the general doctrine and also suggests some considerations by which its application may be controlled." Bisp. Eq. p. 664. The doctrine as thus stated seems to be recognized by this court in Ward v. Coffield, 16 N. C. 108, and Perry v. Maxwell, 17 N. C. 488. We do not decide this interesting question raised by the fact that the testator bequeathed $500 to the plaintiff, as a new trial has been awarded, and we prefer to leave the matter open to be decided upon the facts as finally ascertained. They may not be the same as those we now have before us.

New trial.

(139 N. C. 69)

TYSON v. JOYNER et al.

(Supreme Court of North Carolina. Sept. 19, 1905.)

PROMISSORY NOTE — ACTION BY INDORSEE — PROOF OF INDORSER'S SIGNATURE—SUFFICIENCY.

Where, in an action on a note, the complaint alleges and the answer denies its indorsement to plaintiff, the introduction in evidence of the note, with the indorsement thereon, without proof of the signature of the indorser, is insufficient to prove that plaintiff is the legal holder, so as to cut off defenses available against the indorser.

Appeal from Superior Court, Pitt County; Webb, Judge.

Action by M. E. Tyson against J. H. Joyner and others. From a judgment for plaintiff, defendants appeal. Reversed.

This action was brought to recover on a bond for $200 executed in 1897 by defendant, and payable to J. L. Little, or order. Defendant alleged, and there was evidence tending to show, that he, at the request of his brother, S. V. Joyner, signed the note for the accommodation of the latter and gave a mortgage to secure it. S. V. Joyner received the amount of the note, less the discount. Little did not discount the note or pay any consideration for it, but indorsed it to B. F. Tyson, who, it seems, paid the money to S. V. Joyner. Plaintiff at the trial introduced the note and rested. The name of B. F. Tyson was indorsed on the note, but there was no proof of the signature, other than the production of the note by plaintiff. Defendants objected to this as evidence of the indorsement of the note by Tyson. The objection was overruled, and he excepted. Indorsement of the note by B. F. Tyson was alleged in the complaint and denied in the answer. Defendant further alleged that Tyson, who was commissioner to sell certain land, had agreed, at the time the note was executed, to pay it out of that part of the proceeds of the sale which would go to defendant in satisfaction of a judgment held by him, and which was a lien on the land, and he afterwards collected more than enough for that purpose. Defendant relied upon this agreement and the receipt of the money by Tyson as a payment or satisfaction of the debt, or at least as a set-off or counterclaim. The issues and answers thereto were as follows: "(1) Is the note declared on the property of the plaintiff M. E. Tyson? Yes. (2) In what amount, if any, is the defendant J. H. Joyner indebted to the plaintiff? $200, with interest from February 12, 1897." The court charged the jury that, if they believed the evidence, they should answer the issues as above indicated. Judgment for plaintiff, and defendant appealed.

Skinner & Whedbee, for appellants. Fleming & Moore, for appellee.

WALKER, J. (after stating the case). There was much argument as to whether the note or bond had been duly executed—that is, delivered—as Little did not accept it, nor advance any money on it; but it is not necessary to discuss this matter, as we think the defendant had virtually admitted its execution by the form of his answer, and the case was not tried below upon the theory that the note was not a completed instrument when it passed into the hands of Little, and then by indorsement to Tyson. The only questions presented there related to the character of plaintiff's ownership of the note and the validity of defendant's plea of payment or counterclaim. The court erred in holding that the mere introduction of the note was evidence of its indorsement by Tyson, so as to vest the legal title in plaintiff, and cut off any defenses good against Tyson. It is very true, as contended by counsel, that the introduction of the note by plaintiff raised the presumption that she was its owner, but only the equitable owner or assignee, and it was subject in her hands to any equities or other defenses of the maker against prior holders. The note must have been indorsed specially to her, or at least in blank, to justify the claim that she is its legal owner, and the bona fide holder of a title good against prior equities of which she is not shown to have had notice. It was necessary, therefore, to show such an indorsement in order to defeat any equity the defendant may have against B. F. Tyson. Referring to this doctrine, Harlan, J., in Osgood's Adm'rs v. Artt (C. C.) 17 Fed. 575, says: "It is a settled doctrine of the law merchant that the bona fide purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes by the law merchant only the rights which the payee has, and therefore takes subject to any defense the payor may rightfully assert as against the payee. The purchaser in such case becomes only the equitable owner of the claim or debt evidenced by the negotiable security, and, in the absence of defense by the payor, may demand and receive the amount due, and, if not paid, sue for its recovery in the name of the payee, or in his own name when so authorized by the local law." In Trust Co. v. Bank, 101 U. S. 68, 25 L. Ed. 876, the court says: "The contract cannot, therefore, be converted into an indorsement or an assignment; and, if it could be treated as an assignment of the note, it would not cut off the defenses of the maker. Such an effect results only from a transfer according to the law merchant, that is, from an indorsement. An assignee stands in the place of his assignor, and takes simply an assignor's rights, but an indorsement creates a new and collateral contract." In Lyon v. Bank, 85 Fed. 120, 29 C. C. A. 45, it is held that a mere assignee of a promissory note, like an assignee of any other chose in action, takes his title subject to all equities and defenses which exist between the assignor and the other parties to the instrument; but an indorsee for value without notice before maturity takes the title to such a note, according to the custom of merchants and the now established law of the land, free from all such equities and defenses. See, also, Tiedeman on Commercial Paper, §§ 246, 247.

The same principle is well stated and illustrated by Rodman, J., in the leading case of Miller v. Tharel, 75 N. C. 148, which has been followed in numerous cases by this court. Spence v. Tapscott, 93 N. C. 246; Lewis v. Long, 102 N. C. 206, 9 S. E. 637, 11 Am. St. Rep. 725; Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696; Christian v. Parrott, 114 N. C. 215, 19 S. E. 151; Bresee v. Crumpton, 121 N. C. 122, 28 S. E. 351. An instrument payable to bearer can be negotiated by delivery, and consequently no indorsement is required. Norton on Bills & Notes, § 58; Bresee v. Crumpton, supra. "When, however, a bill or note unindorsed by the payee, or indorsed by the payee specially and unindorsed by his indorsee, is in the possession of another person, the question whether or not its bare possession is evidence of his right to demand payment is of a different character. Without the indorsement of the payee or special indorsee, such possession would clearly not entitle the holder to the privileges of a bona fide holder for value, as, at best, he would only hold the equitable title to the instrument, and could not sue at law upon it as a ground of action." 1 Daniel, Neg. Inst. (5th Ed.) § 574. The signatures of indorsers, where indorsement is required to vest the legal title, must be proved. Norton on Bills & Notes, 331. In the case of an assignment of a bill or note, which transfers only the equitable ownership, as distinguished from an indorsement according to the law merchant, which transfers the legal title, the equitable owner, being the party in interest, may now sue in his own name (Code, § 177), and he may recover subject to prior equities (Spence v. Tapscott and Bresee v. Crumpton, supra). When it is said in the cases that "there is a prima facie presumption of law in favor of every holder of negotiable paper, to the extent that he is the owner of it, that he took it for value and before dishonor and in the regular course of business," it will be found that reference is made to a holder by indorsement, or to an instrument which, under the law merchant, was not required to be indorsed, but which was negotiable by delivery. The expression was used in Tredwell v. Blount, 86 N. C. 31, cited by plaintiff's counsel; but in that case the note was indorsed and the signature of the indorser was proved. It is familiar learning that, where a note is indorsed in blank, the holder has the authority to make it payable to him-

self or to any other person by filling up the blank over the signature, and this may be done at or before the trial. Johnson v. Hooker, 47 N. C. 29; Lilly v. Baker, 88 N. C. 151. It then becomes a special indorsement. In the case last cited, this court reversed the judgment below, upon the ground that the indorsement should have been filled up before judgment was rendered, assigning as a reason for its decision that the courts were particular in this respect, in order to avoid the danger of notes being subsequently indorsed and again put in circulation. However this may be, the plaintiff in this case may fill up the indorsement, if she is so advised.

The court charged the jury that, if they believed the evidence, they should answer the issues in favor of the plaintiff. We infer from this instruction that the court was of the opinion that the defense or counterclaim, if a valid one, could not prevail against the plaintiff's title to the note. This was an error. Whether the matters of defense were sufficient to defeat the plaintiff's recovery, we are unable to determine, as the evidence is not all one way, and required a finding by the jury. Whether the defendant held the judgment in trust for his brother, for whose benefit he executed the note, or for other persons, and, if for his brother, whether the latter assented to the application by Tyson of his share of the proceeds of sale to the payment of the note, are questions to be passed upon by the jury, with such others as may arise. When the facts are found, the validity of the defense can be determined. In the present state of the evidence and the case, we cannot decide that question. Besides, it may be that the plaintiff, by proof as to the indorsement of B. F. Tyson, will be able to cut off all alleged defenses to the action, unless the defendant can show affirmatively that she is not a bona fide holder of the note. The error in the ruling of the court entitles the defendant to another trial.

New trial.

(72 S. C. 270)

JOHNSON et al. v. JONES.

(Supreme Court of South Carolina. Aug. 1, 1905.)

1. APPEAL—REVIEW—FINDINGS OF FACT.
Findings of fact pertaining to issues of title cannot be reviewed by the Supreme Court.

2. TAXATIONS—DELINQUENT SALE—VALIDITY.
Under Act 1880 (17 St. at Large, p. 380) §§ 9, 10, failure to proceed against personal property of defaulting taxpayer before sale of his lands as delinquent renders a tax deed issued on such sale null and void.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1268.]

3. SAME—SALE OF HUSBAND'S LAND—PURCHASE FOR WIFE.
Where lands of a husband are sold at tax sale, and he bids them off for his wife and pays for the same with his own money, the wife knowing that he had sufficient personalty to pay the taxes and not having changed her position because of such sale, he is not estopped from attacking the deed.

4. SAME—DEATH OF OWNER—TAX DEED.
Where lands of a husband were sold as delinquent without first exhausting his personalty, and the husband was instrumental in having the lands so sold with the intent of hindering the enforcement of a judgment against him, and were bid in for his wife, but the deed was not made to her in his lifetime, the power conferred by him on the officers to make it was revoked, and the title remains in him; his personalty not having been first exhausted as required by law.

Appeal from Common Pleas Circuit Court of Aiken County; Dantzler, Judge.

Action by Joe M. Johnson and Pope Catoe, executors, against Nancy J. Jones. From the decree, plaintiffs appeal. Affirmed.

The following is the circuit decree:

"This cause was heard by me at the regular June term of the court of common pleas for Aiken county. It came on to be heard upon the testimony reported by the master and the argument of counsel, and was fully discussed in open court. The complaint raised equitable issues as to the setting aside of the deed, but the answer raised distinctly legal issues for the recovery of the land in question by way of affirmative relief, and the order of reference, being by consent of counsel for the master to take the testimony, waived the trial by jury to which the parties would have been entitled upon the issues raised by the answer of the defendant. The controversy in the action is concerning all that tract of land situate in the county of Aiken and state of South Carolina, known as the 'Stevens Homestead Place,' containing 200 acres, more or less, bounded on the north by lands of J. W. Rutland and lands of Henry Fallaw, east by lands of T. S. Williams, and south by lands of Caddy Johnson, and west by lands of the estate of William Stevens, deceased. After careful consideration of the testimony as to the contention raised by the plaintiffs, I am satisfied that the deed made to Mrs. Nancy Jones, the defendant, by Mrs. Nancy Stevens, the testatrix of the plaintiffs, dated the 17th September, 1902, and covering the land in question, must be set aside. It does not seem to me that there was any fraud or overreaching connected with the transaction by which Mrs. Jones obtained that title from her mother, but I am satisfied that Mrs. Stevens was so enfeebled by old age that she did not have mental capacity enough to understand what she was doing at the time she executed that deed, and I so find; and it is ordered and adjudged that said deed of September 17, 1902, as aforesaid, be, and the same is hereby, set aside as null and void.

"It remains to consider the issues raised by the answer of the defendant, and that involves the question, who is the owner in fee simple of the tract of land described as aforesaid, which is the subject of this action? Did it belong to Nancy Stevens in fee simple, and did it pass under her will, so that it could be controlled by her executors, the plaintiffs in this action and the devisees

under said will, or did it belong in fee simple to William Stevens, and pass under his will to his widow, Nancy Stevens, for and during the period of her natural life, and to the defendant, Nancy Jones, in fee simple, at Mrs. Stevens' death? There is no question upon the testimony in the case, and I find as a matter of fact that William Stevens was the owner in fee simple of said land previous to the year 1876, and that he had owned, held, controlled, and used it absolutely as his own for many years previous to that time; and the question is, did it ever pass out of him, except by the terms of his will? He died on the 13th September, 1890, and previous thereto had executed a legal will, which was duly probated and recorded in the office of judge of probate of Aiken county, whereby he devised said tract of land unto his widow, Nancy Stevens, for and during the period of her life, and at her death to his youngest daughter, Nancy Stevens, absolutely; he having, it seems from the testimony, during his lifetime made ample provision for his other children. The plaintiffs produce a tax title from the sinking fund commission of South Carolina, dated the 12th April, 1892, purporting to convey to Nancy Stevens said land; and it is contended that said deed divested the title of William Stevens, and that, consequently, it did not pass by his will. This deed of the sinking fund commission expressly declares that the land is sold as forfeited land, and said deed is based upon a tax sale made on December 1, 1876, as forfeited lands; said sale being made by the auditor, but no deed, for some reason, having been made by him. Said lands had previously been offered for sale by the auditor, to wit, on the 9th June, 1876, as delinquent land, and forfeited to the state for want of bidders. It does not appear here why the title was not made in 1876, but it does appear that, though the land was sold for taxes as the property of William Stevens, he actually bid off the same and paid the money, but had the bid put in the name of his wife, Nancy Stevens. I am satisfied as a matter of law, and so find, that this deed of the sinking fund commission to Nancy Stevens, and the sale upon which it was based, said deed being dated the 12th April, 1892, is null and void. The deed states that it was for forfeited lands. It is well settled in South Carolina by our Supreme Court, in the case of State v. Thompson, 18 S. C. 538, that when a party interposes a forfeited land title, just such as this, the burden is upon him to show that every prerequisite previous to the same and to the giving of the title as required by law has been carried out, and that, if such steps are not shown, the same must fall. No such evidence has been given, or pretended to be given, in this case, and, to the contrary, there is evidence which will be considered hereafter going to show that such prerequisites were not carried out. See, also, Cooke v. Pennington, 15 S. C. 192; also Cooley on Taxation (2d Ed.) p. 517.

"But, to go a step further, the property could not be forfeited to the state, or sold by the state as forfeited lands, unless it had first become delinquent according to law; and I find as matter of law and fact, from the evidence in the case and the law on the subject, that it never became delinquent. The evidence unquestionably shows that at the time the real estate in question was levied upon for sale at delinquent land sale William Stevens, the defaulting taxpayer, was the owner of personal property of a considerable amount, which was more than was requisite to pay the taxes, and, further, that Mrs. Stevens, his wife, who was the alleged bidder at that sale, was cognizant of that fact. During the year for the taxes of which this sale was made, he returned for taxes in Wards township, where the land was situate, $357 worth of personal property; and the testimony shows that he had considerable personal property around him, such as horses, buggies, etc. All this is sufficient under the authorities to declare that the land never became delinquent, and that the attempted sale thereof by the auditor was null and void. Ebaugh v. Mullinax, 34 S. C. 364, 13 S. E. 613; Curtis v. Renneker, 34 S. C. 494, 13 S. E. 664. The deed in question was not made by the auditor, as he was authorized and required to do, when the lands were sold in 1876 as forfeited lands, but for some unaccountable reason no deed was made until after the death of William Stevens, and then it was made by the sinking fund commission on the 12th April, 1892. I can find no authority whatsoever for the sinking fund commission to make a deed of lands which were forfeited to the state in 1876, and can only find that the auditor was authorized to make such a deed; and, he having made no such deed, it seems to me that on that ground, and I so find, the deed of the sinking fund commission is null and void. Having found, as aforesaid, that the deed by the sinking fund commission, as aforesaid, of the tax proceedings and the sales on which it claims to have been based are null and void, the next question is, are there any other facts in the case which divest William Stevens of the title to the land in question, and which he devised by his will as aforesaid?

"It is claimed in argument that he is estopped from denying that the land passed to his wife, Nancy Stevens, by the tax sale, because he bid it in in his wife's name at said sale. This act of itself cannot amount to an estoppel against him, or those who claim under him, to divest him of the fee-simple title to the land. It is true that he did bid in the land and put down his wife's name as the bidder, but there is no proof whatsoever that her money was paid, and the proof to the contrary is that he paid the money, and there is no pretense of proof

that she, because of what was done at that sale, changed her position in any way or went to any expenses or expenditure because of the act which is claimed as an estoppel against William Stevens, nor is there any proof that she was prejudiced in any other way thereby; and unless it was shown that she changed her position in some way, and went to expenses and made expenditures upon the faith of the act, or was otherwise prejudiced by the act, which was claimed as an estoppel, it cannot be held as such in law. Bull v. Rowe, 13 S. C. 370. It is further insisted by the plaintiffs that the land in question became the property of Nancy Stevens by adverse possession on her part, as against William Stevens during his lifetime and after the tax sale in question. In 1 Am. & Eng. Enc. Law [2d Ed.] p. 789, is found the following clear definition of what is adverse possession: 'In order to constitute an effective adverse possession there must be an ouster of the real owner, followed by an actual, notorious, and continuous possession by the adverse claimant, with an intention on his part to claim in hostility to the title of the real owner.' This quotation from this text-book is fully sustained by all of the authorities in South Carolina, old and recent, and is the law that should apply to such cases.

"It is very clear to my mind, from the testimony, that Mr. Stevens undertook the scheme of transferring the title of this property through a tax sale to his wife, in order to avoid the payment of what is called in the testimony the 'Warren, Wallace & Co. Debt,' and that, when he was satisfied that he would not be pushed further by that matter, he failed to consummate this tax sale by afterwards taking a title from the auditor. Hence it is clear that Mrs. Stevens, as she got no tax title until after the death of Mr. Stevens, to wit, until the 12th April, 1892, when she acquired the title from the sinking fund commission, had no color of title whatsoever upon which to base the claim of adverse possession, or even to begin such a claim. Besides that, the testimony clearly shows that there was no change of possession made at the homestead. The old folks went on together, just as they were before, as man and wife, and there was no assertion of ownership to the world by Mrs Stevens that she had become the owner of the property and that Mr. Stevens was no longer the owner. The testimony shows that he used the place as his own, and received the income therefrom, and in all ways that it was considered as his property by the public. The mere fact that for eight years, as is shown by Auditor Wise, the property was listed for taxes in the name of Mrs. Stevens, is not sufficient to establish title by adverse possession; and Mr. Stevens so remained in possession through that entire period, claiming the property as his own, and then at the end of eight years, before his death, changed the property back in his own name on the tax books, so that I am constrained to find as matter of law that there was no acquisition of this tract of land by Mrs. Stevens during the lifetime of Mr. Stevens by adverse possession as in her favor against him. He died, as aforesaid, the 18th September, 1890, having previously by his will devised this land to her for life, and at her death to Nancy Jones absolutely. The testimony convinces me, and I so find, that she knew of the contents of her husband's will, had it read to her, recognized his right to devise the property, and accepted it as devised to her for life; and, in accordance with the law on the subject, she being the life tenant after his death, she returned the property in her own name.

"The testimony further shows, and I so find, that during the life tenancy of this property, which she had so accepted as aforesaid under the will of her husband, she declared that at her death this property was to go, according to the terms of the will of her husband, to the defendant, Nancy Jones, thus showing that she recognized that she held the property under the terms of the will of William Stevens and by virtue of it alone. Mrs. Nancy Stevens having, as found as aforesaid, taken this property under the will of her husband, and having recognized it as coming to her in that way, she, being a life tenant, cannot under the law, nor can those who claim under her, plead adverse possession against Mrs. Nancy Jones, who was the remainderman in fee simple of said property under said will of William Stevens. It is clear that adverse possession under such circumstances cannot be pleaded in law as against a remainderman. Moseley v. Hankinson, 25 S. C. 519; Rawls v. Johns, 54 S. C. 388, 32 S. E. 451; Rice v. Bamberg, 59 S. C. 509, 38 S. E. 209.

"There is nothing in the facts of the case which go to show that Mrs. Stevens, as a life tenant, so asserted her absolute ownership of the property as to amount to ouster of Mrs. Jones, even if under the law it were possible for her to oust her remainderman. The fact that she took a deed from the sinking fund commission on the 12th April, 1892, and died on the 25th December, 1902, is not sufficient from which to presume an ouster The facts in this case show that, whilst Mrs. Jones knew something of the sale back in 1876, she had no knowledge or information sufficient to put her on inquiry which would give her the knowledge that Mrs. Stevens had obtained title from the sinking fund commission on the 12th April, 1892, until a very few months before her mother's death. Whilst there was no actual notice to Mrs. Jones of this fact, from which any circumstances of ouster could be presumed, neither did she have constructive notice of the existence of such a deed, for the reason that it was not recorded in the office of the clerk of court of Aiken county, where it should

have been recorded according to law, but only in the office of the Secretary of State, and there is no law requiring its record there, or making its record there constructive notice of its existence. I therefore find as matter of fact and law that there is nothing in the testimony to divest title of William Stevens in the tract of land in question, and that, the same being his, he had the right to devise the same by his will, and that, he having devised the same by said will to his wife for life, and to his daughter, Nancy Jones, in fee simple at the death of his said wife, and Nancy Stevens having departed this life, the said Nancy Jones is the owner in fee simple of said tract of land, and entitled to recover the same from the plaintiffs in this action, who are in possession thereof.

"The defendant, Nancy Jones, by her answer claims the recovery of the possession of the land and $500 damages for the detention thereof. The only testimony in the case on the subject of damages is the testimony of Joseph Johnson, one of the executors and a plaintiff in this action, and he states that for the year 1903, after the executors took possession, they received $152 rent for the place. It seems that this amount of rent did not cover the use of the dwelling house and other houses, but was the rent for the arable lands and such houses as the tenant occupied. This amount should certainly be paid to the defendant. I cannot and do not pass upon her right as to any damages or rent which would accrue to her since the commencement of this action. That matter is left without prejudice to her future course as to the same.

"Wherefore it is ordered, adjudged, and decreed that the defendant, Nancy Jones, have judgment against the plaintiffs in this action for the recovery of the tract of land described in the pleadings and described heretofore in this decree, and judgment for the sum of $152 and the costs of this action, said costs to be taxed by the clerk of court and to be entered into the judgment, and that execution do issue for the possession of the said property, for the money given as damages as aforesaid, and for the costs of this action, in favor of the defendant against the plaintiffs."

Plaintiffs appeal on following exceptions:

"(1) Because his honor erred in ordering, adjudging, and decreeing as follows: 'That the defendant, Nancy Jones, do have judgment against the plaintiffs in this action for the recovery of the tract of land described in the pleadings and described heretofore in this decree, and judgment for the sum of $152 and the costs of this action, said costs to be taxed by the clerk of court and to be entered into the judgment, and that execution do issue for the possession of the said property, for money given as damages as aforesaid, and for the costs of this action, in favor of the defendant against the plaintiff;' whereas, under the testimony and all the circumstances in the case, he should have found a decree in favor of the plaintiffs against the defendant for the recovery of the possession of the lands described, and for damages and costs of the action.

"(2) Because his honor erred in finding that the title to said tract or parcel of land was never divested by the tax sale in 1876, or by the tax title from the sinking fund commission of South Carolina, dated 12th April, 1892, and that the said lands passed under the last will and testament of the said William Stevens, deceased; whereas, he should have found that the title of William Stevens was divested by the delinquent land sale, 9th June, 1876, that the said lands then became forfeited to the state for want of bidders, that at the sale thereof as forfeited lands had by the state of South Carolina Nancy Stevens became the bidder, that she complied with the terms of said sale, that thereafter the said state held the legal title to said lands in trust for Nancy Stevens, she having the equitable title thereto, that upon taking the title from the sinking fund commission, on the 12th April, 1892, the fee was vested in Mrs. Nancy Stevens, and that the said lands passed under her will at the date of her death, 25th December, 1902.

"(3) Because his honor erred in finding and holding as a matter of law that the deed of the sinking fund commission, dated April 12, 1892, is null and void.

"(4) Because his honor erred in holding that when a party interposes a forfeited land title, just such as this, 'the burden is upon him to show that every prerequisite previous to the same, and to the giving of the title as required by law, has been carried out, and that, if such steps were not showed, the sale must fail'; whereas, from all the facts and circumstances in the present case, he should have found that the burden of proof as to defects is on the party attacking the tax deed, which in this case was the defendant.

"(5) Because his honor erred in holding that under the facts and circumstances of this case, as a matter of law and fact, the lands in question 'never became delinquent,' and 'that the attempted sale thereof by the auditor was null and void.'

"(6) Because his honor erred in holding as matter of law that, when the lands were sold in 1876 as forfeited lands, no deed was made until after the death of William Stevens (April 12, 1892), and then only by the sinking fund commission, and that there is no authority whatsoever for the sinking fund commission to make a deed of lands which were forfeited to the state in 1876, and that the said deed should have been made by the auditor, and that on this ground the deed of the sinking fund commission, made in 1892, is null and void.

"(7) Because his honor erred in holding that William Stevens, the defaulting taxpayer, was the owner of personal property

more than was requisite to pay the taxes assessed upon said lands, and that his wife was cognizant of this fact, and that this personalty, under the facts and circumstances here, should have been exhausted before going upon the lands, and that this is sufficient under the authorities to declare that the land never became delinquent, and that the sale thereof by the auditor was null and void.

"(8) Because his honor erred in holding that William Stevens was not estopped by his acts and conduct from denying that the lands, after the forfeited land sale, passed to his wife, Nancy Stevens, and that there is no proof that she complied with her bid at the forfeited land sale; whereas, he should have found and held that from the facts and testimony the presumption of law and facts was that she did comply with her bid at said sale, that William Stevens by his conduct and acts was estopped from denying that said lands passed to his wife at the forfeited land sale, and the same passed under her will to the devisees therein named, and was no longer the property of the husband and subject to his will.

"(9) Because his honor erred in finding as matter of law, from the testimony in the cause, 'that Mr. Stevens undertook the scheme of transferring the title to this property to his wife, in order to avoid the payment of what is called in the testimony the "Warren Wallace & Co. Debt," and, when he was satisfied that he would not be pushed further by that matter, he failed to consummate this tax sale by afterwards taking a title from the auditor. Hence it is clear that Mrs. Stevens, as she got no tax title from the sinking fund commission until after the death of Mr. Stevens, to wit, until the 12th April, 1892, when she acquired the title from the sinking fund commission, had no color of title whatever upon which to base the claim of adverse possession, or even to begin such a claim. Besides that, the testimony clearly shows that there was no change of possession made at the homestead. The old folks went on together, just as they were before, as man and wife, and there was no assertion of ownership to the world by Mrs. Stevens that she had become the owner of the property and that Mr. Stevens was no longer the owner. The mere fact that for eight years, as shown by Auditor Wise, the property was listed for taxes in the name of Mrs. Stevens, is not sufficient to establish title by adverse possession; and Mr. Stevens so remaining in possession through the entire period, claiming the property as his own, and then at the end of eight years, before his death, changed the property back in his own name on the tax book, so that I am constrained to find as a matter of law that there was no acquisition of this tract of land by Mrs. Stevens during the lifetime of Mr. Stevens by adverse possession as in her favor against him'—whereas, he should have found from the facts and circumstances just to the contrary, and as a matter of law that Mrs. Stevens had good color of title to said lands upon which to base the claim of adverse possession, and that during the lifetime of her husband she did acquire a title to said lands by adverse possession, and that the tax sales and the conveyance received thereafter from the sinking fund commission were not directly attacked for fraud in the answer of the defendant, and could not on this ground be attacked collaterally.

"(10) Because his honor erred in finding that Mrs. Stevens was a life tenant under the will of her husband in these lands, and that 'she declared that at her death this property was to go according to the terms of his will to the defendant,' thus recognizing that she held the said property under the terms of the will of her husband and by virtue of the same alone, and that 'Mrs. Nancy Stevens, having, as is found as aforesaid, taken this property under the will of her husband, and having recognized it as coming to her in that way, she, being a life tenant, cannot under the law forego those who claim under her, and plead adverse possession against Mrs. Nancy Jones, who was the remainderman in fee simple of the property, under such will of William Stevens'; said finding and conclusion being contrary to the facts and circumstances and the law applicable to the case.

"(11) Because his honor erred in holding and finding as follows: 'There is nothing in the facts of the case which go to show that Mrs. Stevens as a life tenant so asserted her absolute ownership of the property as to amount to ouster of Mrs. Jones, even though under the law it were possible for her to oust her remainderman. The fact that she took a deed from the sinking fund commission on the 12th April, 1892, and died on the 25th December, 1902, is not sufficient from which to presume ouster. The facts in this case show that, whilst Mrs. Jones knew nothing of the sale back in 1876, she had not knowledge, or information sufficient to put her on inquiry which would give her the knowledge, that Mrs. Stevens had obtained title from the sinking fund commission on the 12th April, 1892, until a very few months before her mother's death, whilst there was no actual notice to Mrs. Jones of this fact from which any circumstances of ouster can be presumed; neither did she have constructive notice of the existence of such a deed, for the reason that it was not recorded in the office of the clerk of the court of Aiken county, where it should have been recorded according to law, but only in the office of the Secretary of State, and there is no law requiring its record there or making its record there constructive notice of its existence. I therefore find as matter of fact and law that there is nothing in the testimony to divest the title of William Stevens in the tract of land in

question, and that, the same being his, he had the right to devise the same by his will, and that, he having devised the same by said will to his wife for life, and to his daughter, Nancy Jones, in fee simple at the death of his said wife, and Nancy Stevens having departed this life, the said Nancy Jones is the owner in fee simple of said tract of land, and entitled to recover the same from the plaintiffs in this action, who are in possession thereof'—whereas, he should have found from the testimony, even if Nancy Stevens took the lands in question under the will of her husband and became a life tenant thereunder, that there were circumstances from which an ouster could be presumed; that the defendant did have constructive notice of the existence of the deed, dated 12th April, 1892, from the sinking fund commission to Mrs. Nancy Stevens; that the knowledge and information of Mrs. Jones were sufficient to put her upon the inquiry that the deed, being a patent or grant from the state for forfeited lands sold and conveyed by the sinking fund commission in 1892, was properly executed and recorded in the Secretary of State's office, and did operate as constructive notice of the claim of Mrs. Stevens to said land, and did amount to ouster of Mrs. Jones; and the circuit judge should have concluded that 12 years under said claim and ouster gave Mrs. Nancy Stevens a good title in fee to said lands by adverse possession, and that at her death the same passed under her will, and that, she being the owner thereof at the time her said will took effect, the same should be distributed thereunder and according to its terms.

"(12) Because his honor erred in finding that Joseph Johnson, as one of the executors, received for the year 1903, after the executors took possession of the premises, for rent of said lands, the sum of $152, and that this amount should be paid to the defendant by way of damages, and in decreeing for her said sum, and that the right to damages for said rents since the commencement of this action are left without prejudice to her future cause for the same; whereas, he should have found that the defendant, not being entitled to the possession of the said premises, was not entitled to any damages whatsoever.

"(13) Because his honor erred in not finding and holding that under all the facts and circumstances of this case Mrs. Nancy Stevens acquired a good and valid title to said lands, by virtue of the tax sales and conveyance of the sinking fund commission aforesaid, by adverse possession thereof for more than 12 years under a claim of right, and that her title to said premises could not be attacked collaterally, but only in and by a direct proceeding for that purpose.

"(14) Because his honor erred in finding and holding that the said lands passed under the will of William Stevens to his wife, Nancy Stevens, for life, and at her death the defendant, Nancy Jones, was entitled to the possession thereof in fee, and to damages for withholding the possession thereof, and by rendering judgment in her favor for possession, damages, and costs.

"(15) Because his honor erred in finding and holding that the plaintiffs were not entitled to have the said lands distributed under the will of Mrs. Nancy Stevens as prayed for in this complaint, the burden of proof being on the defendant to show that the said Nancy Stevens did not acquire a good and valid title to said lands under the tax sales for delinquent and forfeited lands and the conveyance made to her by the sinking fund commission in 1892; the said commission at that time being vested with the fee in all lands forfeited to the state for want of bidders, and alone entitled to convey the same to purchasers at forfeited tax sales in 1892, and the recitals in the said deed showing that the said Nancy Stevens had fully complied with terms of said sale, and the proof being before the court that the sale had for good cause been postponed by the proper authorities until the 1st December, 1876.

"(16) Because his honor erred, after finding as a matter of fact that Will Stevens undertook the scheme of a tax sale to defraud his creditor, Warren Wallace & Co., in not holding that, as William Stevens undertook the scheme of defrauding his creditors by the tax sale of 1876, he tainted his hands with fraud, and therefore neither he, nor Mrs. Jones claiming under him, can be allowed to attack the validity of that sale in this action; for 'he who comes into equity must come in with clean hands,' and, not having done so, no relief should be granted to the defendant by holding that William Stevens was not divested of his title by that tax sale."

Croft & Salley and Jas. F. Izlar, for appellants. Hendersons and E. F. Strother, for respondent.

GARY, A. J. The plaintiffs brought this action to set aside a deed executed on the 17th of September, 1902, by Mrs. Nancy Stevens to the defendant, on the ground that Mrs. Stevens did not have mental capacity to make said deed. The answer of the defendant raised an issue of title. She alleged that independently of said deed she was the legal owner of the land under the will of her father, William Stevens, by which he devised the land to her in remainder. His honor the circuit judge rendered a decree, in which he held that the deed was null and void, but that the defendant was the owner of the land in fee. The facts are fully stated in the decree, which, together with the appellants' exceptions, will be set out in the report of the case.

1. The appellants' attorneys contend that the issues are only equitable, and in any event that the findings of fact by the circuit judge can be reviewed by this court. The defendant in her answer specifically denies

that Mrs. Nancy Stevens during her lifetime had legal title to and was seised and possessed in fee thereof. She also set up the following defense: "This defendant alleges that she is the legal owner in fee simple of the land described in the complaint, and that the plaintiffs in this action have taken possession of said tract of land and withhold the same from this defendant, who is the legal owner thereof." This was sufficient to raise the legal issue of title. Bank v. Peterkin, 52 S. C. 236, S. E. 546, 68 Am. St. Rep. 900; Corbett v. Fogle, 51 S. E. 884. The following cases show conclusively that the findings of fact pertaining to the issue of title cannot be reviewed by this court. Johnson v. Johnson, 44 S. C. 364, 22 S. E. 419; Peoples v. Warren, 51 S. C. 560, 29 S. E. 659; Garvin v. Garvin, 55 S. C. 360, 33 S. E. 458; Corbett v. Fogle, 51 S. E. 884.

2. We will first consider the exceptions assigning error on the part of the circuit judge in ruling that the failure to proceed against the personal property for the nonpayment of the taxes before offering the lands for sale as delinquent was a fatal defect, which rendered null and void the deed executed by the sinking fund commission to Mrs. Nancy Stevens. A similar question arose in the case of Ebaugh v. Mullinax, 34 S. C. 364, 374, 376, 13 S. E. 613. After quoting sections 9 and 10 of the act of 1880 (17 St. at Large, p. 380), under which the tax in that case was levied, the court uses this language: "From an examination of those two sections it seems to us that before any real estate can be sold at a delinquent land sale, besides other requirements which need not be mentioned here, as it is conceded that all the other requirements were complied with, an unsuccessful effort must have been made to enforce the payment of the taxes on the land by distress and sale of the personal property of the defaulting taxpayer; and this can be best evidenced by issuing an execution against the personal property and showing that it had been returned nulla bona." Further on the court says: "It seems to us that the true construction of the ninth section of the act is that when taxes upon any property, either real or personal, are unpaid on the day appointed for that purpose, the county treasurer must first proceed to enforce payment by distress, and, if that mode proves unavailing by a day specified, then, and not before, the land may be placed on the delinquent land list and disposed of as provided by law, and that the purpose of section 10 was to declare what kind of property—personal property—should be liable to distress and sale for the nonpayment of taxes, whether assessed upon either real or personal property. The scheme of the tax laws seems to be that in enforcing the payment of taxes upon any species of property the personal property of the defaulting taxpayer must first be exhausted before the sovereign right to sell the land—perhaps the homestead—can be exercised." The court, in Curtis v. Renneker, 34 S. C. 468, 495, 13 S. E. 664, construing statutory provisions similar to those in the present case, thus states the principle: "It only remains to consider the question as to the tax title. It being conceded that no execution or distress warrant had ever been issued to enforce payment of the taxes in arrear out of the personal property of the taxpayer, we think the question is concluded by our decision in Ebaugh v. Mullinax, 34 S. C. 364, 13 S. E. 613, and we refer to that case for the reasons upon which we rest our conclusion. It is true that in that case the question arose out of the failure to pay the taxes for the year 1880, while here the taxes in arrear were those for the year 1877; but, as it is conceded that the terms of the two acts under which the taxes for those two years were levied are identical, so far as this matter is concerned, the reasoning in that case is applicable here. Without considering any of the other alleged defects in the tax title, we think the failure to issue the execution against personal property was fatal." These authorities are conclusive of the question under consideration.

3. We will next consider the question whether the circuit judge erred in ruling that William Stevens was not estopped by his conduct in bidding off the property in the name of his wife. If, when he bid off the property as aforesaid, the proceedings under which is was exposed for sale had not been fatally defective, she would have acquired an equitable right paramount to his title, and the deed executed by the sinking fund commission would have had relation back to the time of the bid, although William Stevens had in the meantime died. Furthermore, if William Stevens had by his conduct induced action on the part of Mrs. Nancy Stevens, by which she incurred the expenditure of money, or by which she changed her position to the prejudice of her rights, he would have been estopped from asserting his title against her rights. But the circuit judge finds "that there is no proof whatsoever that her money was paid, and the proof to the contrary is that he paid the money, and there is no pretense of proof that she, because of what was done at that sale, changed her position in any way, or went to any expenses or expenditure because of the act which is claimed as an estoppel against William Stevens; nor is there any proof that she was prejudiced in any other way thereby. * * *" He also finds that Mrs. Stevens was cognizant of the fact that William Stevens was the owner of personal property which was more than sufficient to pay the taxes on the land. Under these circumstances, the doctrine of estoppel cannot be invoked.

4. If William Stevens was instrumental in having the land offered for sale as delin-

quent, with the intention of hindering the enforcement of a judgment recovered against him, and the deed had been made during his lifetime, quite a different question would be presented from that under consideration. In that case he would not have had the right to the aid of the court in the exercise of its chancery powers to set aside the deed, but equity would have left the parties where it found them—with the legal title to the land in Mrs. Stevens. The rights of the parties must be determined as they existed at the time of his death, at which time the legal title was in him. Mrs. Stevens could not then have asserted her equitable right against him, because the proceedings under which the land was offered for sale were fatally defective. Even in that case, if the deed had been made during his lifetime, it might be said that the deed was in effect his act, under and by virtue of the power conferred by him on the officers of the law, or he might have ratified the sale. But the deed executed after his death could not be referred to the proceedings under which the land was sold, because they were fatally defective. Nor could it be referred to the power conferred by William Stevens on the officers of the law, because, if there was such a power, it was revoked by his death. Johnson v. Johnson, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636; Givens v. Carroll, 40 S. C. 413, 18 S. E. 1030, 42 Am. St. Rep. 889; Williams v. Washington, 40 S. C. 457, 19 S. E. 1.

These conclusions practically dispose of all questions presented by the exceptions that are properly before this court for consideration.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(104 Va. 856)

PRUDENTIAL FIRE INS. CO. v. ALLEY.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

1. INSURANCE — STIPULATIONS IN POLICY — WARRANTIES.

A stipulation in a policy insuring a stock of merchandise, requiring the assured to make periodical inventories, to keep books, and to keep the inventories and books in a fireproof safe at night, or the policy shall be void, is a warranty, and a compliance therewith is a condition precedent to a recovery for a loss; Va. Code 1904, p. 1766, § 3344a, providing that no answer to interrogatories made by an applicant for a policy shall bar a recovery thereon by reason of any warranty in the application, unless the answer was willfully false, not applying to the stipulation.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 853.]

2. SAME — STOCK OF GOODS — KEEPING OF BOOKS—COMPLIANCE.

A stipulation in a policy insuring a stock of merchandise, requiring the assured to keep books showing a record of the business transacted, including purchases, sales, and shipments for cash and credit, is complied with by the assured keeping books so that, with the assistance of those who kept them, the amount of the purchases and sales could be ascertained and cash transactions distinguished from credit transactions.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 853.]

3. SAME—INVENTORIES OF GOODS INSURED—COMPLIANCE.

A policy insuring a stock of merchandise required the assured to take periodical inventories, and, unless an inventory had been taken within a year prior to the date of the policy, one should be taken within 30 days of the issuance of the policy. The assured took an inventory of his stock June 10th. Subsequently he shipped the goods to another town and commenced business there, and the policy was issued June 25th, insuring the goods and the building in which they were placed. The inventory embraced articles not shipped to the new place of business, but these were accounted for as if sold for cash. *Held*, that the inventory sufficiently complied with the policy.

4. SAME—BOOKS OF ACCOUNT—SUFFICIENCY.

A policy insuring a stock of merchandise required the assured to keep books presenting a record of the business transacted, including purchases, sales, and shipments, both for cash and credit. The book of purchases kept by the assured did not give an itemized statement of goods purchased, but showed the amount of each bill of goods purchased, when, and from whom. The book of sales did not give an itemized statement of goods sold, but gave, with exceptions explained, the amount of each day's sales. No goods were authorized to be sold on credit, and such goods as were sold without being paid for were treated as cash sales on the book and accounted for as cash by the clerk making the sale. *Held*, that the books sufficiently complied with the policy.

5. SAME—INCREASE OF RISK—QUESTION FOR JURY.

Whether the erection of a building near the storehouse of assured was an additional risk was for the jury, and was not a question to determine which expert knowledge was proper.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1741.]

6. SAME—ACTION ON POLICY—EVIDENCE—ADMISSIBILITY.

Where, in an action on a policy insuring a stock of merchandise, the insurer alleged that the assured was guilty of fraud in procuring the policy and of false swearing after a loss, it was not error to permit witnesses to testify as to the value of the goods destroyed, based on what they saw in the storehouse.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1695.]

7. SAME—AGENTS—DECLARATIONS.

In an action on a fire policy it was shown that an insurance agency was an agent of the insurer and was authorized to issue policies. A third person was furnished with blank applications by the agency and solicited insurance for it, and represented to the assured that he was working for the agency and induced him to take out the policy afterwards issued by the agency. He was authorized to deliver policies and collect premiums issued on applications procured by him and accepted by the agency. It did not appear that he procured insurance for other agencies. *Held*, that he was an agent of the insurer, rendering declarations made by him admissible in evidence.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 118, 119.]

8. EVIDENCE—VARYING INSURANCE POLICY BY PAROL.

A policy described the building insured as "one-story frame * * * building and addi-

tion." When the policy was issued no addition existed. The assured informed the soliciting agent that he wished to extend the building, and the agent fixed the value on the building, including the addition which was to be erected. *Held*, that parol evidence of the value of the building after the addition had been completed was admissible in an action on the policy for a loss occurring after the completion of the addition.

9. INSURANCE—PROOF OF LOSS—SUFFICIENCY. Where a stock of merchandise insured was totally destroyed, proof of loss, though failing to give the cash value of each item insured and the amount of the loss thereon, as required by the policy, was sufficient.

Appeal from Circuit Court, Wise County.

Action by J. J. Alley against the Prudential Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry & Graham and Geo. W. St. Clair, for appellant. Irvine & Slemp and W. S. Cox, for appellee.

BUCHANAN, J. This action was instituted to recover the amount alleged to be due upon a fire insurance policy issued by the Prudential Fire Insurance Company, covering such losses as might be sustained by the insured, J. J. Alley, in consequence of the destruction by fire of his storehouse and a stock of goods in the town of Appalachia.

Immediately prior to the time the policy sued on was issued, the insured was doing business as a merchant in Gate City, in Scott county, but was about to remove his stock of goods into a storehouse in Appalachia, in Wise county. Before moving the stock of goods from Gate City to Appalachia, the insured took an inventory of his stock, completing the inventory on the 10th of June, 1903. He then shipped the goods to Appalachia, except a few articles, and commenced business there on June 18th. On the 25th day of that month the policy sued on was issued. On the 29th of the same month a permit was issued, authorizing the insured to make an addition to the building insured. Business was conducted there until the morning of January 1, 1904, when the storehouse and its contents were destroyed by fire.

The policy contained what is known as the "iron-safe clause," which is as follows:

"Warranty to Keep Books and Inventories, and to Produce Them in Case of Loss.

"Iron Safe Clause.

"The following covenant and warranty is hereby made a part of this policy:

"(1) The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and, unless such inventory has been taken within 12 calendar months prior to the date of this policy, one shall be taken in detail within 30 days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned.

"(2) The assured will keep a set of books which shall clearly and plainly present a complete record of the business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory as provided for in the first section of this clause, and during the continuance of this policy.

"(3) The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured will keep such books and inventories in some place not exposed to fire which would destroy the aforesaid building.

"In the event of failure to produce such set of books and inventories for inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

One of the defenses relied on by the insurance company was that the terms and conditions contained in that clause had not been kept and performed by the insured. To sustain his contention that he had complied with the iron-safe clause the insured introduced in evidence, over the insurance company's objection, the inventory taken at Gate City, referred to above, two books, one to show the purchases and the other the sales made by the insured while doing business at Appalachia, and certain witnesses to explain the manner of keeping the books. The objection made to the inventory introduced was that it was taken before the goods went into the building at Appalachia, that no complete inventory of the stock of goods insured was ever taken, and that the inventory introduced in evidence includes many articles not covered by the policy. The book of purchases was objected to because it does not give the items or articles claimed to have been purchased, nor show that they were such articles as were covered by the policy. The objection made to the book of sales was that it furnishes no data from which the insurance company could tell what had been sold, at what profit, or for what price, but merely purports to give the cash taken in each day. It is further objected that the books introduced do not "clearly and plainly present a complete record of the business transacted, including all purchases, sales, and shipments for cash and credit from the date of the inventory," as provided by the policy. The insurance company insists that the iron-safe clause was a warranty, and that, being a warranty, literal compliance with its terms was a condition precedent to the right of the insured to recover.

In the case of Virginia F. & N. Ins. Co. v. Morgan, 90 Va. 290, 18 S. E. 191, where in the application for a policy of fire insurance the insured was asked if he would keep his account books in an iron safe or secure in another building, and he answered in the

affirmative, the statement was held to be a warranty.

If the undertaking in that case by the insured that he would keep the books required to be kept in an iron safe or secure in another building was a warranty, the agreement to take the inventory and keep the books required were also warranties, because the covenant is the same as to all. The decision in the Morgan Case seems to be in accord with the weight of authority. Scottish Union, etc., Co. v. Stubbs (Ga.) 27 S. E. 180; Western Assur. Co. v. Altheimer (Ark.) 25 S. W. 1067, 1069; note to Conn. Fire Ins. Co. v. Jeary, 51 L. R. A. 699, 715, and cases cited.

But it is insisted by the insured that the doctrine announced in that case has been changed by the act of the General Assembly found in section 3344a, p. 1766, of the Code of Virginia of 1904, which provides that "no answer to any interrogatories made by an applicant for a policy of insurance shall bar the right to recover upon any policy issued upon such application, by reason of any warranty in said application or policy contained, unless it be clearly proved that such answer was willfully false or fraudulently made or that it was material."

This statute by its terms only applies to a policy of insurance issued upon an application in which the insured has answered interrogatories (as he did not in this case) about matters as to which such answer was willfully false or fraudulently made, and not to conditions of the kind contained in the clause now under consideration. This clause binds the insured to do certain things for the protection of the insurance company, and is important as furnishing a check against fraud on the part of the insured and a mode by which the insurance company may ascertain the extent of the loss. A compliance by the insured with this clause is a condition upon which, by the express terms of the contract, the validity of the policy is made to depend.

But while the iron-safe clause is a warranty, yet if it is so framed as to leave room for two constructions, the words used should be construed most strongly against the insurance company, upon the ground that the company's attorneys, officers, or agents prepared the policy, and it is the company's language which is to be interpreted. Liverpool & London, etc., Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460, and cases cited; Georgia Home, etc., Co. v. Bartlett, Tr., 91 Va. 305, 21 S. E. 476, 50 Am. St. Rep. 832; 1 Joyce on Insurance, § 222.

The clause under consideration is now generally introduced into policies of insurance of merchandise kept for sale against loss by fire, and has frequently been considered by the courts, and most usually has not been subjected to any narrow or close construction. Legal effect has been given it for the purpose of guarding the insurer against fraud or imposition on the part of the insured; but it has received a fair and reasonable interpretation, so that it might not work forfeitures or defeat the claim of the innocent to the indemnity promised by the policy. If the books are kept in such a manner that, with the assistance of those who kept them or understood the system, the amount of purchases and sales can be ascertained, and cash transactions distinguished from credit, it will be sufficient. Insurance Co. v. Ellington (Ga.) 21 S. E. 1006; Western Assur. Co. v. McGlathery (Ala.) 22 South. 104, 108, 67 Am. St. Rep. 26.

In discussing the proper rule for interpreting the iron-safe clause, the Supreme Court of the United States, in the case of L. & L., etc., Co. v. Kearney, supra, said: "Turning, now, to the words of the policies in suit, what is the better and more reasonable interpretation of those provisions, so far as they relate to the issues in this case? The covenant and agreement 'to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business,' should not be interpreted to mean such books as would be kept by an expert bookkeeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly show to a man of ordinary intelligence 'all purchases and sales both for cash and credit.'"

In the case of Western Assurance Co. v. McGlathery, supra, where the iron-safe clause was substantially, if not identically, the same as this case, the Supreme Court of Alabama, in discussing the degree of clearness and plainness which must be observed in the entries on the books, said: "Is it that degree which will be satisfactory to an expert or scientific bookkeeper? If so, what system of bookkeeping must be observed? There are rival systems of bookkeeping, and the adepts in the one may regard the other as wanting in plainness and clearness. Or is it the degree which will satisfy the mind of the inquirer after the true state and condition of the business, not seeking to work or to avoid a forfeiture of the indemnity of the policy? How many books, and of what description, will constitute a set? Can it be said or supposed that the minds of the insurer and the insured met and would have given a common answer to those inquiries? Their minds did come together on the essence and substance of this clause, when its words are looked through—that it was the duty of the insured to preserve in intelligible form, in one or more books of his own choice, written evidence of his purchases, of his sales, and of his shipments."

The books in the case under consideration were not kept as books would be kept by an expert bookkeeper or accountant in a large

business house in a great city, but such bookkeeping was not to be expected of a storekeeper in a little mining town, and, if the insurer expected it, it ought to have said so in plain language.

The articles embraced in the inventory taken at Gate City which were not shipped to Appalachia are shown to have been accounted for, as if sold for cash. While the book of purchases does not give an itemized statement of all goods purchased after the inventory was taken, it does show the amount of each bill of goods purchased, when, and from whom. Neither does the book of sales give an itemized statement of the goods sold; but it does give, with a few exceptions which are satisfactorily explained, the amount of each day's sales. It clearly appears that no goods were sold or authorized to be sold by the insured upon credit, and that such goods as were sold without being paid for by the purchaser were treated as cash sales on the book of sales and accounted for as cash by the clerk who sold them. The claim that certain shipments were made which the books do not show is not clearly established.

We are of opinion that the provisions of the iron-safe clause in this case, under all the facts and circumstances of the case, were substantially complied with by the insured.

The refusal of the court to permit the introduction of expert evidence to show that the erection of a building near the storehouse of the insured was an increase of risk is assigned as error.

Whether or not the erection of the building was an additional risk was for the jury to say, upon all the facts and circumstances in proof, and was not a question to determine which expert knowledge was either necessary or proper. 4 Joyce on Ins. § 3818; Va. Iron, etc., Co. v. Tomlinson (Va.) 51 S. E. 362.

The action of the court in permitting witnesses to testify as to the value of the goods destroyed, based upon what they saw in the storehouse, is assigned as error.

One of the defenses relied on by the insurer was that the insured was guilty of fraudulent conduct in procuring the policy of insurance, and guilty of fraud and false swearing after the fire. Upon these charges the evidence objected to was clearly relevant, if upon no other ground.

The action of the court in permitting certain declarations of Bond, through whom the policy sued on was issued, is assigned as error.

The objection made to that evidence is that it not only was not proved that he was the agent of the insurer, but, on the contrary, it appears that he was an insurance solicitor or broker. The evidence shows that the Hurt Insurance Agency, of Tazewell, was an agent of the defendant company and authorized to issue its policies, and that it did issue the policy sued on; that Bond was furnished with blank applications by that agency and solicited insurance for it; that he went to the insured, representing that he was working for the agency, and induced the insured to take out the policy sued on, which was afterwards issued by the Hurt Insurance Agency; that Bond was authorized to deliver policies and collect premiums issued upon applications made by him and accepted by the Hurt Insurance Agency, and to retain his commissions out of the premiums; that he did deliver the policy in question and most probably collected the premium, and a few days after the policy was issued procured the building permit, which he said the insurance company would issue when he induced the insured to take out the policy. The president of the Hurt Insurance Agency, who was also a director in the defendant company, admitted that Bond solicited insurance for his agency, but denied that he did so exclusively, and denied that Bond was in the employment of his agency, or at least expressed the opinion that he was not. It does not appear that Bond procured fire insurance for other agencies or companies, though there is evidence that he attempted to do so.

It is clear from the evidence that the insured did not regard Bond as his agent or as acting for him in procuring the policy in question.

Under all the facts of the case, we do not think that Bond can be regarded as a mere insurance broker, but should be considered an employé of the Hurt Insurance Agency, an agent of the defendant company authorized to issue its policies, and that the evidence in question was therefore admissible under our decisions. Goode v. Georgia Home Ins. Co., 92 Va. 392, 23 S. E. 744, 30 L. R. A. 842, 53 Am. St. Rep. 817; Mutual Fire Ins. Co. v. Ward, 95 Va. 231, 238, et seq., 28 S. E. 209.

The court permitted evidence to go to the jury as to the value of the building described in the policy after an addition had been put to it, instead of confining the evidence to the value of the building as it was when the policy was issued. This is assigned as error.

At the time the policy was issued the insured testified that he told Bond, the solicitor or agent, that he wished to extend the building back about 30 feet and increase his stock of goods; that Bond fixed the value on the house, including the addition which was to be put to it, at $1,000, and said he would give him $750 insurance on the building and have issued a building permit, which was done four days afterwards. The building insured is described in a typewritten paper attached to the policy as a "one-story frame and metal roof store building and addition." That the word "addition" was intended to cover the addition to be built, and not an existing addition, is clear from the fact that at that time there was no addition to the building, and from the further fact that the building as it then existed was not worth $1,000.

The parol evidence does not contradict or add to the contract between the parties. It merely shows that the word "addition" in the policy clearly had reference, under all the facts and circumstances of the case, to an addition to be built, instead of to one already in existence, and was therefore admissible in order to enable the court to properly interpret the policy. Brown on Parol Ev. § 53; Elliott on Ev. § 597; Joyce on Ins. §§ 185, 3808. The court did not err in admitting that evidence, nor in giving instructions to the jury based upon it.

The court admitted as evidence the paper filed as proof of loss, and this is assigned as error.

The objection made to that paper is that the insured failed to give the cash value of each item insured and the amount of loss thereon covered by the policy, as required by the same.

The destruction by the fire was total, and we are of opinion that the proof of loss was a substantial compliance with the conditions of the policy, which is sufficient under our decisions. Home Ins. Co. v. Cohen, 20 Grat. 312; Georgia Home Ins. Co. v. Goode, 95 Va. 751, 755, 30 S. E. 366.

Upon the whole case we are of opinion that there is no error in the record to the prejudice of the insurer, and that the judgment complained of should be affirmed.

(104 Va. 472)

CLARK v. ROLLER.

(Supreme Court of Appeals of Virginia. Sept. 28, 1905.)

DEEDS—LANDS CONVEYED.

The deed of H. of "all and every part of that certain tract of land * * * which was conveyed to H. by S. by deed [described] to which said H. has legal title under the conveyances from C. and G., the original patentees of the larger tract of land of which said tract forms a part, the same having been described and conveyed in said deed to the said H. from the said S. as containing by survey" 391 acres, conveys the entire tract of 391 acres conveyed by S. to H., and not merely so much of it as was actually within the grants of C. and H.; the reference thereto being used merely for the purpose of showing from what source the land was derived and as a help to trace the title.

Error to Circuit Court, Rockingham County.

Action by R. S. Clark against John E. Roller. Judgment for defendant. Plaintiff brings error. Reversed.

C. R. Wingfield and Geo. G. Grattan, for plaintiff in error. John E. Roller, for defendant in error.

BUCHANAN, J. The plaintiff in error entered a caveat against the issuing of a grant to the defendant for a small parcel of land lying in Rockingham county. Upon the trial of the cause there was a verdict and judgment in favor of the defendant. To that judgment this writ of error was awarded.

To sustain the issue upon his part, the plaintiff introduced in evidence certain deeds through which he claimed title, or color of title, to the land in controversy. Among these was a conveyance from his immediate grantor dated June 12, 1903, the proper construction of which is raised by the first assignment of error.

The circuit court was of opinion that the deed did not embrace, and therefore did not give the plaintiff color of title to, the land in controversy.

So much of the deed as is necessary to determine whether or not the court properly construed it is as follows:

"Witnesseth, that for and in consideration of one thousand dollars ($1,000.00) paid as hereinafter set forth, the said Howard H. Hall and Annie M., his wife, do grant and convey with general warranty unto the said R. S. Clarke all and every part of that certain tract of land, lying in Brock's Gap, in said county of Rockingham, which was conveyed to the said Howard H. Hall by J. M. H. Stover by deed bearing date on the 26th day of March, 1894, and admitted to record on the 7th day of April, 1894, in the clerk's office of the county court of said county of Rockingham, and recorded in Deed Book No. 48, page 487 et seq., to which the said Howard H. Hall has legal title under the conveyances from William Coleman and Horatio Gates Haviland, the original patentees of the larger tract of land of which said tract forms a part, the same having been described and conveyed in said deed to the said Howard H. Hall from the said J. M. H. Stover as containing by survey of May 4, 1891, three hundred and ninety-one (391) acres and thirty-eight (38) poles. * * *"

The contention of the plaintiff is that the deed operated to convey to him all and every part of the land which Hall, his grantor, obtained title to under his conveyance from Stover, and that the reference to the Coleman and Haviland patent is mere matter of description or recital of the chain of title, and was not intended to limit the conveyance to so much of the Stover land as might be found to lie within the actual bounds of the old Coleman and Haviland patent, from which the title to the tract conveyed was supposed to be derived.

The defendant insists, and the court so held, that the deed only conveys so much of the Stover tract of 391 acres and 38 poles as was actually covered by the old grant of Coleman and Haviland.

It is clear, we think, from the language of the deed, that the entire tract of 391 acres of land conveyed by Stover to Hall was conveyed by him to the plaintiff, and that the language of the old deed, viz., "to which the said Howard H. Hall has legal title under the conveyances from William Coleman and Horatio Gates Haviland, the original patentees of the larger tract," relied on by the defend-

ant to show that only so much of the tract was intended to be conveyed as was actually within the limits of the old grant of Coleman and Haviland, was not intended to describe the interest or amount of land conveyed, but was used for the purpose of showing from what source the land was derived, and as a help to trace the title. Moran v. Somes (Mass.) 28 N. E. 152, 153; Brown v. Heard (Me.) 27 Atl. 182, 183. The language which precedes, as well as what follows, the words quoted, negatives the construction contended for by the defendant. It shows clearly, we think, that Hall intended to convey and did convey the entire Stover tract, and that the Stover tract is a part of the old grant. But, if the language of the deed left it in doubt whether the whole Stover tract, or only so much of it as was actually embraced within the old grant, was intended to be conveyed, that doubt would have to be solved in favor of the defendant, under that rule of construction which requires that, where there is uncertainty or ambiguity in the language used in a deed, it shall be construed most strongly against the grantor, and that the grantee shall have the benefit of such doubt or ambiguity. 2 Minor's Inst. (4th Ed.): Carrington v. Goddin, 13 Grat. 587.

There are other assignments of error; but, as the rulings of the court complained of were based upon or controlled by its erroneous construction of the deed from Hall to the plaintiff, it is unnecessary to consider them, as the questions involved in them are not likely to arise upon the next trial.

The judgment of the circuit court must be reversed, the verdict of the jury set aside, and a new trial granted, to be had not in conflict with the views expressed in this opinion.

(104 Va. 423)

MERRIMAN v. COVER, DRAYTON & LEONARD.

(Supreme Court of Appeals of Virginia. Sept. 21, 1905.)

1. CONTRACTS—RESTRAINT OF TRADE—VALIDITY.

A partnership procured a right of way for a railroad, and agreed to ship no bark over its road, except to the owner of the land, unless he refused to pay the market price therefor. There was language in the contract warranting the inference that the road was to be operated as a common carrier, and other language warranting a contrary inference. *Held*, that the contract did not on its face show that the road was to be operated as a common carrier, and the restriction was not on its face invalid.

2. SAME.

Where a contract in restraint of trade is limited, and is supported by a valuable consideration, the contract is valid, if the restraint is reasonable and not injurious to the public.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 542–544.]

3. SAME.

Whether a contract in restraint of trade is reasonable is determined by a consideration of whether it only affords a fair protection to the interest of the person in whose favor it is given, and not so large as to interfere with the public interests.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 542–547.]

4. SAME.

A stipulation, in a contract between a firm procuring a right of way for a railroad and the owner, that no chestnut oak bark shall be shipped over their road, except to "the owner, unless he refuses to take it at the market price," is not on its face void, because unreasonable as between the parties or injurious to the public.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 542–547.]

5. SAME.

In determining the validity of a contract in restraint of trade, each case must be considered in the light of the facts, and facts that do not vary the contract may be alleged and proved on the issue of its validity.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 542–547.]

6. PLEADINGS—PLEA—SUFFICIENCY.

A plea which professes to answer the whole of what is adversely alleged in the declaration, but which in fact only denies a part thereof and does not prevent a recovery, though the facts alleged are proved, is bad.

7. APPEAL—HARMLESS ERROR.

The rejection of a plea setting up facts provable under pleas received is not prejudicial.

8. CONTRACT—RESTRAINT OF TRADE—VALIDITY.

A partnership procured a right of way over an owner's land for a railroad, and agreed to ship no bark thereon, except to the owner, unless he refused to take it at the market price. Plaintiff, at the time the contract was entered into, knew that the road was to be operated as a common carrier of freight, and that a railroad company was to be organized to construct and operate the road as a common carrier. *Held*, that the contract was void, though there was no agreement between the parties that the road was to be constructed and operated as a common carrier.

9. SAME—SUIT ON SUCH CONTRACT—BURDEN OF PROOF.

One seeking to enforce a contract in restraint of trade has the burden of proving that it is reasonable, unless the contract shows on its face that it is reasonable, in which case the party seeking to avoid it by extrinsic matter has the burden of proving illegality.

10. SAME — FAILURE TO SPECIFY TIME FOR PERFORMANCE—REASONABLE TIME TO PERFORM.

Where a contract which provided that defendant was to notify plaintiff, on or before a specified day of each year, how much goods he desired to furnish over his railroad, and that plaintiff was to name the amount he was willing to take, did not fix the time when plaintiff was to fix the quantity he desired, the law implied that he had a reasonable time within which to do so.

11. TRIAL—INSTRUCTIONS.

It is not error to refuse instructions stating principles embodied in instructions given.

Error to Circuit Court, Giles County.

Action by Thomas Cover and others, partners doing business under the firm name of Cover, Drayton & Leonard against W. E. C. Merriman and another, partners doing business under the firm name of E. B. Younken &

Co. Judgment for plaintiffs, and defendant W. E. C. Merriman brings error. Reversed.

J. H. Fulton, S. W. Williams, and E. W. Robertson, for plaintiff in error. Barton & Boyd, and A. A. Phlegar, for defendant in error.

BUCHANAN, J. This is an action of covenant upon an agreement entered into by the defendants in error, as partners doing business under the firm name of Cover, Drayton & Leonard, and the plaintiff in error and another, doing business as partners under the firm name of E. B. Younken & Co.

The principal question involved in this writ of error is whether or not the contract sued on is in restraint of trade and contrary to public policy, and therefore void.

At the time of the execution of the contract, the plaintiffs, parties of the first part, were the owners of land in Giles county, near the mouth of Wolfe creek, upon which they had a tannery and were engaged in the manufacture of leather. Upon their premises was a railroad siding or track owned and controlled by them, which connected with a siding of the Norfolk & Western Railway, whose line passes through the plaintiffs' premises. The parties of the second part wished to build a railroad up Wolfe creek at least as far as their property, a distance of about six miles. In order to do this they deemed it advisable to get the right to build their road over the plaintiffs' premises, and to connect with and use the latter's siding, which connected with the Norfolk & Western Railway. In consideration of those rights which the contract sued on grants them, the parties of the second part, among other things, agreed "that no chestnut oak bark shall be shipped over their road, no matter how far it extends, except to the parties of the first part, unless the parties of the first part refuse to take the said bark at the market price." The declaration sets out the contract in full, the circumstances under which and the purposes for which it was entered into, the building of the road, and assigns as a breach thereof the failure and refusal of the defendants to deliver to the plaintiffs the chestnut oak bark shipped over their road during the season of 1902 as they had agreed to do.

The plaintiff in error, the only one of the parties of the second part upon whom process was served, demurred to the declaration. The action of the court in overruling his demurrer is assigned as error.

The grounds of demurrer chiefly relied on here, and which require special notice, are that the declaration, by setting out in full the contract sued on, shows on its face that it was prima facie illegal and void, in that it was a contract in restraint of trade and particularly against public policy; and, second, that the averments of the declaration are not sufficient to exclude such presumption.

It is conceded by the plaintiff's counsel, as we understand their arguments, that if the parties of the second part had been an incorporated railway company the contract would be illegal, and that their action could not be maintained.

When the contract was entered into, the parties of the second part were partners, and not an incorporated railway company. While there is language in the contract from which it might be inferred that the road to be built was to be operated as a common carrier of freight for hire, there is other language from which it could be inferred with as much reason that it was not to be so operated.

Where two constructions may be given a contract or a statute, one of which would render it valid and the other of which would destroy it, the former construction will be given it, if reasonable; for in such a case neither the contracting parties nor the Legislature will be held to have intended to do that which they had no right to do. Martin v. South Salem, etc., Co., 94 Va. 28, 37, 26 S. E. 591; 9 Cyc. 586.

Having reached the conclusion that the contract upon its face does not show that the road to be built was to be a common carrier for hire, is the restraint imposed upon the defendants by the contract contrary to public policy?

The early English cases seem to have treated all restraints upon trade, whether limited or unlimited, as contrary to public policy, and therefore void. That doctrine, as the conditions of society and trade have changed, has been modified from time to time.

In the case of Reynolds v. Mitchell, 1 P. Wm. 181, decided nearly 200 years ago, in which many, if not all, of the cases were reviewed, and which has been referred to as "the foundation of the rule in relation to the invalidity of contracts in restraint of trade," Chief Justice Parker was of opinion that general restraints, or restraints extending to the whole kingdom, were void; that particular restraints, or restraints as to particular persons or places, if made upon a good and adequate consideration and under circumstances which showed that it was reasonable for the parties to enter into them, were valid. And to the same effect are the earlier American cases.

But in some of the later cases, both in England and this country, there has been a tendency to ignore the distinction between general and partial restraints, and to hold that restraints are valid and enforceable when they are not greater than are necessary for the fair protection of the covenantee in respect to the subject-matter of the contract and not injurious to trade in general. See note to Richards v. Am. Desk, etc., Co., 10 Am. Ry. & Corp. Rep. 99, 107, and following, where many cases are collected, showing generally the history and course of decisions

on the subject; 24 Am. & Eng. Ency. of Law (2d Ed.) 843 et seq., and cases cited; 9 Cyc. 525, and cases cited.

But, whatever may be the better rule, where the restraint is general, it is well settled that, where the restraint is limited and there is a valuable consideration to support it, the contract is valid if the restraint imposed is reasonable as between the parties and not injurious to the public by reason of its effect upon trade.

Whether or not the restraint is reasonable is to be determined by considering whether it is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Rorner v. Gaves, 7 Bing. 735; Ross v. Sadgbeer, 21 Wend. 166; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. Ed. 315.

The restraint in the contract under consideration is limited. It does not prevent the defendants from carrying on their business or abridge their rights in any respect, other than that no chestnut oak bark shall be shipped over their road, except to the plaintiffs, unless they refuse to pay the market price therefor at their own or any other large tannery in that county. As between the parties such a restriction does not seem to be unreasonable. It would hardly be seriously insisted that a landowner who was operating a flouring mill upon his lands would not have the legal right, in granting another private individual a wagon way over his land, to make it a condition to the exercise of such right, and as a consideration therefor, that no wheat should be hauled over that wagon way except for the mill owner, unless he refused to take it at the market price. The fact that the right granted is for a steam railroad, where the parties are private individuals, does not affect the question.

Neither does the restriction injuriously affect the public. Before the contract was made the defendants had no right to haul anything over the plaintiffs' lands for sale to the public. By virtue of the contract they acquire the right to haul all commodities over it without restraint, except chestnut oak bark. If the contract has any effect upon the rights of the public, it enlarges rather then lessens them.

But if the contract on its face were prima facie an unreasonable restraint upon trade, the averments of the declaration as to the circumstances under which and the purposes for which it was entered into, if such averments can be considered, exclude that presumption. It is true, as argued, that averments of fact are not proper in a declaration which add to, vary, or otherwise alter the contract sued on, and that such averments are not admitted to be true by a demurrer to the declaration, since a demurrer only admits such facts as are well pleaded. Jones v. Thomas, 21 Grat. 96; Newberry Land Co. v. Newberry, 95 Va. 128, 27 S. E. 899. But in determining whether or not a contract in restraint of trade is reasonable each case must be considered in the light of its own facts and circumstances. Oregon Steam, etc., Co. v. Winsor, supra. This being so, such facts and circumstances, in so far as they do not add to, vary, or otherwise alter the writing sued on, may be shown by proof, and it would seem to follow as a matter of course that they may be averred in the declaration.

In the case of Ross v. Sadgbeer, 21 Wend. 166, 168, it was said by the Court of Appeals of New York that, "although it does not appear on the face of the contract that there was good reason for making it, the plaintiff may, I think, help out his case by proper averments in pleading. See Mitchell v. Reynold, 1. P. Wms. 181, Homer v. Ashford, 3 Bing. 322. Such averments will not contradict the deed, because that expresses no consideration whatever; and, if the special circumstances were such as will uphold the contract of the parties, I see no very good reason why the plaintiff should not be allowed to aver and prove them. The point seems never to have been directly adjudged, and perhaps we ought not to pass definitely upon it in a case where the question has not been discussed by counsel."

In Richards v. Am. Desk, etc., Co. (Wis.) 58 N. W. 787, it was held that a pleading would be bad on demurrer if it did not appear from the contract or averments of extrinsic facts that the restraint was reasonable. This, said the Supreme Court of Wisconsin in that case, was in accord with the great weight of authority, and seems to be the necessary result of the rule as to the validity of such restraint.

Construing the contract in the light of the circumstances nnder which and the purposes for which it was executed, as averred in the declaration, we are of opinion that the demurrer to the declaration was properly overruled.

The trial court rejected pleas numbered 1 and 2, offered by the defendant. This action of the court is assigned as error.

Plea No. 1 professes to answer the whole of what is adversely alleged in the declaration, but in fact does not do so. The contract provides that the railroad mentioned therein may be constructed and operated by the parties of the second part, their successors or assigns. The declaration follows the language of the contract; yet the plea denies that the parties of the second part built and operated the road, and does not deny that it was built and operated by their successors or assigns. All that is in the plea may be true, and yet the plaintiff be entitled to recover. The plea was clearly bad, and was properly rejected. Hunt's Adm'r v. Martin's Adm'r, 8 Grat. 578.

No prejudice resulted to the defendant from the rejection of plea No. 2. All that could be proved under it was admissible under pleas 7 and 8, which were received.

The action of the court in refusing to give certain instructions asked for by the defendant, in refusing to give certain other instructions as asked and in giving them as amended, and in giving certain instructions asked for by the plaintiffs, is assigned as error.

There was evidence tending to prove that it was known to the plaintiffs that the railroad to be constructed was to be operated as a common carrier; that the company to construct and operate it was to be chartered by the General Assembly as a common carrier of freight and passengers; that the contract sued on was entered into with such knowledge on the part of the plaintiffs, and after such company was so chartered the contract sued on was assigned to the chartered company; that this assignment was made with the consent of the plaintiffs, on condition, however, as shown by the assignment, that the chartered company should assume and carry out all the covenants of E. B. Younken & Co. set out in the contract sued on, and on the further condition that Younken & Co., individually and as partners, should not be released from the performance of such covenants. It further appeared that the chartered company, after the assignment, completed the road, and have since been operating it.

Instruction No. 1, as offered by the defendant, was as follows:

"The court instructs the jury that, by virtue of the character of railroad companies as common carriers of goods, they are under a general duty to receive and carry, when properly offered, all goods of the kind they undertake or assume to transport, and that a contract by which they undertake to carry for one person or corporation, to the exclusion of others, is contrary to public policy and void; and, if they beleive from the evidence that at the time of making the contract in the declaration mentioned, it was known and 'contemplated' by and between the parties that the railroad to be built, provided for in said contract, was to become a common carrier of freight and passengers, and that in pursuance of such 'contemplation' the General Assembly of Virginia granted a charter of incorporation to W. E. C. Merriman, E. B. Younken, and others, under the name of the New River, Holston & Western Railroad Company, whereby it became empowered to construct, operate, and maintain said railroad for the purpose of carrying passengers and freight, and did after the passage of said act of incorporation enter into, in pursuance of the original understanding and contemplation of the parties, a contract dated the 4th day of June, 1901, under which it assumed and agreed to carry out the said contract in the declaration mentioned, then the court instructs the jury that said two contracts are to be considered as one, and they are contrary to public policy and void, and the jury must find for the defendant."

For the word "contemplated," in that instruction, the court substituted the words "mutually understood and intended," and for the word "contemplation," next following, the court substituted the words "knowledge and intention." This action of the court is assigned as error.

It seems that in England, where the agreement is not itself in violation of law, but the intention of one of the parties is unlawful, as where goods are purchased or money is borrowed for an unlawful purpose, the mere fact that the party selling the goods or loaning the money knows of such unlawful purpose renders the agreement illegal, and it cannot be enforced.

In this country, while some of the courts have followed the English rule, the majority have taken a different view, and have held that the mere knowledge of the seller or the lender that the purchaser or borrower intends to make an illegal use of such goods or money is no defense to an action for the purchase price. 9 Cyc. 570, 571, and notes citing English and American cases.

Which of these rules is the better need not be considered, as that is not the question involved in this case. If it was known by the plaintiffs, when the agreement sued on was entered into, that the proposed railroad was to be constructed and operated as a common carrier of freight, as alleged in special pleas 5 and 9 and as stated in the instruction under consideration, the contract was illegal, because contrary to public policy; for no one has a right to enter into an agreement for a consideration which he knows cannot be furnished or the obligation imposed by it cannot be performed by the other party without a violation of law.

It was not necessary, therefore, that there should have been an agreement between the parties that the proposed railroad was to be constructed and operated as a common carrier, as counsel for the plaintiffs insist and as the court seems to have thought when it modified the instruction under consideration.

And for like reasons the action of the court in modifying the defendant's instructions Nos. 2 and 3, and in giving the plaintiffs' instructions numbered 1 and 2, was erroneous. A further objection made to the plaintiffs' instruction No. 2 is that it imposed upon the defendant the burden of proving clearly and unequivocally that it was known and mutually understood and intended by the parties that the road to be built was to be constructed and operated as a common carrier.

The general rule is that a party who seeks to enforce a contract in restraint of trade

must show that it is reasonable, and the burden of proof was on the plaintiffs to do this. Reynolds v. Mitchell, supra; Ross v. Sadgbeer, supra; Richards v. Am. Desk, etc., Co., 10 Am. Ry. & Corp. Rep. 99, 105, 171, 172, and notes. But if the contract upon its face shows that it is reasonable, as in this case, and the defendant seeks to avoid it by some extrinsic matter which renders it illegal, the burden is upon him to establish such illegality, as in other cases where the illegality of a contract is set up as a defense to a contract valid upon its face, by clear and satisfactory evidence. Burdine v. Burdine's Ex'r, 98 Va. 523, 36 S. E. 992, 81 Am. St. Rep. 741; 9 Cyc. 762; Sissons v. Dixon, 12 E. C. L. 371; U. S. v. Trans. Freight Ass'n, 58 Fed. 58, 78, 7 C. C. A. 15, 24 L. R. A. 73; McBratney v. Chandler, 31 Am. Rep. 213, 215.

By the terms of the contract the defendants were to notify the plaintiffs on or before the 15th day of January of each year how much bark they desired to furnish over said road, and they (the plaintiffs) were to name the amount of bark they were willing to take at the market price. Instructions numbered 4 and 5, as offered by the defendants, in effect told the jury that if the defendants, on or before the 15th day of January, 1902, named the amount of bark they desired to ship the plaintiffs, it was the duty of the plaintiffs at once to name the amount of bark they would take.

As the contract did not fix the time when the plaintiffs were to say how much bark they would take, the law implied that they had a reasonable time within which to do so (Young v. Ellis, 91 Va. 297, 301, 21 S. E. 480; Southern Ry. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144), and the court properly modified the instructions in that respect.

What has been said in reference to the defendant's instructions Nos. 4 and 5 applies equally to the objections made to the court's action in giving the plaintiffs' instruction No. 4.

The refusal of the court to give instructions numbered from 7 to 13 inclusive, offered by the defendant, is assigned as error. No reason is given in the petition to sustain this assignment of error, and it seems to be little relied on in the briefs. It will therefore be sufficient to say that, in so far as they announce correct principles of law applicable to the case, such principles were substantially embraced in the instructions which were given, and there was no error in the court's refusing to give them.

As the judgment of the circuit court will have to be reversed, the verdict set aside, and a new trial granted because of erroneous instructions given, as heretofore pointed out, it will be unnecessary to consider the remaining assignments of error as to the refusal of the court to arrest the judgment and set aside the verdict for the reasons set out in the defendant's bills of exceptions Nos. 3 and 4.

Reversed.

(104 Va. 372)

GRAVES v. SCOTT et al.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

MALICIOUS PROSECUTION — TERMINATION OF PROSECUTION—DISMISSAL.

The dismissal of a criminal prosecution, with costs against the prosecutor, on his failure to produce evidence in support of the charge, is such a termination of the prosecution as will enable the accused to sue for malicious prosecution.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, §§ 70–75.]

Error to Circuit Court, Giles County.

Action by Joseph W. Graves against W. H. Scott and others. There was a judgment sustaining a demurrer to the declaration, and plaintiff brings error. Reversed.

A. H. Woodyard, for plaintiff in error. Williams & Farrier and Williams & Williams, for defendants in error.

KEITH, P. This is an action for malicious prosecution, in the circuit court of Giles county, in which the defendants demurred to the declaration. The only question raised is whether or not it is sufficiently averred that the prosecution had been terminated, which was alleged to have been maliciously instituted.

It seems that the defendants had charged Graves with having procured goods and chattels of them under false pretenses, and under a warrant issued by a justice he was arrested and entered into a recognizance for his appearance before the justice upon a day named. When the day arrived the declaration proceeds to set forth that "the said plaintiff, in obedience to said recognizance, appeared before the said justice at the said place designated for trial, and had with him his witnesses to prove and establish his innocence of the said supposed offense charged in the said warrant and complaint, and announced his readiness for a trial to the said justice and to the said Scotts, and insisted upon a trial then and there; but the said defendants refused, and declined to be sworn and give any evidence touching the supposed crime charged in said warrant against said plaintiff, and failed to offer and produce, and refused to offer and produce, when called upon, any evidence whatsoever to prove the charge in said warrant against the said plaintiff, and then and there the said justice aforesaid dismissed the said warrant at the costs of the said Scotts, and then and there caused the said plaintiff to be discharged, out of custody, fully acquitted of the said supposed offense, and the said defendants hath not further prosecuted the said complaint, but hath deserted and abandoned the same, and the said complaint and prosecution is now fully ended."

The demurrer was sustained, and a writ of error brings the case before us for review.

In Ward v. Reasor, 98 Va. 399, 36 S. E. 470, this court held that, "in an action for malicious prosecution it must be charged and proved, among other things, that the prosecution alleged in the declaration was conducted to its termination, and that it ended in the final acquittal of the plaintiff. An allegation that an offense of which a justice of the peace had jurisdiction was dismissed by him 'without the introduction of any testimony,' or that the defendant 'without the introduction of any testimony' caused the plaintiff to be discharged, and not prosecuted for said offense, is not such an averment of the final termination of the prosecution as will support an action for malicious prosecution. It amounted to no more than a nolle prosequi, which was no bar to a further prosecution for the same offense. It did not establish the innocence of the plaintiff, or show want of probable cause on the part of the defendant."

It is obvious, therefore, that the case under consideration must be affirmed, if we adhere to the law as propounded in Ward v. Reasor. The conclusion there reached is supported by Hilliard on Torts, by Greenleaf, by Mr. Minor in his Institutes, by Barton in his Law Practice, by the Supreme Court of Massachusetts in Bacon v. Towne, 4 Cush. 217, and by a dictum by Judge Burks in Scott & Boyd v. Shelor, 28 Grat. 891.

The opportunity for a more extensive research and a further consideration of the principles involved have led us to a different conclusion.

It is true that "public policy favors prosecution for a crime, and requires that a person who in good faith and upon reasonable grounds institutes proceedings upon a criminal charge shall be protected." 19 Am. & Eng. Encyc. of Law, p. 650.

It is the lawful right of every man to institute or set on foot criminal proceedings wherever he believes a public offense has been committed. But it is a duty which every man owes to every other not to institute proceedings maliciously which he has no good reason to believe are justified by the facts and the law. Newell on Malicious Prosecution, § 1.

The difficulty, therefore, presented is to protect the citizen against criminal proceedings which are not justified by the facts and by the law, being at the same time careful not unduly to deter men from the institution of criminal proceedings honestly intended to punish public offenses against the law.

To meet and harmonize these difficulties as far as practicable, the law requires that the plaintiff in an action for malicious prosecution must aver and prove the institution of a suit or proceeding without reasonable cause, malice in the institution of the suit or proceeding, and the complete termination of the suit or proceeding. If a plaintiff in a suit for malicious prosecution can maintain these propositions to the satisfaction of a jury, he may and should recover damages; nor would the result tend to deter others from the honest and fearless prosecution of offenders against the law.

In Scott & Boyd v. Shelor, supra, Judge Burks states that to warrant a recovery in a suit for malicious prosecution it must be proved that the prosecution alleged in the declaration had been set on foot and conducted to its termination. Had he stopped there, he would have been in entire harmony with the law as stated in Newell on Malicious Prosecution; but he goes further and says: "And that it ended in the final acquittal and discharge of the plaintiff." It is true that in the case which Judge Burks was considering there had been a final acquittal and discharge of the plaintiff, and it, of course, cannot be questioned that there was a final termination of the prosecution; but that case cannot be binding authority for the proposition that nothing short of a final acquittal constitutes such a termination of the proceeding as will support an action for malicious prosecution.

In Morgan v. Hughes, 2 Durn. & East's 225, Justice Buller says: "Saying that the plaintiff was discharged is not sufficient. It is not equal to the word 'acquitted,' which has a definite meaning. Where the word 'acquitted' is used, it must be understood in the legal sense, namely, by a jury on the trial. But there are various ways by which a man may be discharged from his imprisonment, without putting an end to the suit. If, indeed, it had been alleged that he was discharged by the grand jury's not finding the bill, that would have shown a legal end to the prosecution."

Of course, if in Morgan v. Hughes, it had been averred that the plaintiff was acquitted, it would have been sufficient, as in Scott & Boyd v. Shelor, supra; but it was held that "discharged" was not a sufficient averment in a declaration that the prosecution had terminated. If it had been alleged that he was discharged by the grand jury not finding a bill, that would have been a legal end to the prosecution, and would, therefore, have been sufficient averment of the legal termination of the particular proceeding against the plaintiff to have warranted the institution by him of his suit for malicious prosecution.

In the note to Ross v. Hixon (Kan.) 26 Am. St. Rep. 123, by Freeman, it is said that "the prosecution on which the action is based must have terminated without resulting in the conviction of the plaintiff. It is sometimes said that it must have terminated in his acquittal, but this is not true. A trial on the merits or otherwise is not essential. It is sufficient that the prosecution has ended, so that it cannot be reinstated nor further maintained without commencing a new proceeding; but it must have terminated in some of the several modes in which it is pos-

sible for a criminal proceeding to reach a stage beyond which the accused cannot be further prosecuted therein"—citing Casebeer v. Drahoble, 13 Neb. 465, 14 N. W. 397; McWilliams v. Hoban, 42 Md. 56; Blalock v. Randall, 76 Ill. 224; Gillespie v. Hudson, 11 Kan. 163; Schippel v. Norton, 38 Kan. 567, 16 Pac. 804. Further discussing the question, he speaks of a discharge by a committing magistrate, and says that "If the examining magistrate finds that there is not sufficient cause to hold the accused to answer, and therefore discharges him, that prosecution is thereby ended; and the consideration that other prosecutions may be brought against the same person on the same charge, and that the grand jury, on its presentation to them, may find an indictment thereon, cannot prevent the action of the magistrate from having its effect as a termination of the prosecution before him, sufficient to support the civil action." And so with the failure of a grand jury to find an indictment.

With respect to the entry of a "nolle prosequi," he says that "if some action or proceeding, on the part of the court or otherwise, is required to make an entry of nolle prosequi operative as a final termination of a prosecution, then, of course, such action or proceeding must supplement such entry; but, when it is manifest that the prosecution is at an end and cannot be revived, it is not material how it came to its end, and the right of the party injured by it to seek redress is complete."

And, speaking generally as to other means of terminating a prosecution, this learned author says: "The only reasonable ground for denying that the termination of a prosecution by the entry of a nolle prosequi will support an action for malicious prosecution was that there had been no trial on the merits, and therefore no acquittal of the accused; but it is settled, as we think, beyond dissent that a trial on the merits is not essential. To hold it essential would be to permit a prosecutor to do all the damage which a malicious prosecution can possibly effect, and then deny the accused the opportunity to vindicate himself by a trial, by having the proceeding quashed or dismissed, and thus escaping all liability for the wrong unlawfully inflicted. Therefore any mode by which a prosecution may be dismissed or ended, though without a trial, is sufficient. The indictment may be insufficient, and for that reason may be quashed before trial, or upon trial may require the jury to return a verdict of acquittal. In either event, if the accused is discharged by the court, the prosecution is finally terminated, in the sense that an action for malicious prosecution may be instituted and sustained, though there is nothing to prevent the finding of another indictment sufficient in form."

This statement of the law by Mr. Freeman is sustained by a great array of authority, which we deem it needless to discuss or cite.

At sections 248 and 249 of Bishop on Noncontract Law, it is said that:

"If, on motion of the state's attorney, a criminal cause is stricken from the docket, with leave to reinstate it, the defendant is not dicharged from the indictment, and a suit for malicious prosecution will be premature. But a nolle prosequi ends the indictment past recall, and thereupon the right to a malicious prosecution suit is perfected, a proposition from which a few of our courts, misapprehending the effect of a nolle prosequi have dissented, making distinctions not necessary to be particularly pointed out here.

"The methods of ending the proceeding are numerous, and they need not be all specified. It is sufficient, for example, if the indictment is quashed and the prisoner discharged by judgment of the court. Only the particular proceeding need be at an end, it being immaterial that the party is subject to a new one. A criminal prosecution, said a learned judge, is 'terminated (1) where there is a verdict of not guilty; (2) where the grand jury ignore a bill; (3) where a nolle prosequi is entered; and (4) where the accused has been discharged from bail or imprisonment.' Therefore the court held that a prosecution was not ended while pending before the grand jury. A discharge by the examining magistrate will suffice. In the nature of some proceedings the defendant has nothing to do, and whenever the plaintiff's steps are finished the right to the malicious prosecution suit is complete; 'as,' it was judicially observed, 'where the plaintiff was committed on articles of peace for a definite term unless he should find sureties for the peace. In such a case the plaintiff is allowed, ex necessitate rei, to maintain his action, though he was discharged by the efluxion of the time for which he was committed, for the reason that he is not at liberty to controvert the statement of the defendants in making the complaint, and therefore could not have a hearing and obtain a favorable decision.' A release on giving surety to keep the peace is a sufficient ending of the proceeding."

To the same effect is Cooley on Torts (2d Ed.) p. 215: "The termination of the proceeding must, in general, be by a final acquittal. It is not enough that the parties in a case which they might lawfully settle, have effected a compromise, and thereby terminated, it, or that the defendant was discharged because the offense was misnamed in the papers, or because of formal defects. But if the proceeding is ex parte to hold to bail, and the accused party has no opportunity to disprove the case made against him, he may maintain the suit, notwithstanding he was required to give bail; and so he may if on a preliminary examination before a magis-

trate on charge of crime he is discharged. Whether the entry of a nolle prosequi by the prosecuting officer is a sufficient discharge has been made a question. In some cases it has been held that it was; but other cases hold the contrary. The reason assigned in these last cases is that the finding of the grand jury is some evidence of probable cause, and another indictment may be found on the same complaint. But the reasonable rule seems to be that the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one."

It would be easy, but we think unnecessary, to cite very many adjudicated cases in support of the views of the eminent text writers from whom we have quoted. We shall content ourselves with adding to the authorities adduced the statement of the law as given in 19 Am. Eng. Encyc. of Law, p. 681: "That a prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute proceedings de novo."

The judgment of the circuit court is reversed.

(104 Va. 314)

SOUTH & W. RY. CO. v. COMMONWEALTH ex rel. FLANARY et al.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

1. APPEAL—QUESTIONS NOT RAISED AT TRIAL—JURISDICTION.

An objection that the court had no jurisdiction of the proceeding is available on appeal, though not made in the trial court.

2. QUO WARRANTO—RIGHT TO PROSECUTE—RAILROADS—CHARTER—NONCOMPLIANCE.

Va. Code 1904, pp. 1611, 1612, §§ 3022–3024, authorize the award of a writ of quo warranto against a corporation not municipal for misuse or nonuse of its corporate privileges and franchises, either by the Attorney General or, in case of his refusal, by a private prosecutor; and section 1105e, cl. 30 (page 566), declares that all corporations, whether expiring by limitation or are otherwise dissolved, shall be continued for such length of time as may be necessary for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle their business. *Held*, that section 1313a, cl. 58 (page 733), declaring that if the works of any internal improvement company be not commenced and be completed within the time prescribed by law or by its charter, or if the works be completed and the company abandon them, etc., the state may proceed against such company by writ of quo warranto, etc., to forfeit its franchises and sell its property, should be construed as a limitation on the general act, and hence a writ of quo warranto on the relation of a private prosecutor could not be maintained to terminate the franchises of a railroad company for failing to construct its road in the time allowed.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quo Warranto, §§ 40, 41; vol. 44, Cent. Dig. Statutes, §§ 302–305.]

Error to Corporation Court of Bristol.

Quo warranto by the commonwealth on relation of C. B. Flanary and others, against the South & Western Railway Company. From a decree in favor of relators, respondent brings error. Reversed.

A. A. Phlegar, J. N. Powell, and R. T. Irvine, for plaintiff in error. D. D. Hull, W. S. Cox, Hoge & Bailey, Bailey & Byars, Bullitt & Kelly, and F. W. Christian, for defendants in error.

BUCHANAN, J. This is a writ of error to a judgment of the corporation court of the city of Bristol in a quo warranto proceeding, by which it was determined that the plaintiff in error had forfeited all its rights, privileges, and franchises as a corporation in this state, because it had failed to construct and have in operation 30 miles of its road in this state within the time required by its charter.

The first assignment of error to be considered, and the only one that can be considered if it is sustained, is that the trial court had no authority to issue the writ of quo warranto upon the petition of private persons. This question was not raised in the court below, and it is insisted by the relators that it cannot be made in this court for the first time.

The general rule is that a question not made in the trial cannot be raised in the appellate court. This rule, however, is subject to exceptions, one of which is that a question which goes to the jurisdiction of the court may not only be raised for the first time in the appellate court, but, where it appears that the trial court did not have jurisdiction, the appellate court may of its own motion take notice of that fact.

As was said by President Tucker in Jones & Ford v. Anderson, 7 Leigh, 309, 314: "It must always be ex officio the duty of a court to disclaim a jurisdiction which it is not entitled to exercise. To do otherwise would be to usurp a power not conferred by law."

To hold that the question of the jurisdiction of the trial court could not be made in the appellate court for the first time would be in effect to hold that consent could give jurisdiction, and might result in the affirmance of a judgment which the trial court had no authority to enter. See Philips v. Com., 19 Grat. 485; Ryan v. Com., 80 Va. 385; Saunders v. Griggs, 81 Va. 506; McAllister v. Guggenheimer, 91 Va. 317, 320, 21 S. E. 475; Boston Blower Co. v. Carmen Lumber Co., 94 Va. 94, 100, 26 S. E. 390.

The ground upon which it is claimed that the trial court did not have jurisdiction is that the general law, which authorizes a writ of quo warranto to be awarded against corporations generally (other than municipal corporations), upon the petition of private persons, does not apply to a railroad or other internal improvement company for failure

to complete its works within the time prescribed by its charter, because such a case is provided for by a special statute in which the state alone is authorized to institute a quo warranto proceeding. It is conceded that the provisions of the general law are sufficiently broad to embrace a railroad corporation; but the contention is that, where the special provision is in conflict with the general law, the special provision to the extent of such conflict will govern.

That special provision is as follows: "If the works of any internal improvement company be not commenced and be completed within the time prescribed by law, or by its charter, or if after such works be completed, the company abandon them, or for three successive years cease to use and fail to keep them in good repair, in each of these cases the state may proceed against such company by writ of quo warranto, and if in any such proceeding there is a judgment against the company, the commission shall forthwith take possession of its work and property and sell the same (except the debts owing to the company), and convey the works and property so sold to the purchaser thereof as soon as the purchase money has been paid, the deed of conveyance to be executed by the chairman of the commission under its seal. The commission shall, moreover, collect, as far as practicable, the debts aforesaid, and apply the proceeds thereof and of the said sale, after deducting the costs and expenses of the collection and sale, to the discharge of the liabilities of the company, and whatever remains after said liabilities are discharged, pay into the treasury of the state. Upon such conveyance to the said purchaser, he shall forthwith be a corporation by any name which may be set forth in such conveyance, or any writing signed by him and admitted to record in the county or corporation wherein the conveyance shall be admitted to record; and to the corporation thus created all the provisions of section twelve hundred and thirty-four of the Code shall apply, except that the franchises, rights, and privileges to which such corporation shall succeed and the duties which it shall perform, shall be such as would have been had or performed by the first company but for the judgment aforesaid in the proceeding by writ of quo warranto, or information in the nature of a writ of quo warranto, save only as in said section provided." Va. Code 1904, p. 733, § 1313a, cl. 58.

The general statutes, which it is claimed contain provisions in conflict with that special provision, are as follows:

Va. Code 1904: "Sec. 3022. In what cases writ of quo warranto awarded. A writ of quo warranto may be awarded and prosecuted in the name of the state of Virginia in any of the following cases, to wit:

"First. Against a corporation (other than a municipal corporation) for a misuse or nonuse of its corporate privileges and franchises, or for the exercise of a privilege or franchise not conferred upon it by law, or where a charter of incorporation has been obtained by it from a court for a fraudulent purpose, or for a purpose not authorized by law;

"Second. Against a person for the misuse or a nonuse of any privilege and franchise conferred upon him by or in pursuance of law;

"Third. Against any person or persons acting as a corporation (other than a municipal corporation) without authority of law; and

"Fourth. Against any person who shall intrude into or usurp any public office. But no such writ shall be awarded or prosecuted against any person now in office for any cause which would have been available in support of a proceeding to contest the election of such person to such office.

"Sec. 3023. When, where, how, and by whom the writ to be applied for. Whenever the Attorney General or attorney for the commonwealth of any county or corporation, the circuit or corporation court whereof has jurisdiction of the proceeding, is satisfied that a cause for the writ exists, he may, at his own instance, or at the relation of any person interested, apply by petition to the said circuit or corporation court or to the judge thereof in vacation, to have such writ issued, and shall state the reasons therefor in the petition. If the Attorney General or the attorney for the commonwealth, upon being requested as aforesaid, refuse or fail to apply for the writ, the person so interested may present his petition to such court or judge asking for the same.

"Sec. 3024. When awarded; where returnable; how signed and attested; when bond required. If, in the opinion of the court or judge, the reasons so stated in the petition are sufficient in law, the said writ shall be awarded by the court or judge, returnable to the next term of the court, and the same shall be signed by the judge and attested by the clerk of such court. But if the writ be awarded at the relation of any person, it shall not be issued until the relator shall have given bond with sufficient surety (if such bond be required by the court or judge), to be approved by the clerk, in such penalty as the court or judge shall prescribe with condition that the relator shall pay all such costs and expenses as may be incurred by the state in the prosecution of the writ, in case the same shall not be recovered from and paid by the defendant therein."

Section 1105e, cl. 30: "All corporations, whether they expire by their own limitation or are otherwise dissolved, shall, nevertheless, be continued for such length of time as may be necessary from such dissolution or expiration for the purpose of prosecuting and

defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which said corporation shall have been established."

A comparison of these statutes will show that section 3022 is a general provision broad enough to embrace all corporations (other than municipal corporations), while clause 58, § 1313a, is a special provision applicable only to internal improvement companies; that by section 3023 a quo warranto proceeding may be instituted in the name of the commonwealth against a corporation for a nonuse or misuse of its corporate franchises, not only by the Attorney General or the attorney for the commonwealth for the proper county, but also by private persons under certain conditions, while by clause 58, § 1313a, the state alone is authorized to institute a quo warranto proceeding against an internal improvement company for its failure to commence and to complete its works within the time prescribed by its charter; and that clause 30 of section 1105e, construed in the light of clause 1 of that section, provides that all corporations, whether they expire by their own limitation or are otherwise dissolved (and one of the methods of dissolving a corporation is by a forfeiture of its franchise by a judicial proceeding), shall nevertheless be continued for such length of time as may be necessary from such dissolution or expiration for the purpose of prosecuting and defending suits by or against them, to enable them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital, but not to continue the business for which they were incorporated, while by clause 58, § 1313a, if there be a judgment in a quo warranto proceeding against an internal improvement company, the State Corporation Commission is required forthwith to take possession of the works and property of such company, sell the same (except debts due to it), convey its works and property to the purchaser as soon as the purchase money has been paid, collect its debts and apply the proceeds thereof and of the sale of its works and property, after deducting costs and expenses of such collection and sale, to the discharge of the liabilities of the company, and pay the residue into the treasury of the state, and upon a conveyance of the works and property so sold the purchaser is created a corporation, and the new corporation thus created succeeds to all the franchises, rights, and privileges, and is required to perform all the duties that would have been had or should have been performed by the old company, except as provided by section 1234 of the Code of 1887 (clause 18, § 1294b, p. 659, Va. Code 1904).

These general and special provisions are in apparent conflict. The parties authorized to institute the proceedings are different. Under the special provisions it can only be done by the state, while under the general provisions it may, under certain circumstances, be instituted by private persons. The consequences which flow from a judicial forfeiture of a corporation's franchises under the general and special provisions are wholly different. In the one case the corporation for some purposes continues to exist. It settles and closes its business, sells and conveys its property, collects its debts, and divides its capital. In the other the corporation ceases to exist for any purpose. An agency of the state government winds up its affairs; and the proceeds of its works, property, and the debts due it, after the payment of the costs and expenses attending their sale and collection and the payment of the company's liabilities, are paid into the treasury of the state, and the purchaser of its works and property is created a new corporation, clothed with the powers and burdened with the duties of the old corporation.

The history of the general and special provisions, so far as it is material to the question now under consideration, is as follows: Sections 3022–3024 became the law by the Code of 1887, and they have not been amended or changed by subsequent legislation. Clause 30 of section 1105e, so far as its provisions affect this case, is substantially the same as section 1103 of the Code of 1887. Clause 58 of section 1313a is the same as section 1239 of the Code of 1887, except that the latter provision conferred and imposed upon the board of public works the powers and duties which clause 58 confers and imposes upon the State Corporation Commission.

The Code of 1887 is one act. Section 1, Code 1887 [Va. Code 1904, p. 8, § 1]. It is a settled rule of construction that all statutes in pari materia should be read and construed together as if they formed parts of the same statute and were enacted at the same time; and, where there is a discrepancy or disagreement between them, such interpretation should be given so that all, if possible, may stand together. Dillard v. Thornton, 29 Grat. 392, 396. And in that case it is said that the rule applies with peculiar force in the construction of a Code to the several parts thereof which relate to the same subject-matter, were conceived by the same minds, prepared by the same hands, and adopted at the same time by the same legislative body. Easley v. Barksdale, 75 Va. 281; Bank v. Holland, 99 Va. 495, 505, 39 S. E. 126, 55 L. R. A. 155, 8 Am. St. Rep. 898.

Another rule of construction is that, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that one is special and the other general creates a presumption that the special is to be con-

sidered as remaining an exception to the general, and that the general will not be considered as repealing the special, unless the provisions of the general are manifestly inconsistent with those of the special. Sedgwick on Constr. of Stat. 97, and note; Sutherland on Constr. Stat. §§ 152, 153; 26 Am. & Eng. Ency. of L. (12th Ed.) 739, 740; Com v. R. & P. R. Co., 81 Va. 355, 367, 368. And a fortiori this must be the true rule, where the general and special provisions are parts of the same act or code of laws.

These rules of construction were followed in the case of Dillard v. Thornton, supra, where two sections of the Code of 1873 were in apparent conflict. "These sections of the Code," said the court in that case, "in the points of apparent disagreement are now substantially as they came from the hands of the revisors, and the only way to give effect to section 6 of chapter 166 is to construe it as in the nature of a proviso to section 45 of chapter 167. The latter section gives the general rule; the former the limitation or exception."

The only way to give effect to clause 58 of section 1313a is to construe it as a limitation upon or an exception to the general provisions contained in sections 3022–3024, and clause 30 of section 1105e, as was done in Dillard v. Thornton. Under this construction, which we deem the correct one, it follows that the corporation court did not have jurisdiction to award the writ of quo warranto against the plaintiff in error upon the petition of private persons, as were the relators.

Its judgment must therefore be reversed, and the petition of the relators be dismissed.

(104 Va. 459)

BERRY'S EX'X v. FISHBURNE et al.

(Supreme Court of Appeals of Virginia. Sept. 21, 1905.)

1. VENDOR AND PURCHASER—QUANTITY—DEFICIENCY—ABATEMENT OF PRICE.

Where the agent of the vendors of certain land, in response to a direct inquiry of the vendee, represented that the tract contained 179 acres of land, and offered to have it surveyed, if desired, and the deed, after reciting the consideration of $6,200, declared that it conveyed that certain tract or parcel of land containing 179 acres, more or less, etc., the sale was by the acre, and not in gross, so that the vendee was entitled to recover an abatement in the price for a deficiency in the quantity of land.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 95–105, 333.]

2. ESTOPPEL IN PAIS—SALE OF LAND.

In an action by a vendee of land to recover an abatement of the price for a deficiency in quantity, evidence of the vendee's statements at the time certain of the bonds given for the price were assigned *held* insufficient to estop him from claiming such abatement as against the purchasers.

Appeal from Circuit Court, Augusta County.

Suit by Abram Berry, revived after his death in the name of his executrix against Loa A. Fishburne and others. From a decree in favor of defendants, plaintiff appeals. Reversed.

J. M. Perry, for appellant. Fitzhugh Elder and H. H. Blease, for appellees

WHITTLE, J. This is a suit in equity brought originally by Abram Berry against his vendors and others, the appellees, for an abatement in the purchase price of the land in the bill and proceedings mentioned on account of a deficiency therein of 21½ acres. Pending the litigation, Berry died; and, the cause having been revived in the name of his executrix and heirs at law, the decree under review was passed dismissing the bill, with costs.

The deficiency in the land is established beyond controversy; so that the main question presented by the record for decision is whether the sale was a sale by the acre or a sale in gross. If the former, appellant, the executrix, would be, in that aspect of the case, entitled to the abatement demanded; otherwise, she would not be so entitled.

The principles governing the subject of such sales have been settled in this jurisdiction by a long line of decisions. In the case of Benson v. Humphreys, 75 Va. 196, they are summarized as follows:

"First. Every sale of real estate, where the quantity is referred to in the contract, and when the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale per acre.

"Second. The language 'more or less,' used in contracts for sale of land, must be understood to apply only to small excesses or deficiencies, attributable to variations of instruments of surveyors, etc. When these terms are used, it rather repels the idea of a contract of hazard, and implies that there is no considerable difference in quantity.

"Third. While contracts of hazard are not invalid, courts of equity do not regard them with favor. The presumption is against them, and, while such presumption may be repelled, it can only be effectually done by clear and cogent proof.

"Fourth. The burden of proof is always upon a party asserting a contract of hazard; for, the presumption always being in favor of a sale per acre, a sale in gross or contract of hazard must be clearly established by the facts.

"Fifth. Where the parties contract for the payment of a gross sum for a tract or parcel of land upon the estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard.

"Sixth. Whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the terms of the contract, and all the facts and circumstances

connected with it. But in interpreting such contracts the court, not favoring contracts of hazard, will always construe the same to be contracts of sale per acre, wherever it does not clearly appear that the land was sold by the tract and not by the acre. See Watson v. Hoy, 28 Grat. 698, where all the cases decided by this court and many others are carefully collected in the elaborate opinion of Judge Burks."

See, also, to the same effect, the subsequent cases of Cunningham v. Millner, 82 Va. 530; Trinkle v. Jackson, 86 Va. 238, 9 S. E. 986, 4 L. R. A. 525; Boschens v. Jurgens, 92 Va. 756, 24 S. E. 390; Hull v. Watts, 95 Va. 10, 27 S. E. 829.

The evidence in the case has received careful consideration, and without discussing it in detail it is sufficient to remark that it fails to afford the clear and cogent proof contemplated by the authorities, and strongly tends to sustain the theory of appellant that the sale was by the acre, and not in gross. This is not only true of the antecedent parol contract of sale entered into between the agent of the vendors and the vendee, but also finds corroboration in the language of the deed subsequently executed by the parties in consummation of that contract. There is no doubt about the fact that this agent, in response to the direct inquiry of the vendee, represented that the tract contained 179 acres of land, and likewise offered to have it surveyed, if desired—an avowal and offer, be it observed, that contribute to disprove the assumption that the sale was in gross, and that acreage was no inducement to the purchase.

The deed, after reciting the consideration of $6,200, conveys "that certain tract or parcel of land * * * containing one hundred and seventy-nine acres, more or less, adjoining the lands of A. P. Anderson," etc. This description is substantially the same as that in Benson v. Humphreys, supra, which was held to constitute a sale by the acre, and not a sale in gross. We have no difficulty, therefore, in resolving the first proposition in favor of the appellant.

But it is insisted, in the second place, that appellant is estopped by declarations of Berry from demanding an abatement of the bonds representing the deferred installments of purchase money.

Two of these bonds were assigned to Palmer, a stranger to the sale, and the remaining two to Loa A. Fishburne, one of the vendors. These parties allege in their answers that they were induced to purchase the bonds by the conduct of Berry, and that his action and statement that he had no objection to their transfer, whether so intended or not, misled them, and, if allowed an abatement of the purchase price, it would inure to his advantage and their disadvantage.

In that connection it appears that Berry had gone to the office of counsel for the vendors, in the city of Staunton, to call attention to the shortage in the land, made known to him by a recent survey. He there met with several of the vendors, who had assembled for the purpose of completing a sale and assignment of the bonds to Palmer and Loa A. Fishburne. There is serious conflict in the testimony of witnesses as to what Berry said on that occasion in regard to the transfer of the bonds, varying in purport from an unqualified statement that he had no objection to the proposed assignment to the qualified declaration that "it was hard to pay for land and not get it, but that if he could not help himself, they might dispose of the bonds." It was also proved that counsel advised Palmer and Loa A. Fishburne that Berry might contend for a rebate, but, in his opinion, he was not entitled to it, as he had bought in gross, and not by the acre. Neither Palmer nor Loa A. Fishburne was examined to sustain the affirmative allegations of their answers; and the extent to which they may have been influenced, if at all, by the statement of Berry, is altogether matter of conjecture and inference.

As remarked in a recent case by this court: "The authorities uniformly hold that estoppels in pais are not to be taken by argument or inference, but must be certain to every intent. The burden of proof rests on the party relying upon an estoppel, and it must be made to appear affirmatively by clear, precise, and unequivocal evidence." Newport News, etc., Co. v. Lake, 101 Va. 334–343, 43 S. E. 566; Bolling v. Mayor of Petersburg, 3 Rand. 563; Taylor v. Cussen, 90 Va. 40, 17 S. E. 721.

Tested by the foregoing rule, it is apparent that the evidence relied on for that purpose is insufficient to establish the precise facts upon which the alleged estoppel is based.

For the foregoing reasons, the decree of the circuit court is erroneous, and must be reversed, and the cause remanded for such further proceedings as may be proper, in accordance with this opinion.

(104 Va. 330)

SCOTT v. THOMAS et al.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

1. MORTGAGES—DEED OF TRUST—CONSIDERATION—EFFECT.

Where a deed of trust, though purporting to have been made in consideration of the beneficiary bank satisfying the lien debts of the grantor and the debts in the bank at that time due and protested against him, further provided that it was made in trust to secure the payment of a negotiable note for the sum of $2,200 payable to the bank, which furnished a valuable consideration for the whole of such note, except a small amount which was indorsed thereon, it was not error for the court in a creditors' suit to refuse to limit the security of the deed to the lien debts satisfied by the bank and its protested notes.

2. FRAUDULENT CONVEYANCE—INTENT OF DEBTOR.

Where, in a suit to set aside a conveyance of a debtor's property for fraud, there was no proof of a real design on the debtor's part to prevent the application of his property to the satisfaction of his debts, but the whole of the property in controversy had been so applied, the conveyance was not fraudulent.

3. ACKNOWLEDGMENT—DISQUALIFICATION OF NOTARY.

That the notary who took the acknowledgment of the grantor of a deed of trust was the employé of the trustee, and for his services as notary was to receive, in addition to his regular salary, the sum of $1.50 out of the money to be raised under the deed, to be paid him by the trustee, did not disqualify him to take the acknowledgments.

[Ed. Note,—For cases in point, see vol. 1, Cent. Dig. Acknowledgment, §§ 104, 108.]

4. FRAUDULENT CONVEYANCES—SUIT TO SET ASIDE—RELIEF AWARDED.

Where a judgment creditor, suing to set aside a deed of trust on certain property in whole or in part on the ground of fraud, failed on such issue, he was nevertheless entitled to have the land sold and the proceeds applied first to the satisfaction of such deed, and the balance, if any, to the payment of the judgment.

5. SAME—SURETY OF DEBT.

Where, in a suit by a judgment creditor to set aside a trust deed for fraud, the debt secured thereby was due when an erroneous decree dismissing the bill was rendered, it was immaterial to such judgment creditor's right to have the property sold in satisfaction of the debt secured and of his judgment that the debt so secured was not due when the bill was filed.

6. APPEAL—RECORD—CONSTRUCTION.

Where an exhibit in the record recited that certain chancery causes were "lately pending" in a certain circuit court, such recital did not show that such causes were still on docket.

Appeal from Circuit Court, Floyd County

Bill by W. Scott, trading as S. & W. Scott, against I. O. D. Thomas and others. From a decree in favor of defendants, plaintiff appeals. Affirmed in part, but reversed as to dismissal of bill.

Robt. E. Scott and G. M. Agnew, for appellant. A. A. Phlegar, Thompkins & Thompkins, M. S. Howard, and V. M. Sowder, for appellees.

KEITH, P. On the 26th day of October, 1901, Thomas and wife conveyed certain land by deed to Brame, trustee. The deed, omitting the description of the property conveyed, is in the following words:

"This deed, made and entered into this the 26th day of October, 1901, between I. O. D. Thomas and Mary C. Thomas, his wife, of the first part, and S. R. Brame, trustee, of the second part,

"Witnesseth, that for and in consideration of the People's Bank of Floyd satisfying the lien debts against the said I. O. D. Thomas and the debts in the People's Bank now due and protested against the said I. O. D. Thomas, the parties of the first part grant, sell, and convey unto the said S. R. Brame, trustee, his real estate lying in the county of Floyd. * * * This deed is made in trust to secure the payment of one negotiable note for the sum of twenty-two hundred dollars ($2,200) payable to the People's Bank of Floyd County, said note dated on the 26th day of October, 1901, and payable at People's Bank of Floyd County, four months after date of said note, said note made by the said I. O. D. Thomas. And this deed is given to secure each renewal of said note or part thereof that may be made by the said Thomas and accepted by the said bank."

This deed was on the 28th day of October, 1901, at 10 minutes past 10 o'clock a. m., duly admitted to record in the clerk's office of the county court of Floyd County. On the same day, at 20 minutes past 12 o'clock p. m., Thomas confessed a judgment in favor of W. Scott for the sum of $734.93. On the 28th day of October, 1901, "in consideration of the sum of $475," paid by S. R. Brame on the debts of Thomas, Thomas sold to Brame certain personal property, horses, cattle, sheep, and a wagon, the bill of sale for which was recorded on the same day in the clerk's office of Floyd county. It appears, also, that an execution, dated the 28th day of October, 1901, upon the judgment confessed by Thomas to Scott, was levied on the 29th day of October upon the property sold by Thomas to Brame, the bill of sale for which has just been adverted to. The levy of this execution was released by order of the plaintiff on November 14, 1901.

On November 15, 1901, Scott instituted a suit in equity against Thomas, Brame, as trustee and in his own right, and the People's Bank of Floyd. In his bill he insists that the deed of trust from Thomas to Brame was made with intent to defraud his creditors and that it undertook to secure a greater amount than was justly due by Thomas, and prays that it may be declared a lien only for the amount actually advanced by the People's Bank of Floyd to pay the lien debts of Thomas and such other debts due to the People's Bank as were due and protested at the date of the deed of trust, and that the bank be compelled to apply the proceeds of the two notes given to Thomas by Ira M. Compton and in the possession of the bank, amounting to $265, to the lien debts which it holds against Thomas. The bill further sets out the sale of the personal property by Thomas to Brame, avers that at the institution of this suit no part of the consideration had been paid, and claims that the whole of it should be applied to the satisfaction of Scott's judgment against Thomas.

By an amended bill it is charged that the deed of trust from Thomas to Brame was acknowledged before R. B. Morgan, who was at the time "the clerk, agent, and employé of said S. R. Brame, trustee, was sent by said Brame, the grantee in said deed, with the same to said Thomas and his wife to procure their acknowledgments to the same, and for the services so rendered, in addition to the regular salary paid by said Brame to said Morgan, said Morgan was agreed to be paid and was paid by the said Brame $1.50 out of the money to be raised under said deed." These facts the plaintiff claims rendered Morgan incompetent to take the acknowledgments of Thomas and wife to the deed, and furnished no authority for the clerk to admit the same to record, and that its recordation is therefore of no effect.

The bank in its answer denies the fraud imputed to it, avers that it furnished valuable consideration for the full amount of the note of $2,200 secured by said trust deed, except the sum of $96.99, which is credited upon said note as of March 15, 1902, and further avers that the two notes executed by Compton to Thomas were purchased and fully paid for by it in May, 1901.

The answer of Thomas is substantially the same as that of the bank with reference to the note for $2,200 and the Ira Compton notes. With reference to the personal property sold to Brame, he avers that no part of the consideration of $475 was ever paid to him, but that it was paid by Brame upon the respondent's debts.

Brame's answer is to the same effect.

Evidence was taken upon the issues thus made, and when the case was heard before the circuit court a decree was entered dismissing the bill, and W. Scott obtained an appeal to this court.

His contention is, first, that the circuit court erred in not holding the deed of trust to be fraudulent and void.

Without undertaking to review the evidence, we content ourselves with saying that the proof is insufficient to establish fraud. It on the contrary disproves any fraudulent intent upon the part of either the grantor, the grantee, or the beneficiary, and establishes the bona fides of the transactfon.

The second error assigned is that, in the event the deed is held not to be fraudulent, the decree of the circuit court is erroneous in not holding it to be a security only for the lien debts and the protested notes.

We think that the deed of trust is to be read as a whole. It is true that it purports to have been made in consideration of the People's Bank of Floyd satisfying the lien debts against Thomas and the debts in the People's Bank at that time due and protested against him; but the deed further declares that it was made in trust to secure the payment of a negotiable note for the sum of $2,200, payable to the People's Bank of Floyd County, and the proof shows that the bank furnished a valuable consideration for the whole of this note, except the sum of $96.99, which is credited upon it as of March 15, 1902. The proof does not tend to vary or contradict the deed. The usual form employed in deeds of trust is that the grantor, in consideration of a nominal sum, conveys property to the trustee to secure certain debts. If, instead of reciting that the deed was made in consideration of satisfying the lien debts and the protested notes, Thomas had conveyed to Brame in consideration of one dollar in hand paid, in trust to secure a note of $2,200, it would have been a valid instrument; the real question being, upon the issue of fraud charged in the bill, whether there was a purpose in the execution of the instrument to hinder and delay the creditors of the grantor, or whether the amount secured was in good faith appropriated to the satisfaction of the grantor's creditors.

In Lucas v. Clafflin, 76 Va. 269, this court held that to avoid a deed for fraud there must be a real design on the part of the debtor to prevent the application of his property in whole or in part to the satisfaction of his debts.

In this case there does not appear to have been any diversion of the debtor's property from his creditors, but the whole of it has been appropriated to the discharge of his debts. The proof also fails to make out the case stated in the bill with respect to the Compton note or notes.

The decree of the circuit court is right with respect to the personal property purchased by Brame. The transaction is on its face a fair one. Brame purchased certain property from Thomas for the sum of $475, to be paid to the creditors of his vendor. The proof shows that this obligation has been performed, and the appellant has failed to establish any fraud or bad faith with respect to the transaction.

We are further of opinion that the facts set out in the amended bill with reference to R. B. Morgan, the notary before whom the deed of trust was acknowledged, are insufficient to affect his competency to take the acknowledgment of the deed.

The decree appealed from should not have dismissed the bill. The appellant had a lien by judgment. He sought to get rid of the deed of trust, either in whole or in part, upon his allegation of fraud. In that he has failed; but he was entitled to have the land sold and the proceeds applied first to the satisfaction of the deed of trust, and whatever might remain applied upon his judgment.

In answer to this contention appellees say: First, that at the time the bill was filed the debt secured by the deed was not due, which is true; but it was due when the decree dismissing the bill was entered. Appellees also claim that appellant could have gone into the chancery suits of Howard's administrator against Thomas, and Profit against Thomas, and proved his judgment. To this we reply that he was already properly in court, and there was no reason for turning

him out in order that he might assert his claim in another suit. And, in the second place, that there is no proof in the record of the pendency of any other suit in which he could have made himself a party. There is an exhibit in the record before us from which it appears that the chancery causes mentioned were "lately pending in the circuit court of Floyd county," which, so far from showing that they were still upon the docket of the court in Floyd county, rather indicates that they had been stricken from it.

We are of opinion that the circuit court erred in dismissing the bill, and for this reason its decree must be reversed, and in all other respects affirmed.

(104 Va. 450)

BLACK'S ADM'R v. VIRGINIA PORTLAND CEMENT CO.

(Supreme Court of Appeals of Virginia. Sept. 21, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMED RISK.

Though a servant, on entering an employment, agrees by implication to assume the ordinary risks incident to the service, he does not assume any risk which may be obviated by the exercise of reasonable care on the part of the master.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, §§ 538, 547, 550.]

2. SAME—DECLARATION—SUFFICIENCY.

A declaration in an action for death of a servant by the fall of rock in a stone quarry in which he was employed, alleging that the rock was in a position from which it was liable to fall, that defendant knew such fact and negligently permitted it so to remain, and that deceased, ignorant of the situation, remained at work in the quarry in due course of his employment, and while so engaged received his fatal injury, was not demurrable on the ground that the place where plaintiff was employed was constantly changing, and was not a place furnished by the master, but prepared in part by the work of the servants, the dangers of which they assumed.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, §§ 547, 557.]

Appeal from Circuit Court, Augusta County.

Action by W. Arthur Wilson, administrator of George H. Black, deceased, against the Virginia Portland Cement Company. From a judgment dismissing the complaint, plaintiff appeals. Reversed.

H. H. Wayt, Carter Braxton, and Curry & Glenn, for appellant. Patrick & Gordon, for appellee.

KEITH, P. This is an action of trespass on the case, in which the administrator of George H. Black, deceased, sues the Virginia Portland Cement Company for injuries resulting in the death of his intestate.

The declaration shows that George H. Black was, when injured, in the employment of the Portland Company, engaged in getting out rocks from its quarry, and, after stating in general terms the obligation of the company to its servants, proceeds as follows: "It was particularly the duty of the said defendant company to keep and maintain the walls and sides of its said quarry, which walls and sides were of great height and very abrupt, clear of loose rock, or of such rock and stones as were liable to fall down and injure or kill its servants while at work in said quarry. And said plaintiff says that the said defendant disregarded its duty in this behalf, and carelessly and negligently failed to keep its said quarry in a reasonably safe condition, and left rocks or stones in the walls or sides of said quarry loose and in such a condition that they were liable to fall from their places on said defendant's servants while they were at work in the said quarry for said defendant for hire; and said defendant carelessly and negligently left a certain rock or large stone in such condition in the wall or side of its quarry that it was liable at any time to fall out of its place and down upon the servants of the said defendant while they were at work in the said quarry for hire, and to injure and kill them, and of all of which the said defendant had notice, and especially had notice of the dangerous condition of the said rock or large stone, and the dangerous condition of the said quarry, and the danger from the said rock or stone was unknown to the said plaintiff's intestate, George H. Black. And said plaintiff says that at the time aforesaid, to wit, on the 11th day of January, 1904, while his said intestate, George H. Black, as a servant for hire of the said defendant company, was at work in the said quarry in the course of his employment, not knowing the danger, and while in the exercise of due and proper care and caution on his part, the said rock or stone fell from its place from the wall or side of said quarry, to wit, a great distance and with great force, and struck him, the said George H. Black, and severely bruised, injured, and crushed him, so that by reason thereof he died."

The defendant company appeared and demurred to this declaration, and upon the demurrer judgment was rendered in its favor; and thereupon the plaintiff obtained a writ of error from this court.

It is true that a workman or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is to be engaged. But it is also true that a servant does not assume any risk which may be obviated by the exercise of reasonable care on the master's part. Labatt on Master and Servant, §§ 1, 2.

Negligence, in a legal sense, is "failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." Cooley on Torts, p. 630.

Any failure upon the part of the master to observe for the protection of his servant that reasonable degree of care which the circumstances of the particular case justly demand is actionable negligence, and is not within the influence of the doctrine of assumed risks.

The declaration before us states that the plaintiff's intestate was in the employment of the cement company, engaged in quarrying rock; that the defendant company, whose duty it was to keep its quarry in a reasonably safe condition, knowingly permitted a stone to remain in a position from which it was liable to fall at any time; and that in fact it did fall on the day stated upon George H. Black, he being ignorant of the danger and in the exercise of due and proper care and caution, by reason of which he received injuries which resulted in his death. It would seem beyond dispute that this state of facts disclosed actionable negligence upon the part of the defendant in error. Every fact here stated is upon demurrer to be taken as true—that the rock which inflicted the injury was in a position from which it was liable to fall; that the master knew this fact and negligently permitted it to remain; and that the servant, ignorant of the situation, remained at work in the quarry in the due course of his employment, and while in the performance of his duty received the fatal injury. If these facts be established, a case of negligence is made out which entitles the plaintiff in error to a recovery.

The view of the case urged by counsel for the cement company is that the employé in this case was working in a place in which the conditions were constantly changing, and the preparation of which was in itself part of the work of the employés, and not a place furnished by the master for its employés, within the spirit of those decisions which delegate to the master the duty of providing for the servant a safe place to work. Labatt on Master and Servant, § 612a, note 1c.

This would seem to be a matter of defense. If it should be made to appear to the jury that the accident arose from the changing and shifting conditions of the quarry, resulting from its operation, of which the master was not informed and which he could not be reasonably expected to have known, or if it were the result of an open and obvious danger of which the plaintiff in error had knowledge, or which in the exercise of ordinary care he should have known, it may be that in these cases, and perhaps in others which could be suggested, the defendant in error would be entitled to a verdict. But such is not the case stated in the declaration.

We are of opinion that the declaration under consideration sets out a good cause of action, and that the judgment of the circuit court sustaining the demurrer was erroneous.

(104 Va. 480)

STOUT v. STOUT et al.

(Supreme Court of Appeals of Virginia. Sept. 26, 1905.)

1. WILLS—DECREE—CONSTRUCTION.

The decree, in a suit for construction of a will, that testator's widow is under the will entitled to receive for her use and support all the estate for her life, and what remains at her death is to pass under the will to certain others, but, should the widow remarry, then R., who in such event becomes a trustee of the estate, will reclaim said property, or so much thereof as he can, and hold it subject to the provisions of the will as provided in such event, is an adjudication that the widow takes only a life estate under the will.

2. EQUITY DECREE—FINALITY—CONCLUSIVENESS.

The decree in a suit to construe a will, made after the decree construing it as giving the widow only a life estate, subject to be terminated by her remarrying, giving the widow, as prayed for in her petition, a lien on the estate for money advanced by her to the executor, and providing that such lien may be enforced "in this cause whenever she may be advised so to do," and concluding, "all matters in this cause having been finally disposed of, except the said house and lot in which the widow has a life estate, all the rest of the estate and the money advanced by the widow to the executor having been used to pay the debts of the estate, it is ordered that the cause be stricken from the docket, with leave reserved to any party to reinstate it and seek any proper relief at the foot of this decree," is a final decree, which, with the prior decree, became conclusive, in the absence of a timely appeal or proceedings to set it aside.

Appeal from Circuit Court, Augusta County.

Suit by Sallie R. Stout and others, remaindermen under the will of John W. Stout, deceased, against Kate R. N. Stout, widow of said John W. Stout, deceased, to set aside an order, made on the petition of said Kate R. N. Stout, in the suit of John W. Stout's executor against John W. Stout's widow and others to construe the will of John W. Stout, which said order set aside the decree of December 6, 1894, and prior decrees in said suit by Stout's executor. From a decree for complainants on the ground that said decree of December 6, 1894, was final, and that, no appeal or proceedings having been taken to reverse or set it aside, it and prior proceedings were conclusive and irrevocable, defendant appeals. Affirmed.

Timberlake & Nelson and Patrick & Gordon, for appellant. J. & R. Bumgardner, for appellees.

HARRISON, J. The appellant seeks by this appeal to establish her right under the will of her late husband, John W. Stout, to a fee-simple estate in a certain house and lot on Frederick street, in the city of Staunton.

We are met at the threshold of the appellant's claim with the contention that her interest in the house and lot mentioned has already been adjudicated, and held to be a life estate merely, and that all question touching her estate therein is now beyond the reacn of further judicial inquiry. If this contention be well founded, it is obvious that the appellant cannot prevail in this court.

It appears from the record that in April, 1893, the executor of John W. Stout, deceased, filed his bill in the circuit court of Augusta county, asking that the will of his testator be construed, and that the rights of his widow in the estate, after paying debts and costs, be determined; the court being especially asked to say whether she took an absolute estate in the residuum or an estate for life only, and, if only an estate for life, whether the property was to be turned over to her or to be held by the executor as trustee. In response to the prayer of this bill all necessary parties, including the appellant, were brought before the court, and in May, 1893, a decree was entered containing, among others, the following provision: "And the court, having maturely considered the will of John W. Stout, deceased, is of opinion and doth decree that Kate R. N. Stout, the widow of said decedent, is under his will entitled to receive for her use and support all of the estate of every kind of said decedent which remains after the payment of debts and the costs of administration for her life, and what remains at her death is to pass under the will of said decedent to the children of William I. Stout. But the court is further of opinion that, should said Kate R. N. Stout marry again, then Alexander F. Robertson, who in that event becomes a trustee of the estate, will reclaim said property or so much thereof as he can, and hold the same subject to the provisions of the will as provided in the event of the widow remarrying."

This clause of the decree unquestionably declares that all of the estate which remains after the payment of debts and costs of administration is to be for the use and support of appellant for her life. It is true that, after thus adjudging her estate to be one for life, the clause, following the language of the will, contains expressions calculated to confuse the court's meaning; but when the decree is carefully read in connection with the will, and especially when considered in connection with the subsequent proceedings in the cause, it is manifest that the court intended to declare and did hold that appellant only had a life estate under the will of her husband. This is shown by the decree of May 15, 1894, which authorizes the executor to borrow from the appellant a sum sufficient to pay off a balance of debt remaining unpaid after all of the estate, other than the house and lot in question, had been exhausted, and to secure the same by a lien in her favor upon the said house and lot. That the appellant understood the view of the court to be that she only had a life estate is shown by her petition filed in the cause December 1, 1894, asking that the cost of a tombstone she had erected over the grave of her husband should also be secured in her favor upon the house and lot, together with the amount borrowed from her by the executor. In this peti-

tion she says: "The estate has been nearly settled up and all of the indebtedness of the decedent paid, save a balance of something over $150, leaving to your petitioner out of the estate of said decedent, under the provisions of his will, only the life estate in the house and lot in the city of Staunton, where she at present resides." On the 6th of December, 1894, a decree was entered upon this petition, wherein it is said: "The court being of opinion that it is just and proper that the prayer of the petition of Mrs. Kate R. N. Stout should be granted, * * * it is therefore adjudged, ordered, and decreed that Mrs. Kate R. N. Stout have a lien, which is hereby established upon the house and lot, * * * for the sum of $272.24, without interest, during her life, the aggregate of the amount advanced to the executor as aforesaid and the cost of said monument, which lien can be enforced in this cause whenever she may be advised so to do." This decree, establishing a lien in favor of appellant upon the house and lot in question, cannot be reconciled with the contention that she had theretofore been adjudged to be the owner of a fee simple in the property. The learned judge who entered that decree can hardly be supposed to have solemnly adjudged that appellant was entitled to a lien in favor of herself upon her own property, and to have provided that she might, whenever advised so to do, sell her own property to satisfy a lien thereon in favor of herself. Establishing this lien upon the house and lot is sufficient, without more, to show clearly that the court understood its previous action in the premises to be an adjudication that appellant was the owner of a life estate only.

This last-mentioned decree of December 6, 1894, also declares in express terms that appellant was the owner of a life estate, as shown by the following concluding paragraph: "And all matters involved in this cause having been finally disposed of, except the said house and lot in which the widow of decedent has a life estate, and which she is now occupying as a residence, it is ordered that this cause be stricken from the docket, with leave reserved to any party thereto to reinstate the same and seek any proper relief at the foot of this decree."

Upon the whole record it is clear that the court and the parties treated and dealt throughout with this matter upon the theory that the court had, in response to the prayer of the bill for a construction of the will, adjudged that appellant was entitled to a life estate merely in what remained of her husband's estate after payment of his debts and the costs of administration.

It only remains to consider the contention made for appellant, calling in question the finality of the decree of December 6, 1894.

As already seen, that decree in its concluding paragraph employs the following language: "And all matters involved in this cause having been finally disposed of, except the house and lot in which the widow of decedent has a life estate," etc. The record shows that the entire estate had been settled, and every purpose for which the bill was filed accomplished. This is expressly declared to be the case by the decree, and the cause is retired from the docket, with leave reserved to any party thereto to reinstate the same and seek any proper relief at the foot of the decree. It is contended that the final clause of the decree, giving leave to any party to reinstate the same, shows that everything had not been done in the cause that the court intended to do, and that for this reason the decree was not final.

This position is not tenable. The record shows that the estate had been completely settled, leaving after payment of debts the house and lot involved in this controversy, subject to the lien established thereon in favor of the appellant. The leave reserved at the foot of the decree to reinstate the cause for proper relief was not intended to give any party thereto the right at any time to have the entire case reheard and the adjudications of the court set aside and annulled. The purpose was to enable appellant to exercise the right which had been reserved to her of enforcing in the cause the lien established in her favor upon the house and lot, and possibly to enable the trustee to administer the trust created by the will in the event appellant married again. If the cause could be reinstated for the purpose of again litigating the questions that had been decided, there would be no end to controversy. As said by Judge Phlegar in Echols v. Brennan, 99 Va. 150–154, 37 S. E. 786: "No man could ever know that litigation was certainly ended."

In French v. Shoemaker, 12 Wall. 86, 20 L. Ed. 270, the Supreme Court holds that leave given to either party to apply at the foot of a decree for relief as to any matter not fully determined was a mere matter of precaution, not affecting the finality of the decree. At page 98 of 12 Wall. (20 L. Ed. 270) the court says: "Leave, it is true, is given to either party to apply at the foot of the decree for such further order as may be necessary to the due execution of the same, or as may be required in relation to any matter not finally determined by it; but it is quite apparent that that reservation was superadded to the decree as a precaution, and not because the court did not regard the whole issue between the parties as determined by the decree."

The decree may be erroneous, but the error does not render it less final. The view taken by the court of the rights of appellant under the will of the decedent may be erroneous, but that error cannot now be corrected. The court has by its order put the cause beyond its control. There are but two ways known to the law by which such a decree could be set aside—by bill of review in the court which rendered it, or appeal

to this court. Neither was resorted to in the time limited by statute, and it is now too late to recall the decree and resume a jurisdiction that has been exhausted. Battaile v. Maryland Hospital, 76 Va. 63.

For these reasons, the decree appealed from must be affirmed.

(104 Va. 443)

WEAVER et al. v. GLENN.

(Supreme Court of Appeals of Virginia. Sept. 21, 1905.)

INFANTS—NECESSITY OF GUARDIAN AD LITEM.

Judgment against an infant defendant for whom no guardian ad litem was appointed is void.

Error to Circuit Court, Augusta County.

Action by J. C. Glenn against Mary F. Weaver and others. Judgment for plaintiff. Defendants bring error. Reversed.

Curry & Glenn, for plaintiffs in error.

WHITTLE, J. This action of ejectment was brought by the defendant in error against the plaintiffs in error to recover the land described in the declaration. At the trial the defendants, without waiving any of their rights, agreed with the plaintiff to submit all matters of law and fact to the determination of the court, whereupon a joint judgment was rendered against them for the land in controversy and costs.

It appears that four out of the five claimants of the property in fee simple are infants, and that no guardian ad litem was appointed to defend them, which omission constitutes the first assignment of error.

In every action or suit against an infant defendant, it is the duty of the court wherein the same is pending, or of the judge or clerk thereof in vacation, to appoint a guardian ad litem to represent the interest or estate of the infant. Va. Code 1904, p. 1714, § 3255.

"So necessary is the appointment of a guardian ad litem esteemed," says Mr. Minor, "that although the process against an infant is issued and executed against him just as against an adult, and the declaration or bill setting forth the complaint is framed and filed in like manner, yet, after the declaration or bill is filed, no rule or any proceeding whatever can be had lawfully until a guardian is designated, and any step that is taken will be void as to the infant." 1 Minor, Inst. (2d Ed.) 432; 1 Barton's Law Pr. 206.

In Turner v. Barraud, 102 Va. 324, 46 S. E. 318, this court held: "The only way known to our law of bringing an infant before a court is by a guardian ad litem, appointed to conduct his defense for him. If he has appeared in a suit by a guardian ad litem regularly appointed for that purpose, he cannot afterwards, in an independent suit, impeach a decree rendered against him for errors and irregularities in the proceedings in the suit in which the decree was rendered; but, if no guardian ad litem was appointed or recognized by the court, he is not bound by the action of one who assumed to act for him, and the decree against him is void, and may be collaterally assailed."

In the yet more recent case of Langston v. Bassette (Va.) 51 S. E. 218, it is said: "As an infant can only appear and defend by guardian ad litem, proceedings against him are generally fatally defective unless the record shows that a guardian ad litem was assigned him. Code 1887, § 3255 [Va. Code 1904, p. 1714]. See Roberts v. Stanton, 2 Munf. 129, 5 Am. Dec. 463; Cole v. Pennell, 2 Rand. 174; Parker v. McCoy, 10 Grat. 594; Ewing's Adm'r v. Ferguson's Adm'r, 33 Grat. 548; Turner v. Barraud, 102 Va. 324, 331, 46 S. E. 318; note to Caperton v. Gregory, 11 Grat. (Michie's Ed.) at page 251 et seq., where a number of cases on the subject are collected."

The omission to appoint a guardian ad litem for an infant defendant is reversible error in all cases, unless it appears that the judgment or decree is for the infant, and not to his prejudice. Va. Code 1904, p. 1830, § 3449; Langston v. Bassette, supra.

Without passing upon any other assignment, we are of opinion that for this initial error the judgment complained of must be reversed, and the case remanded for further proceedings to be had therein in conformity with this opinion.

(104 Va. 330)

ROBERSON et al. v. WAMPLER.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

DEEDS—CONSTRUCTION—"HEIRS."

The word "heirs," in a deed to the heirs of a living person, will be construed as meaning "children"; it appearing from other language of the deed and the circumstances surrounding its execution that it was used with such meaning.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 417, 422.]

Appeal from Circuit Court, Wise County.

Suit by John M. Wampler, guardian of Susan J. Roberson, and infant, against Thomas Smith and others, to enjoin the cutting of timber on land claimed to belong to complainant's ward, as the only child of John B. F. Roberson. A. A. Roberson and others filed a petition in the suit, claiming to be part owners of the land. From an adverse decree, petitioners appeal. Affirmed.

Ayers & Fulton, for appellants. Bond & Bruce, for appellee.

BUCHANAN, J. The principal question involved in this case is whether the word "heirs," as used in the deed under which the parties to this controversy claim, was employed in its technical sense, or as meaning "children." The language of that deed,

omitting the description of the land conveyed, is as follows:

"This deed made this April 25th, 1902, between James Roberson and Nancy, his wife, of the County of Wise and State of Virginia, of the first part, and John B. F. Roberson heirs, of the County of Letcher and State of Ky., of the second part.

"Witnesseth: That for and in consideration of the natural love and affection they have for their sd. son and especially for his heirs and for the further consideration of the preformance of the agreement herfb to be written on their part, doth grant, bargain and sell unto the heirs of the sd. John B. F. Roberson, a certain tract or parcel of land, lying and being in the County aforesaid on the waters of Pound River. * * *

"To have and to hold the said heirs of John B. F. Roberson forever, and it is also agreed and becomes a part of this contract that the said heirs of John B. F. Roberson shall take it is also agreed the said heirs of John B. F. Roberson is furnish timber to keep up the line fence so far as it binds on the other heirs of James Roberson care of or cause to be taken care of said James Roberson and Nancy, his wife for and during their natural lives by furnishing them with food and raiment, washing and bedding such as will be fit and becoming to persons of this age and as the customs of the country, and for the performance of the said service the said grantors doth hereby retain a lien on the said premises, and the said James Roberson and Nancy, his wife, for themselves and their heirs doth covenant with the said heirs of John B. F. Roberson that they will warrant generally the premises hereby conveyed."

At the time of the execution of the deed John B. F. Roberson was living.

It is a well-settled rule of construction that technical words are presumed to be used technically, unless the contrary appears upon the face of the instrument, and that words of a definite legal signification are to be understood as used in their definite legal sense. Nye v. Lovitt, 92 Va. 710, 713, 714, 24 S. E. 345, and authorities cited; Waring v. Waring, 96 Va. 641, 82 S. E. 150; Brett v. Donaghe's Guardian, 101 Va. 786, 788, 45 S. E. 324. But where other expressions are used in conjunction with such technical words which plainly indicate what the intention was, and that such intention was not in accordance with the technical signification, the intention will control the legal operation of the words. 2 Minor's Inst. (1st Ed.) 1114, 1115; 1 Jarman on Wills (Bigelow's Ed.) 61, and note; Wootton v. Redd's Ex'r, 12 Grat. 196, note to Michie's edition, citing cases; Tebbs v. Duval, 17 Grat. 349.

The word "heirs" is a technical word having a definite legal signification, and, when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical import, and in this sense it designates the person or persons appointed by law to succeed to the real estate in cases of intestacy. But where, from the language of the instrument and the circumstances surrounding its execution, it appears that the maker in using the word "heirs" meant "children," it will be so construed. This it is conceded is so as to wills; but it is insisted that a different rule prevails as to deeds, and cases are cited to sustain the contention that a deed made to the "heirs" of a living person is void, although words are used in conjunction therewith which show that the word was not used in its technical sense, but as meaning children. Hall v. Leonard, 1 Pick. 27; Hileman v. Bouslaugh (Pa.) 53 Am. Dec. 478; Morris v. Stephens, 46 Pa. 200; Winslow v. Winslow, 52 Ind. 8.

Whatever may have been the rule of decision in the earlier cases of the states of Massachusetts, Pennsylvania, and Indiana, the later decisions seem to have modified the rule. The weight of authority and the better reason is in favor of the rule that in deeds, as well as in wills, the intention of the maker of the instrument, as gathered from all its parts, must prevail.

In Heath v. Hewitt, 127 N. Y. 166, 27 N. E. 959, 13 L. R. A. 46, 24 Am. St. Rep. 438, where by statute the courts are required to give effect to the intention of the maker in construing deeds as well as wills, it was held that where, from the language of the deed and the circumstances surrounding its execution, it appears that the grantor, in using the word "heirs" meant "children," it will be so construed, and effect thus given to the instrument, notwithstanding the general rule that a conveyance to the heirs of a living person is void for uncertainty. In this respect the court declared there was no difference between wills and deeds. Seymour v. Bowles (Ill.) 50 N. E. 122. See 13 Cyc. 660, note 87, citing cases.

No decision of this court has been cited by counsel, nor have we found one in our investigation, in which the precise question involved in this case was raised and decided. But the rule of construction in this state, independent of statute, is that in deeds as well as in wills the intention of the parties must prevail, unless that intention is contrary to law.

In the early case of Hawkins' Ex'rs v. Berkley, 1 Wash. 204, 206, it was said that "agreements are always to be construed according to the evident intent of the parties appearing from the deed itself, without a rigid adherence to the letter." And this reasonable and just rule has ever since been recognized as the correct rule for interpreting written instruments. 2 Minor's Inst. (1st Ed.) 1113–1116; Stace v. Bumgardner, 89 Va. 420, 16 S. E. 252; Temple's Adm'r v.

Wright, 94 Va. 338, 340, 26 S. E. 844; Lindsey v. Eckels, 99 Va. 668, 671, 40 S. E. 23; White v. Sayers, 101 Va. 821, 828, 45 S. E. 747.

In the case of Stace v. Bumgardner, supra, it was said by Judge Lewis, in delivering the opinion of the court, where it was insisted that a different rule applied in the construction of wills from that which prevailed as to deeds and other contracts, that "there is, however, no material difference in principle in the rules of interpretation between wills and contracts, except what naturally arises from the different circumstances of the parties. No technical language is necessary to create a trust either by deed or will, and in both classes of cases the object of the judicial expositor is the same, namely, to discover the intention which is to be gathered in every case from the general purpose and scope of the instrument in the light of surrounding circumstances."

Applying the foregoing rules of construction to the deed under consideration, it is reasonably certain that the word "heirs" was not used technically, but as synonymous with "children," a sense in which it is frequently used in common language, especially by unlettered people, as the scrivener in this case evidently was.

It appears from the record that on the same day the deed under consideration was made the grantor executed two other conveyances, and a few days afterward another, by which he partitioned and conveyed his real estate to three of his children and the heirs of his other child, in consideration of natural love and affection, with a requirement that the grantees in the deed should support and maintain the grantor and his wife during their natural lives. A consideration of natural love and affection for the grantees in the deed implies that they were living persons for whom he cherished affection, and not persons unknown or perhaps not in being, as the grantees might be if the word "heirs" was used in its technical sense. Fountain Coal Co. v. Beckleheimer, 102 Ind. 82, 1 N. E. 202, 52 Am. Rep. 645. Again, the provision in the deeds that the grantees should care for, support, and maintain the grantor and wife, or cause that to be done, necessarily implies that they were living persons, since the deeds took effect upon their delivery, and the duty to support and maintain at once commenced.

The grantees in the deed in question are described as being "of the county of Letcher and state of Kentucky," where John B. F. Roberson resided, again indicating that the word "heirs" was used in the sense of "children," and not in its technical sense, since the grantor could not know who would be the possible heirs of John B. F. Roberson.

The deed further provides that the grantees shall "furnish timber and keep up the line fence so far as it binds on the other heirs of James Roberson," the grantor. There can be no question that the grantor used the word "heirs" in this connection in the sense of "children," for he himself was then living and had no heirs.

In the other deeds made on the same day to his daughters, the grantor makes use of the same expression again, unmistakably indicating that the word was not used in its technical sense.

Construing the deed as a whole, we are satisfied that the manifest intention of the grantor was to convey the property to John B. F. Roberson's children, and not to his heirs in the technical sense of that word, and that the circuit court did not err in so holding.

The appellants assign as error the action of the circuit court in failing to provide in its final decree that the person to whom the tract of land in controversy belonged should contribute his proportion of the maintenance and support of the grantors in said deed.

This assignment of error is, we think, without merit. The pleadings in the case do not properly put that question in issue. Unless the appellants had done more for the support and maintenance of the grantor and his wife than their conveyances required them to do, they had no right to implead the appellee's ward for a failure to comply with the terms of the conveyance to her as to such support and maintenance. Again, the necessary parties were not before the court. The grantor in the deed was dead, and neither his personal representative nor his widow, the principal parties interested in that controversy, was a party to the suit.

The decree appealed from must be affirmed.

(104 Va. 446)

WILSON v. MILLER et ux.

(Supreme Court of Appeals of Virginia. Sept. 21, 1905.)

1. ACCOUNTING—EQUITY—JURISDICTION.
Where an accounting between an attorney in fact and his principals involved a complicated statement of accounts of such attorney occupying a position of trust and confidence, and required a discovery, the proceeding was within the jurisdiction of a court of equity.

2. LIMITATION OF ACTIONS — ACCRUAL OF RIGHT OF ACTION—ACCOUNTS.
Where defendant's service as attorney in fact for complainants was continuous under a power of attorney from 1881 until 1898, when his employment was ended, but he had not then completed the work for which he was appointed, and complainants, residing in a distant state, necessarily relied on defendant for the faithful discharge of his trust, limitations did not begin to run against items in his account until the termination of his employment.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 273–275, 285, 286.

Appeal from Circuit Court, Rockbridge County.

Action by James H. Miller and wife against James A. Wilson. From decrees in

favor of plaintiffs, defendant appeals. Affirmed.

D. E. Moore, for appellant. Greenlee D. Letcher, for appellees.

HARRISON, J. Having removed from the county of Rockbridge, Va., to the state of Oregon, the appellees, on December 19, 1881, executed a power of attorney, appointing the appellant their attorney in fact to sell and convey all real estate owned by them in the county of Rockbridge and to collect the proceeds, and also to demand, sue for, and collect all debts, rents, accounts, and other claims which might be due, payable, and owing to the appellees in the county of Rockbridge. The power and authority vested in the appellant by this instrument was full and complete to do any and all things in the premises that the grantors could perform, if present in person.

The appellant assumed the duties and obligations thus imposed upon him, and from the date of his authority in 1881 to the year 1898 was from time to time collecting rents, selling real estate, wood, railroad ties, etc., and disbursing the proceeds in expenses of various kinds and in remittances to the appellees. During all of this time appellant rendered no account and made no settlement of any kind. A continuous and frequent correspondence was kept up between the parties, on the part of appellees chiefly demanding money and urging the business forward to a conclusion, and on the part of the appellant excusing his tardiness and promising to make remittances.

In 1898, in response to demands for information and for a settlement, appellant rendered his first account, covering the entire period of his agency and involving innumerable items. This statement of his transactions as agent for the appellees brought the latter in debt to the appellant in the sum of $177.54. Shortly after this account was rendered appellees placed the matter in the hands of counsel, who filed the bill in this cause, asking for a discovery and a proper settlement of the accounts of appellant as their agent, charging that he had not rendered a correct account and had failed to make proper returns of the collections made by him.

The record clearly shows this allegation of the bill to be well founded. The result of the litigation was a decree in favor of the appellees for $377.54, with interest from October 4, 1898, the date of the termination of the agency.

The demurrer to the bill was properly overruled. There is no merit in the contention that equity is without jurisdiction. This is not a case of a single money demand which might be enforced in a court of law, nor, indeed, of mutual demands merely; but it is a case involving a trust. It involves a complicated settlement of the accounts of an agent occupying a position of trust and confidence, where a discovery is called for and necessary; and the remedy, if any, at law would be far from plain, simple, and free from difficulty. The jurisdiction of a court of equity in such a case is well established. Simmons v. Simmons' Adm'r, 33 Grat. 451; Thornton v. Thornton, 31 Grat. 212; Coffman v. Sangston, 21 Grat. 263; Segar v. Parrish, 20 Grat. 680; Zetelle v. Myers, 19 Grat. 62.

We are further of opinion that there was no error in the action of the court in refusing to apply the statute of limitations relied on by appellant. As a general rule, when there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run until the termination of the undertaking or agency. Wood on Limitations (Ed. 1883) § 123; Rowan v. Chenoweth (W. Va.) 38 S. E. 545, 87 Am. St. Rep. 796; Riverview Land Co. v. Dance & Co., 98 Va. 239, 35 S. E. 720.

There is nothing in the facts of the case to take it from under the influence of the general rule mentioned. The services of appellant were continuous under the power of attorney from 1881 to 1898, when the relation of agent was ended, and he had not then completed the work for which he was appointed, for part of the real estate was still unsold. His principals lived in a distant state, where they could give no personal attention to the matter, necessitating reliance by them upon him for a faithful discharge of the trust he had assumed as their agent. The record shows that the transactions of the appellant were very numerous, involving a long and complicated account, the details of which were known alone to him. The case is clearly one governed by the general rule, where the statute does not begin to run until the termination of the undertaking or agency.

Upon the whole case, we are of opinion that there is no error in the decrees appealed from, and they must be affirmed.

(104 Va. 424)

SHIFLETT v. GRIMSLEY, Judge.

(Supreme Court of Appeals of Virginia. Sept. 21, 1905.)

INTOXICATING LIQUORS—TAX FOR MANUFACTURING.

Va. Code 1904, p. 277, § 555, provides that all licenses shall expire April 30th. Act April 16, 1903, § 141 (Laws 1902–04, p. 910 [Va. Code 1904, p. 2253]), as amended by Laws 1904, p. 42, imposes a tax on the manufacture of alcoholic liquors by distillation from pomace, where the distillery is run for less than three months of $5, and where it is run for more than three and less than six months of $50. *Held*, that one applying for the privilege of manufacturing liquors by distillation from pomace for three months, beginning August 24th, must pay a tax of $50; the act of 1903, as amended in 1904, not repealing section 555, and the tax of $5 being for the privilege of manufacturing for three months, expiring April 30th.

Petition for mandamus by one Shiflett against one Grimsley, circuit judge, to compel respondent to issue a license for the manufacture of liquors. Denied.

R. S. Thomas and John S. Chapman, for plaintiff. Daniel A. Grimsley, for defendant.

PER CURIAM. This case arises upon an application of Shiflett for a license to manufacture and distill alcoholic liquors by direct fermentation and distillation from pomace for a period of three months, beginning on the 24th day of August, 1905, and ending on the 24th day of November, 1905; the business to be conducted at the home of the petitioner in the county of Greene. According to petitioner's view of the law, he was required to pay for this privilege the sum of $5, which he deposited with the treasurer of Greene county. He showed to the satisfaction of the court that he was a fit person to conduct that business, that he would keep an orderly house, and that the place where the business was to be conducted was suitable, convenient, and appropriate. As to all of these questions there is no controversy.

The judge of the circuit court, however, was of opinion that a person applying for a license, such as that asked for by petitioner, should be required to pay $50 for the privilege, and refused to grant the license unless the latter sum was paid. Thereupon Shiflett applied to this court for a mandamus.

By section 555, p. 277, Va. Code 1904, it is provided, among other things, that "all licenses shall expire on the 30th day of April, except licenses to theaters, public shows, exhibitions or other performances, and to bowling alleys and to billiard and bagatelle tables at watering places."

By section 141 of an act to raise revenue for the support of the government and public free schools, etc., approved April 16, 1903 (Laws 1902-04, p. 910 [Va. Code 1904, p. 2253]), as published by the Auditor of Public Accounts, with amendments to the adjournment of the General Assembly of 1904, it is provided that "no person, corporation, company, firm, partnership, or association shall, within the limits of this state, engage in the business of rectifying or of manufacturing or distilling malt or alcoholic liquors, other than wine, or sell, or offer to sell, by sample or representation or otherwise, wine, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters, bitters containing alcohol, or fruit preserved in ardent spirits, either by wholesale, retail, or to be drunk at the place where sold, or in any way, without first having obtained license therefor. * * * Every manufacturer or distiller of alcoholic liquors shall pay for said privilege, at the time his license is granted, a specific sum therefor to be graduated and classified as follows: * * * The manufacturer of alcoholic liquors by direct fermentation and distillation from pomace or from cider or fruits, where the distillery is run less than three months, shall pay a specific sum of five dollars, but if the distillery is run more than three months and less than six the specific amount to be paid for the privilege shall be twenty dollars, and if run six months or more there shall be paid for the privilege fifty dollars."

The last-mentioned act was passed at a later date than section 555, and by section 146 it is provided that "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

The contention of petitioner is that section 555, which provides that all licenses shall terminate on the 30th of April, is in that respect inconsistent with the tax law, which provides for the issuing of a license such as he desires for a period of three or more months, and that by the terms of the tax law, upon the tender of $5, he is entitled to a license for the manufacture of alcoholic liquor by direct fermentation, etc., to begin at any period which the applicant may desire, and to extend for the period of three months next ensuing.

If section 555 and the tax law can by any reasonable construction stand together and be enforced, then it is the duty of the courts to give effect to both of them; for repeals by implication are not favored, and section 555 is now in force, unless by reason of its inconsistency and repugnancy to the will of the Legislature as last declared in the tax law, it has been repealed. If the construction contended for by the petitioner be the correct one, it leads to a result so extraordinary as to fall little short of an absurdity. The law provides that for a license to run for a period of six months or more there shall be paid the sum of $50; and yet, if the contention of the petitioner be correct, he can, by dividing the year into four periods of three months, and applying for a license to run for three months only, enjoy the privilege for the entire year at a cost of $20. Such a result is not be reached, unless the language of the law be so plain as to exclude any other construction.

His honor, Judge Grimsley, after stating these views with much precision in his answer, suggests a theory upon which the two laws may be reconciled and both be given a reasonable and rational construction, and it is that the qualified or limited license is to be issued within the limited period from the termination of the fiscal year; that is to say, that an applicant, who applies on the last day of January for the privilege here sought, to run until the 30th of April, which is three months, would be entitled to it upon the payment of $5 and proof of the other requisites enumerated in the law. So, still taking the end of the fiscal year or the 30th of April as the date on which the license would terminate, the applicant would be entitled to the privilege for a period of less than six months, beginning, for instance, on the 2d

day of November, upon the payment of $20. The Legislature, in passing the tax bill, of course, had before it all the laws bearing upon the subject; and it is far more reasonable to suppose that they intended that the tax law should be construed in harmonious relation to section 555 than that it should have enacted a law which requires a tax of $50 for the exercise of a privilege for six months or more, and then have proceeded to render this provision nugatory by permitting the applicant to subdivide the year into four parts and obtain a license covering the whole period upon the payment of two-fifths of the sum which it had just solemnly declared was the price fixed upon the privilege.

There are, perhaps, other grounds upon which our conclusion could be sustained; but under the circumstances disclosed by the record we prefer to rest our judgment upon a construction of the law.

The application for a writ of mandamus is denied.

(104 Va. 350)

CUPP v. LESTER.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

1. LIENS—ENFORCEMENT—REDEMPTION—CONDITIONS PRECEDENT.

Pending a suit to subject real estate to sale to satisfy liens, the debtor procured a loan from a third person, secured by a deed of trust. Subsequently the third person agreed to put in an upset bid to prevent a confirmation of a sale and to pay off liens prior to his deed of trust, and the debtor agreed to reimburse him for buying the lands. At a resale the third person became the purchaser. A bank held first lien on the land conveyed in the deed of trust, which the third person discharged out of the money loaned to the debtor and took an assignment of the bank's lien. The entire proceeds of the resale were consumed in paying the liens prior to the deed of trust, leaving a balance of the loan to the third person unpaid. *Held*, that as, to the extent of the lien of the bank, the third person was repaid at the resale, a decree requiring the debtor to pay to the third person the balance as a condition precedent to his right to redeem was proper.

2. CONTRACTS — FALSE REPRESENTATIONS — EFFECT.

A contract between a debtor and a third person bound the latter to put in upset bids to prevent a sale to satisfy liens. It provided that in consideration of the accommodation the third person should have a half interest in the coal on a tract and the debtor the other half, and that, in case the debtor reimbursed the third person, the land should be conveyed to the debtor without affecting their rights in the coal on the tract. There was a vendor's lien on a part of the land, which was subsequently purchased by the vendor for a sum less than the lien. The debtor represented to the third person that the lien had been satisfied. *Held* to justify the court in depriving the debtor of the benefit of the stipulation as to the coal in settling the rights of the parties after the third person had purchased the premises at a resale.

Appeal from Circuit Court, Montgomery County.

Application for writ of possession by George E. Lester against Anderson Cupp. Decree for applicant, and defendant appeals. Affirmed.

Wm. G. Robertson and Moore & Harless, for appellant. Archer A. Phlegar and M. H. Thompkins, for appellee.

WHITTLE, J. The object of the suit out of which this controversy arose was to subject the real estate of the appellant, Anderson Cupp, to sale to satisfy liens.

Pending the litigation appellant, accompanied by his counsel, sought the appellee, George E. Lester, who was not a party to the suit, and procured of him a loan of $1,000, to secure which Cupp executed a deed of trust on a tract of 83½ acres of land, which was represented to Lester as affording ample security for the debt. Subsequently, when the cause had reached the stage where the lands had been sold and a confirmation of the sales was being pressed, Cupp again approached Lester, and, in consideration of his agreeing to prevent the confirmation of the sales of several parcels of the land by putting in upset bids, the following contract was entered into:

"That, whereas, Geo. E. Lester agrees to put in an upset bid on six tracts of land sold on 4th March, to wit, 83½ acres, 50 acres, 87 acres, 9 acres, 100 acres, one-half interest in 50-acre tract, and pay off the liens reported by Com'r Farley that are prior to the deed of George E. Lester's deed of trust: * * * Now, the said Cupp, in consideration of the premises, agrees to give to Geo. E. Lester a one-half interest in the coal on the one hundred-acre Miller tract; that is to say, that in consideration of this accommodation Lester is in any event to have one-half interest in that coal and Cupp one-half interest. In case Lester buys the lands to protect himself, and Cupp can reimburse him for principal, interest, and costs expended in buying said lands, then Cupp is to have the said lands back; but this last clause shall in no wise affect either interest in the coal on said 100-acre tract. In all events this contract is to give Geo. E. Lester one-half interest in said coal and retains the other half as Cupp's."

At resales of appellant's lands upon the upset bids, appellee became the purchaser of the six tracts referred to, at the aggregate price of $1,287.50.

The cause was heard upon a rule against appellant to show cause why a writ of possession should not be awarded requiring him to deliver to appellee the possession of the lands purchased by him, and upon the pleadings and evidence. Whereupon the trial court passed the decree complained of, which ascertained the amount due from Cupp to Lester to be $2,046; $1,287.50, part thereof, representing the sum paid by Lester for the lands purchased by him at the resale, and $758.50, the residue thereof, being the unpaid balance due upon the $1,000 loan se-

cured by deed of trust. The decree also provided that, upon appellant paying to appellee said sums within 90 days from the adjournment of the court, the latter should convey to the former the lands in question, with the exception of one-half interest in the coal on the Miller tract. Alternatively the decree provided that, upon the failure of appellant to pay the amounts decreed against him within the time prescribed, he should be forever barred from demanding or claiming any interest in said lands.

The first assignment of error involves the action of the court in requiring the appellant to pay to Lester the balance of $758.50, due on the loan of $1,000.

With respect to that assignment, it appears that the Bank of Christiansburg held a first lien on the 83½-acre tract, which Lester discharged out of the $1,000 loaned to Cupp and took an assignment of the bank's lien. To the extent of that lien, therefore, by substitution to the right of the bank, Lester was reimbursed at the subsequent sale of that property; but the entire proceeds of sale of the residue of Cupp's lands were consumed in the liquidation of liens prior to Lester's deed of trust, so that the balance due thereon was never paid. Hence there was no error in the decree requiring Cupp to pay that balance as a condition precedent to his right to redeem the lands purchased by Lester.

The remaining assignment of error deserving notice relates to the ruling of the court denying appellant the benefit of the stipulation in the contract with respect to one-half the coal on the Miller tract.

In that connection it appears that there was a vendor's lien on the 37-acre tract of land mentioned in the agreement, amounting, with interest, to over $800, which was afterwards bought by the vendor for $700. That lien was not included in the report of Commissioner Farley, and was represented by appellant to have been satisfied. Appellee was thus induced by the false representation of appellant to enter into the agreement, and wholly deprived of the security afforded by that property. Under the foregoing circumstances the court was justified in denying appellant the benefit of the stipulation with regard to the one-half interest in the coal.

Upon the whole case, the decree is without error, and must be affirmed.

(104 Va. 337)

DIXON v. PADDOCK.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

1. PARTNERSHIP—ACCOUNTING—CONCEALMENT OF ASSETS—FRAUD.

Where, on the dissolution of a partnership, it was the owner of a certain railroad, and defendant, who was the active partner in winding up and settling the affairs of the firm, secretly made a contract to sell the railroad for $33,000, but valued it in the account with complainant, which was made the basis of their settlement, at only $18,000, such act constituted a violation of his trust relation to complainant, who was entitled to share in the benefit of the contract, though at the time of the account it was only an option which was thereafter exercised, and though the purchaser had orally requested that no information with reference thereto should be given by defendant.

2. SAME.

Where, on dissolution of a firm owning a railroad, it appeared that the active partner had purchased an engine and caboose and rented it to the firm as his private property at a certain rental per month, he was not entitled, after charging such rentals, to charge the engine and caboose as a liability of the firm.

3. SAME—OFFICE EXPENSES.

Where the active partner of a firm conducted a private competing business in the firm's general offices, which amounted in volume to two-thirds of the business of the office, he was not entitled to charge the firm with the entire cost of salaries and office expenses.

Appeal from Circuit Court, Wise County.

Suit by F. S. Paddock against John T. Dixon for a partnership accounting. From a decree in favor of complainant, defendant appealed, and complainant assigned cross-errors. Affirmed.

E. S. Finney, for appellant. O. M. Vicars and Ayers & Fulton, for appellee.

HARRISON, J. By agreement in writing dated April 1, 1899, John T. Dixon, the appellant, and F. S. Paddock, the appellee, formed a partnership, under the firm name of Dixon-Paddock Lumber Company, for the purpose of conducting a general lumber business, and in connection therewith acquiring the stock of the Gladeville Railroad Company and equipping and operating the same.

The railroad mentioned was acquired, the purposes of the partnership carried out, and its business conducted until October 31, 1900, at which time, by an agreement in writing between the parties, the firm was dissolved. Under this agreement all of the partnership assets, with the exception of certain property then sold to the appellee, passed into the hands of the appellant, to be disposed of by him with a view to his settling up the business of the concern as expeditiously as possible; it being therein agreed that appellant should have until July 1, 1901, to close up the partnership business and make a settlement with appellee of all firm matters, except the Gladeville Railroad, provided that property should then remain unsold, it not being known at the time whether a satisfactory sale of the railroad could be made by July 1, 1901.

The dissolution contract of October 31, 1900, provided, among other things, that nothing contained therein should be construed as in any manner impairing the rights and obligations of the parties under the partnership agreement of April 1, 1899, and that a settlement of the partnership business should be subject to that agreement.

In response to a proposition from appellant that he would take the Gladeville Railroad and equipment at the price of $18,000, appellee replied on June 13, 1901, in part, as follows: "If you will make me up a clear statement of the affairs of the Dixon-Paddock Lumber Company and the Gladeville Railroad, together with an itemized statement of your account and my account, an itemized statement of the losses sustained by us, and an approximate statement of the amount, value, and location of the lumber on hand, I will name you a price that I would be willing to take, provided you and Gen. Ayers do not trade."

In answer to this request for a statement, appellant wrote appellee June 15, 1901, in part, as follows: "Regarding making up a statement of the affairs of the Dixon-Paddock Lumber Company, am not in a position at this time to give you such a statement as you indicate. I of course expect to make up a statement the 1st of July as per our contract, which I prefer to do then, instead of now." On the 9th of July, 1901, appellant furnished appellee with a statement of the partnership business. This statement was accepted by the appellee as an honest disclosure by the appellant of the affairs of the partnership which were in his hands to be wound up, and formed the basis of a settlement then made between the parties and by which the appellee sold out his interest in the assets of the concern to the appellant.

The bills, original and amended, in this cause, were filed by the appellee, alleging that he, relying upon the honesty and integrity of appellant, and believing that the statement or balance sheet mentioned was a true statement of the affairs of the partnership business, had sold his interest in the partnership assets to the appellant upon the basis of such statement. The bills further charge that the complainant had subsequently discovered that the statement rendered by appellant, which formed the basis of their settlement, was not true, but that appellant had wrongfully and fraudulently concealed a number of important matters from appellee, which should have entered into the settlement and which would have produced a wholly different result greatly to the advantage of complainant. The prayer of these bills is that the sale made by complainant of his interest in the partnership assets to the appellant be declared to be fraudulent and void, that appellant be required to render a true and correct account of his dealings with the partnership assets, and that he be required to pay the complainant what shall appear to be justly due him upon a fair settlement of such accounts.

The allegations of these bills are denied by the answers thereto filed by the appellant.

The largest item of the statement rendered by appellant of his transactions with the partnership assets, which formed the basis of the sale by appellee, was a credit of $18,000, as the value of the Gladeville Railroad, which was to pass to the appellant as part of his purchase from the appellee. Before this sale of July 9, 1901, indeed at the time the letter of June 15, 1901, already mentioned, was written, appellant had entered into a contract in writing, in the name of the Dixon-Paddock Lumber Company, as party of the first part, agreeing to sell to George E. Manning, trustee, this railroad property at the net price of $33,000, and had received from Manning $1,000 in cash on account of the purchase money, appropriating the same to his individual use. In October $16,000 of this purchase money had been paid, and by the following January $28,500 had been paid. No mention was made by appellant of the existence of this contract at the time he rendered the statement which formed the basis of his purchase of the half interest of appellee in this railroad property at $9,000.

As a general rule, he who alleges fraud must distinctly prove it. Engleby v. Harvey, 93 Va. 440, 25 S. E. 225. But it is equally true that, where a fiduciary or confidential relation exists between the parties to a transaction, the party who occupies the position of active confidence must show beyond all reasonable doubt the fairness and honesty of the transaction. Kerr on Fraud and Mistake, vol. 1, p. 386.

That the appellant occupied a relation of trust and confidence to the appellee with respect to the matter here inquired of is fully established by the evidence. As the active partner in winding up and settling the affairs of the dissolved company, he had assumed the duty, no less obligatory than a fiduciary trust, of realizing from the common assets the best price obtainable for the benefit of himself and his confiding partner, and for this work he was allowed by the dissolution contract liberal compensation.

Appellant admits that he concealed from the appellee the contract he had with Manning, trustee, and undertakes to excuse his action in the matter upon the ground that it was an option contract, and therefore without binding force, and that he had agreed with Manning that he would not disclose the fact that he held the option.

It is unnecessary to consider whether this Manning contract was an option or a conditional sale. So far as the rights of the appellee are concerned, it is wholly immaterial whether the sale to Manning, trustee, was an option or an absolute sale; for in either event appellee was entitled to an equal interest with appellant in all benefits that were likely to accrue from the transaction. Nor is it a matter at all affecting the rights of appellee in the premises that appellant agreed with Manning, trustee, that he would observe secrecy as to the contract. No such agreement is to be found in the written memorandum between the parties, and, if it were true that an oral understand

ing to that effect was had, it would be void as to appellee, who was entitled to a full disclosure from appellant of all matters pertaining to their partnership interests. The concealment by the appellant of the Manning contract, under which he had then received $1,000 cash and was to receive in addition thereto $32,000, and the purchase, under such circumstances, of the half interest of his partner in the railroad property at $9,000, was a fraud upon the appellee, and the appellant has been properly held liable to make good the loss thereby sustained.

We are further of opinion that there was no error in requiring appellant to account to appellee for the item of $746.18, growing out of his fraudulent misrepresentation with respect to the "engine and caboose."

It appears that appellant bought this engine and caboose for $2,350, for use on the Gladeville Railroad, and rented it to the partnership as his private property at $80 per month. In the statement rendered appellee as the basis of their settlement, appellant charges up this engine and caboose as a liability of the firm at $2,500, and requires his partner, who was ignorant of the facts, to account for it upon that basis, notwithstanding the fact that he had received from the firm $1,540 on account of rents for its use. The commissioner treated the engine and caboose as a liability of the partnership at $2,350, its actual cost, and required the appellant to refund to appellee his one-half interest in the rents which had been fraudulently appropriated by the appellant to himself. This was so manifestly proper that comment is unnecessary. The record discloses no justification for the course of appellant in treating this engine, etc., as an asset and liability of the partnership in the statement furnished by him to the appellee, and at the same time charging the firm with $1,540 for the use of it as his private property during the short time it was used by the firm.

We are further of opinion that there was no error in holding appellant liable to appellee for $938.63 on account of office expenses improperly charged by appellant to the Dixon-Paddock Lumber Company.

It appears that the general offices of the company were located at Ronceverte, W. Va., and, as contemplated by the terms of the partnership, were under the control and management of appellant. Soon after the formation of the partnership appellee, whose special duty it was to look after the outside work of the company, moved with his family to Wise county, Va., where he might be conveniently located with respect to the active operations of the company. It further appears that appellant conducted a private and competing business of his own, all of which was transacted through the general offices of the Dixon-Paddock Lumber Company. This private enterprise amounted in volume to two-thirds of the business of the office, while that of the partnership was only one-third. Notwithstanding appellant was appropriating to his private purposes two-thirds of the benefit of these officers, he charged the Dixon-Paddock Lumber Company with practically the entire cost of salaries and all other office expenses.

The contested item now under consideration grows out of the action of the commissioner in attempting to correct this injustice by requiring appellant to account for an equitable proportion of these expenses.

The finding of the commissioner in this matter has done no injustice to appellant, and the exception thereto was properly overruled.

Appellant contends that the court erred in confirming the report of Commissioner Peary charging him with several other minor items, and the appellee assigns several cross-errors involving the correctness of various findings of the commissioner. These several disputed items involve matters of accounting and questions of fact merely. There is no occasion to enter upon a detailed statement of the history of such items. An able commissioner has filed an unusually clear and satisfactory report, involving a careful and painstaking investigation of every item now in dispute; and a laborious consideration of the mass of evidence accompanying that report shows that the commissioner was well-justified and fully sustained in his findings. It is clear that no error was committed to the prejudice of appellant, whose conduct in this matter was not such as to commend him to a court of equity.

Upon the whole case, the decrees complained of must be affirmed.

(104 Va. 833)

SOUTH & W. RY. CO. v. VIRGINIA & S. E. RY. CO. et al.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

1. EMINENT DOMAIN—ENJOINING PROCEEDINGS—PLEADING.

A bill by a railroad company to restrain another railroad company from surveying and condemning a right of way over complainant's right of way, alleging that the completion of such surveys and the institution of condemnation proceedings would constitute a cloud on complainant's title and inflict irreparable damage on it, was insufficient, without an allegation of the facts and circumstances constituting the alleged grievance, so as to show whether in a legal sense the damage was irreparable.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 799; vol. 27, Cent. Dig. Injunction, § 232.]

2. INJUNCTION—CLOUD ON TITLE—BILL.

In a suit to prevent the imposition of an alleged cloud on complainant's title, as distinguished from the removal of an existing cloud, the bill is insufficient, where it fails to affirmatively show the alleged cloud or the threatened acts which will impose it, and the inadequacy of complainant's remedy at law.

3. EMINENT DOMAIN—ENJOINING PROCEEDINGS.

Where defendant railroad company attempted to survey and locate a railroad right of way over the right of way of complainant railroad company, complainant was not entitled to maintain an injunction to restrain such act and the condemnation of such right of way by defendant, as complainant had a complete and adequate remedy at law in any condemnation proceedings that defendant company might institute.

4. SAME—STATE CORPORATION COMMISSION—PERMISSION TO CONDEMN.

A suit by a railroad company to restrain another railroad company from proceeding to survey and condemn a right of way over complainant's right of way, because defendant company had failed to obtain previous permission from the state corporation commission to condemn the property, as required by Va. Code 1904, p. 576, § 1105e, cl. 52, could not be sustained, where there was no allegation in the bill that such permission had not been obtained.

Appeal from Circuit Court, Scott County.

Suit by the South & Western Railway Company against the Virginia & Southeastern Railway Company and others, to restrain defendants from surveying and instituting proceedings to condemn a railroad right of way. From a decree dismissing the bill, complainant appeals. Affirmed.

A. A. Phlegar, R. T. Irvine, and J. N. Powell, for appellant. D. D. Hull, Jr., and Bullitt & Kelly, for appellees.

WHITTLE, J. This appeal is from a decree dissolving an injunction and dismissing the plaintiff's bill on demurrer, with costs.

The material allegations of the bill are that the plaintiff is a public service corporation duly organized and existing under the laws of the state of Virginia, and holds the legal title to, and has possession of, a right of way consisting of a strip of land 66 feet in width, extending from a point near Clinchport, in Scott county, to a point near St. Paul, in Wise county, Va.; that upon that right of way a roadbed has been located and graded, and is practically in condition for the laying down of ties and steel, and that plaintiff is proceeding to construct and maintain a railroad thereon, as authorized by law; that the defendant, claiming to be a public service corporation, and its agents, had entered and are entering upon said strip of land at various points, and had commenced the making of surveys and the location of a line of railroad upon the same, and had committed and is committing innumerable trespasses in and upon said strip of land; that the acts aforesaid had been undertaken, and are being carried on by the defendant as the basis of condemnation proceedings to be instituted by it against said strip of land; that the plaintiff is a public service corporation possessing the powers of eminent domain, and therefore no surveys or locations can be made upon its property, and that any entry upon its property for that purpose is a trespass; that the defendant commenced the surveys and locations complained of within the last day or two, and is prosecuting the same with two or more corps of engineers, and unless restrained (without the court requiring notice of the application for injunction) will complete the surveys and locations and institute condemnation proceedings, which, if commenced, will constitute a cloud upon the title of the plaintiff and inflict irreparable damage upon it; that the acts of the defendant in reference to said land are not being done in good faith for the purpose of building and operating a railroad, but are being done for the sole purpose of hindering and delaying the plaintiff in the construction of its line of road; that the defendant is not a corporation duly organized under the laws of the state of Virginia, and cannot exercise the powers of a public service corporation.

The prayer of the bill is that the defendant and its agents be enjoined and restrained from entering upon the plaintiff's property, and from making or attempting to make surveys and locations for a railroad thereon, and from doing any act with reference thereto, and especially from instituting and prosecuting condemnation proceedings against said strip of land.

It is quite apparent that the feature of the bill which deals with the alleged invasion of the plaintiff's premises by the defendant, for the purpose of surveying and locating the route for a railroad along its right of way, does not present a case for injunctive relief on the theory that irreparable damage will result from the acts complained of. The rule in such case is that, in invoking this extraordinary remedy, the facts and circumstances constituting the alleged grievance must be specifically set out in the bill, for the court to determine whether in a legal sense the mischief is irreparable.

The principle is thus stated in the Encyclopædia of Pleading and Practice: "A general allegation that the acts apprehended will be irreparable, unattended by such a statement of facts as enables the court to see that such will be the result, is insufficient. The pleader must not content himself with a mere averment of his conclusions, but must show how the irreparable injury apprehended is to arise, by giving a full and detailed statement of the facts and circumstances, the nature and condition of his property, etc., so as to enable the court to determine the necessity for an injunction." 10 Ency. of Pl. & Pr. 954; Collins v. Sutton, 94 Va. 127, 26 S. E. 415.

In this instance the bill does not charge physical injury or damage to the substance of the plaintiff's property, nor any physical obstruction or interference by the defendant in the prosecution of the work. Consequently these preliminary acts cannot per se inflict irreparable damage, and are but means to an end, which constitutes the gravamen of the complaint, namely, that the defendant intends to institute condemnation proceed-

ings against a part of plaintiff's right of way, which, it is said, will impose a cloud on the title to the property from which irreparable damage will result. So that, in its last analysis, the question presented by the bill for decision is whether a court of equity ought, upon the case made, to enjoin the defendant from instituting and prosecuting the contemplated condemnation proceedings, and that depends upon whether such proceedings afford a plain, adequate, and complete remedy for the wrongs sought to be redressed.

The well-established jurisdiction of courts of equity to remove clouds from the title of the true owner of property by canceling an outstanding claim or incumbrance, which, if valid and subsisting, would affect or impair the title, has no application to the facts of this case. The proceeding is really one to prevent the imposition of an alleged cloud upon plaintiff's title, rather than to remove an existing cloud. In that class of cases, the rule is that the bill must show affirmatively the cloud, or the threatened acts which will impose it, and also the inadequacy of the remedy at law; for, where the remedy at law is adequate, a court of equity will not interfere. 17 Encyc. Pl. & Pr. 343; Otey v. Stuart, 91 Va. 714, 716, 22 S. E. 513; Va. Coal & I. Co. v. Kelly, 93 Va. 332, 339, 24 S. E. 1020; Sulphur Mines Co. v. Boswell, 94 Va. 480, 484, 27 S. E. 24.

In condemnation proceedings, the rights of the owner of property sought to be condemned are amply safeguarded by statute.

With respect to procedure, it is said:

"Although the tribunal which hears and determines the questions in condemnation proceedings has a special jurisdiction, and the proceedings are summary in their nature, yet the conduct of the proceedings is governed by the ordinary rules of law which obtain in the trial of civil cases, with such modifications as are required by the peculiar nature of the questions to be determined. The hearing should be commenced at the time designated in the notice; and, if tried on a wrong theory, it is reversible error. The right to institute condemnation proceedings may properly be determined on a motion to dismiss the same.

"As to the province of the court and jury, respectively, in condemnation proceedings, the ordinary rule in civil cases applies; questions of law being for the court, and those of fact for the jury or commissioners. It is for the court to determine the preliminary question of the right to condemn the land, or whether the use is a public one; while it is for the jury to determine the measure of compensation, or whether the use is temporary or permanent, and all questions of value and benefit." 15 Cyc. 863 et seq.

In Chesapeake, etc., R. Co. v. Washington, etc., R. Co., 99 Va. 715, 40 S. E. 20, this court says: "It is not denied that, under some circumstances, unless expressly prohibited, one railroad company may condemn the land of another for its purposes; but it is denied that such circumstances existed in this case. It may be that this is true, but that was one of the questions involved in the condemnation proceedings." Again, at page 723 of 99 Va., and page 22 of 40 S. E.: "The statute does not specifically provide what issues may be raised upon the motion to condemn, but it is unreasonable to say that the defendant must be notified when the motion to condemn his land will be made, and yet, when he appears, he cannot be heard to show that the plaintiff has no corporate existence, or that it has no authority to condemn the particular property for its use, or that it can only condemn upon certain conditions which have not been complied with, or under circumstances which do not exist. The policy of the law is to have all matters arising out of one controversy settled in a single suit; and this ought to be so, especially in a proceeding the effect of which is to take the defendant's land against his will and invest the plaintiff with the fee-simple title to it. If this be not the case, railroad companies would have no assurance that the steps taken by them to procure rights of way or property wanted for their purposes would conclude any one, and they would be constantly subject to vexatious litigation. This view is not only in accordance with the better reason, but is sustained by the weight of authority. See 2 Mills on Em. Dom. (2d Ed.) §§ 388, 389, 391; B. & O. R. Co. v. P. W. & Ky. R. Co., 17 W. Va. 844; St. Joseph R. Co. v. Hannibal, etc., R. Co. (Mo.) 6 S. W. 691; Secombe v. Railroad Co., 23 Wall. 109, 119, 23 L. Ed. 67; 1 Redf. on Railways (5th Ed.) 271."

It is obvious that every question raised by the bill touching the right of the defendant to condemn any part of the land in controversy can be determined in the condemnation proceedings; and, the plaintiff having an adequate remedy at law, it follows, upon the principles adverted to, that a bill for injunction does not lie. Lewis on Em. Dom. (2d Ed.) § 646; 15 Cyc. 987; High on Injunctions, §§ 644, 645; 1 Beach on Injunctions, § 581; Waterloo Water Co. v. Hoxie (Iowa) 56 N. W. 499.

The exceptions and qualifications to the rule, which find expression in the opinions of courts and text-writers, leave unimpaired the established general doctrine, prevailing in this jurisdiction, that courts of equity will not interpose by injunction, where there is a plain, adequate, and complete remedy at law.

It was sought to bring the case within the influence of that line of authorities which hold that an injunction will lie to prevent entry on property or the construction of works before complying with the law, or without authority of law, by insisting that the defendant had not obtained

previous permission from the state corporation commission to condemn the property, as required by section 1105e, cl. 52, p. 576, Va. Code 1904. But a noncompliance with that section is not charged in the bill, and the effect of the provision cannot therefore be considered.

There is no error in the decree appealed from, and it is affirmed.

(104 Va. 464)

MIDDLE STATES LOAN, BUILDING & CONSTRUCTION CO. v. MILLER'S ADM'R.

(Supreme Court of Appeals of Virginia. Sept. 21, 1905.)

1. BUILDING AND LOAN ASSOCIATIONS—LOANS—WHAT LAW GOVERNS.

Where a Maryland building and loan association loaned money to a citizen of Virginia, secured by bond and mortgage on Virginia real estate, the contract was a Maryland contract and is governed by the laws of that state as to its validity and construction.

2. SAME—LOANS—USURY.

Where a building and loan contract only required the borrowing member to pay 6 per cent. interest on the money during the continuance of the loan and the taxes and insurance premiums on the property conveyed to secure the repayment of the loan, in addition to what he undertook to pay when he became a member of the company and was bound to pay to mature his stock, the contract was not tainted with usury.

3. SAME—SETTLEMENT.

On the death of a borrowing member of a building and loan association, the latter's claim against his estate should be ascertained by charging the estate with the amount of the loan as of its date and 6 per cent. interest, and crediting all sums paid thereon as of the date of the payments, whether of principal or interest, and thus ascertain the balance due on the loan at the time of the member's death, and then credit on such balance the withdrawal value of the member's shares at the time of his death according to the by-laws of the company then in force, and charge the estate with the amount so ascertained to be due, with interest from the date of the member's death, together with the fines assessed to him during his life and remaining unpaid and the taxes paid by the association on the property, with interest thereon from the date of the payment until paid.

Appeal from Circuit Court, Rockingham County.

Proceedings by J. Henry Miller, as administrator of J. G. H. Miller, deceased, for the settlement of his estate. From an order allowing the claim of the Middle States Loan, Building & Construction Company for a part only of the amount demanded, it appeals. Reversed.

Conrad & Conrad, for appellant. Sipe & Harris, for appellee.

BUCHANAN, J. In June, 1891, J. G. H. Miller, of Rockingham county, became a member of the Middle States Loan, Building & Construction Company, of Hagerstown, Md. In October of that year he borrowed from the company $3,000, a sum equal to one-half the face value of the 60 shares of stock for which he was then a subscriber. At the time the loan was made he and his surety executed a bond in the following words:

"Know all men by these presents, that we, J. G. H. Miller and S. P. H. Miller, of Rockingham county and state of Virginia, are indebted unto the Middle States Loan & Construction Company, of Hagerstown, Maryland, in the sum of three thousand dollars, being the amount of a loan this day received by J. G. H. Miller from said company, with interest thereon from this date, payable monthly.

"Now the condition of the above obligation is such that if J. G. H. Miller and S. P. H. Miller, or either of them, shall pay the interest monthly on said sum of three thousand dollars received by J. G. H. Miller as aforesaid, and shall make the monthly payments monthly on sixty shares of stock of said company subscribed for by J. G. H. Miller in said company, and any and all fines assessed against J. G. H. Miller's sixty said shares of stock, and shall likewise pay, when due, the taxes against the property conveyed by deed of trust to secure the payment of said loan of $3,000.00, and the premiums necessary to keep the buildings on said property insured from loss by fire, in such sum as the said company may require (not exceeding $———), until the said stock subscribed by J. G. H. Miller as aforesaid becomes fully paid in and of the value of one hundred dollars per share, then it is understood that upon the surrender of said stock to said company this obligation shall be deemed fully paid and canceled. But if J. G. H. Miller or S. P. H. Miller fails to pay when due and payable the said taxes and insurance premiums, or make default in the payment of said monthly interest, fines, and monthly payments on said stock for a period of six months after the same are or any installment thereof is due, then, at the option of said company, the whole indebtedness evidenced by this obligation (including any taxes and insurance premiums due or paid by said company) shall at once become and be due and collectible.

"Witness our hands and seals this 6th day of October, 1891."

To secure the payment of this bond, Miller executed a deed of trust on certain real estate. He made payments from time to time on the dues payable on his stock, on fines assessed against him, and upon the interest and principal of the loan. On June 9, 1899, he died. Within a short time after his death his personal representative instituted a suit to have his estate administered under the direction of the court. In that case the company asserted its bond against Miller's estate, claiming that there was due it, after all proper credits had been allowed, the sum of $2,602.59, as of August 21, 1899.

After several references, the commissioner to whom the matter was referred reported the amount due the company to be $596.40 as of April 2, 1904, of which sum $415.15 was principal. This report was confirmed by the court. From that decree the company applied for and obtained this appeal.

Several errors are assigned, but they only involve two questions—one, whether the court erred in holding that the contract was a Maryland contract and was governed by the laws of that state; and the other, whether the court erred in ascertaining the true balance due the company from Miller's estate.

Under the decisions of this court in the cases of Building Asso. v. Ashworth, 91 Va. 706, 22 S. E. 521, Nickels v. People's Asso., 93 Va. 380, 25 S. E. 8, and Ware v. Bankers', etc., Co., 95 Va. 680, 29 S. E. 744, 64 Am. St. Rep. 826, upon the facts of this case, it is clear that the contract in question must be treated as a Maryland contract and be governed by the laws of that state as to its validity, interpretation, and effect, and that the circuit court did not err in so holding.

Treating the contract as a Maryland contract, was the method adopted in the circuit court for ascertaining the balance due the appellant company correct?

While the laws of the state of Maryland, which are to guide this court in passing upon the contract in question, have not been proved in the usual manner, counsel on both sides cite us to and rely upon decisions of the Supreme Court of the state of Maryland as furnishing the law by which the validity and effect of the contract is to be determined, and this seems to have been the course pursued in the circuit court.

The commissioner who made the final report upon the appellant company's claim, which was confirmed by the circuit court, was of opinion that under the decision of the Supreme Court of Maryland in the case of White v. Williams, reported in 45 Atl. 1001, the contract under consideration was usurious, and, treating it as such, ascertained the balance due the appellant company in accordance with the rule adopted in that case as he construed that decision.

There is a marked difference between the contract construed in that case and the contract under consideration. By the terms of the former, the borrowing member was not only required to pay to his company, the Baltimore Building & Loan Association, the monthly dues as they accrued on his stock and such fines and penalties as might be assessed against him under the by-laws of the association, and 6 per cent. interest on the money borrowed by or advanced to him, but he was also required to pay, during the continuance of the loan, a premium of $7.50 monthly. This charge of $7.50 per month, in addition to the charge of legal interest on the money advanced, it was held, could not be sustained as premium, and that it was 'simply something to be paid for the advance or loan of money in excess of legal interest, which is usury."

The contract involved in this case only requires the borrowing member to pay 6 per cent. interest on the money borrowed by him during the continuance of the loan, and the taxes and insurance premiums on the property conveyed to secure the repayment of the loan, in addition to what he undertook to pay when he became a member of the company, and which he was bound to pay to mature his stock, although he never became a borrowing member. Such a contract is not usurious under the laws of the state of Maryland, as we understand the decision of the Supreme Court of Maryland in the case of Middle States Loan, Building & Construction Co. (the appellant) v. Hagerstown Matress, etc., Co., reported in 33 Atl. 886–889, in which it construed a contract of the same building association containing substantially, if not identically, the same provisions as the contract construed in this case, so far as they affect the question now under consideration.

The borrower in that case desired to take advantage of the provisions of section 5, art. 6, of the by-laws of the association, which gave him the right to repay the loan at any time after giving 30 days' notice. The notice was given; but, a controversy having arisen as to the amount necessary for the repayment of the loan, he instituted suit to have that question determined. In ascertaining what amount was still due from the borrower, the court said: "A borrower can never, in this state, be required to pay in satisfaction of an ordinary loan more than the principal and 6 per cent. interest per annum thereon. Therefore, if this amount should be paid by the mortgagor in this case, the debt would be discharged. But the mortgagor is not only a debtor, but is also a stockholder in the building company, and after the payment of the debt it would still be a stockholder, and would still have all the rights and be liable to all the obligations attached to the ownership of stock. By the by-laws it would have the right to withdraw its stock according to certain terms, which will be hereafter explained. Although not stated in so many words, it is evident that it is the purpose of the mortgagor to settle and conclude all its business with the mortgagee and to dissolve all connection between them. It is proper to settle in this suit all questions between the parties growing out of their dealings with each other on the subject of this loan. We must, therefore, determine what amount the mortgagor is bound to pay to the mortgagee, and what amount he is entitled to receive on the withdrawal value of its shares." After discussing certain provisions of the by-laws for ascertaining the withdrawal value of stock, the court reached the conclusion that "the mortgagor must be charged with the loan of $5,000, with interest thereon down to the filing of the bill of complaint; and it is to be credited with its payments into the loan fund,

to wit, 50 cents a month on each of its shares, with interest on each payment from the time it was made down to the institution of this suit. For the amount thus ascertained to be due, the mortgagee is entitled to a decree, with interest thereon until paid."

While the borrowing member in that case was a corporation and a going concern, and voluntarily offered to repay the money borrowed, and in this case the borrowing member is dead, his personal representative is entitled to all the advantages the decedent would have had upon a voluntary withdrawal or upon his paying back in advance of the stipulated time the money loaned him. Endlich on Bldg. Asso. (2d Ed.) §§ 57, 148; Hensel v. International, etc., Co. (Tex. Sup.) 20 S. W. 116.

We are of opinion, therefore, that the proper method of ascertaining the balance due from Miller's estate on the claim asserted against it by the appellant company is to charge Miller's estate with the amount of the loan as of the 6th day of October, 1891, and 6 per cent. interest, and to credit his estate with all sums paid on the loan as of the date of such payments, whether of principal or interest, and thus ascertain the balance due on the loan at the time of Miller's death; then to credit upon that sum the withdrawal value of Miller's shares of stock at the time of his death, ascertained in accordance with the by-laws of the company in force at the time of his death for determining the withdrawal value of the stock of a borrowing member who pays back in advance of the maturity of his stock the money loaned him. For the amount thus ascertained to be due on the loan, with interest thereon from the time of Miller's death until paid, the fines assessed against him during his lifetime remaining unpaid, and the taxes paid by the appellant on the trust property, with interest thereon from the date of payment until paid, the appellant will be entitled to a decree.

The decree appealed from must be reversed, and the cause remanded for further proceedings, to be had in accordance with the views expressed in this opinion.

(104 Va. 455)

SCOTT et al. v. PATTERSON'S ADM'R et al.

(Supreme Court of Appeals of Virginia. Sept. 21, 1905.)

WILLS — ESTATE DEVISED — REMAINDER IN FEE.

Testator bequeathed his entire estate to his wife, to be hers for her use and that of their children named, or such of them as remained on the property during the wife's lifetime, and provided that after the wife's death the entire estate should pass into the hands of such children, or such of them as remained on the property for the period of 25 years, unless they elected to divide it sooner, and after the expiration of such period, or at the time the children elected to divide, then the whole estate should be equally divided between them. *Held*, that the children took an ultimate fee in remainder after the death of their mother, and that their interests were liable for their debts.

Appeal from Circuit Court, Augusta County.

Bill by W. B. Scott and others against W. B. Patterson and others. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

Curry & Glenn, for appellants. Kerr & Kerr, for appellees.

KEITH, P. So much of the case presented by the record as is necessary for us to consider is as follows: Certain creditors of W. B. Scott and Emma Scott filed their bill in the circuit court of Augusta county to subject their interests in certain real estate derived from their father, Robert Scott, to the payment of their debts. In the progress of the cause it was found that certain other persons, sisters of W. B. Scott and Emma Scott, among them Sallie Scott, were interested in the litigation, and they were made parties. It appears that Robert Scott by his will bequeathed his entire estate, both real and personal, to his wife, Hester V. Scott, "to be hers for her use, and that of our children, viz., Sallie Scott, Harriet Ann Scott, Martha Emma Scott, William B. Scott, and Estaline Scott, or such of them as remain on my property during my wife's lifetime, without appraisement or sale. Secondly. After the death of my wife, I direct that my entire estate, both personal and real, without sale or appraisement, pass into the hands of the above-named children, or such of them as remain on my property for the period of twenty-five years, unless they elect to divide sooner; then after the expiration of twenty-five years, or at the time my children elect to divide, should they so elect, then I direct that my entire estate, both real and personal, be equally divided between all my children."

The circuit court, after ascertaining through a commissioner the amount of debts and liens and the order of their priority, decreed that the interests of William B. Scott, Emma Scott, and Sallie Scott be sold, and the proceeds applied to the satisfaction of the debts proved against them, and from that decree an appeal was allowed.

The widow of Robert Scott, the testator, is dead, and the contention upon the part of appellants is that the second clause of the will, by which after the death of his wife the testator directs that his entire estate, both real and personal, shall without sale or appraisement pass into the hands of his children, or such of them as remain on his property for the period of 25 years, unless they elect to divide sooner, is an executory limitation for the benefit of the children, or such of them as elect to remain upon the land after the death of his widow, and can-

not be subjected by the creditors of any one of them.

On behalf of appellees it is insisted that, if the second clause of the will be an executory devise, it is void as creating a perpetuity, because the rule against perpetuities requires that the estate must vest within the life or lives in being and 21 years and 10 months thereafter, whereas in this case the 25 years might by possibility extend beyond the life or lives in being and 21 years and 10 months thereafter; that the will creates a life estate in the wife and a vested remainder in her children; and that the interest with which the testator undertook to clothe his children for a term of years after the death of his wife merged in the remainder and created a fee simple—in other words, the remainder swallowed the term of years.

We do not propose to enter that field of unending discussion and controversy to which we are invited. We shall not vex ourselves with the niceties of executory devises and contingent and vested remainders, but shall content ourselves with deciding what seems to be a very obvious proposition—that the will invested the children with an ultimate fee simple in the property in remainder after the death of their mother, that an inseparable incident of such an estate is liability for debts, and we can sanction no construction of the provision with respect to the interests of the children, or any of them, in this property for the period of 25 years, the effect of which would be to exonerate it from this obligation. Hutchinson v. Maxwell, 100 Va. 169, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944.

It will be observed that the will nowhere in express terms undertakes to place this property beyond the reach of the creditors of the devisees. It is asserted that such was the intention of the testator in providing that it should pass into the hands of his children, or such of them as remained on the property for the period of 25 years, unless they elected to divide the same; but, if such were the intent of the testator, it cannot be carried into effect.

We are of opinion that the decree of the circuit court should be affirmed.

(104 Va. 295)

SPENCER et al. v. FLANARY.

(Supreme Court of Appeals of Virginia. Sept. 14, 1905.)

1. EXECUTORS AND ADMINISTRATORS—CLAIMS—ACTIONS—LIMITATIONS.

Va. Code 1904, p. 1540, § 2920, provides that the right of action against the estate of any person which shall have accrued at his death shall not continue longer than five years from the qualification of his personal representative. Section 3577, p. 1910, provides that a scire facias or action on a judgment, when brought against the personal representative of a decedent, shall be brought within 5 years from the qualification of the representative. *Held*, that a suit to enforce a judgment against a decedent, brought 11 years after the qualification of his representative, was barred, where in the meantime the judgment had not been revived or any other action taken thereon.

2. SAME—LIEN.

Va. Code 1904, p. 1923, § 3601, creates a lien on the estate of a debtor not capable of being levied on. Section 3602, p. 1925, provides that the lien shall cease when the right of the judgment creditor to enforce the judgment by execution, scire facias, or action ceases. *Held*, that the lien could not be enforced by suit against the personal representative brought 11 years after his qualification; sections 2920, 3577, pp. 1540, 1910, barring the right of scire facias or action at the end of 5 years after the qualification of the representative.

Appeal from Circuit Court, Lee County.

Bill by Mat Spencer and another against C. F. Flanary, administrator of Chadwell Brittain, deceased, to enforce a judgment against the deceased. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Orr & Noel, for appellants. Duncan & Cridlin, for appellee.

HARRISON, J. The judgment sought to be collected in this proceeding was rendered March 30, 1877, against Chadwell Brittain. Two executions were issued thereon, and each of them was returned "No property found"; the date of the last execution being April 30, 1886, and returnable to the following July rules. In 1893 the judgment debtor, Chadwell Brittain, died, and in November of that year his estate was committed to C. E. Flanary for administration.

Brittain had begun in his lifetime the prosecution of a claim against the United States government for property taken by the Federal army during the late war between the states. The prosecution of this claim terminated successfully in March, 1905, and the bill in this case was filed to the April rules, 1905, seeking to enforce the judgment and execution against Brittain as a preferred lien upon the claim which had been allowed by Congress, the proceeds of which were then in the hands of his administrator.

No revival of this judgment, either by scire facias or action, was ever had against the administrator of Chadwell Brittain.

A demurrer was filed to the bill, and a plea of the statute of limitations interposed by the administrator. The circuit court rested its decision upon the defense of the statute of limitations and dismissed the bill.

There can be little doubt of the correctness of this conclusion, when the law, as we understand it, is applied to the facts stated. There are two sections of the Code which bear upon and provide periods of limitation to actions against personal representatives. The first is section 2920 (Va. Code 1904, p. 1540), which is the general statute of limitations of all personal actions, except a judgment or recognizance; and after enumerating the several periods of limitation of such actions the section concludes:

"Provided, that the right of action against the estate of any person hereafter dying, on

any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued." See Kesterson v. Hill, 101 Va. 739, 45 S. E. 288.

The other section to which we have reference, providing a period of limitation to actions against personal representatives, is 3577, p. 1910, of the Code of 1904. As already seen, section 2920 does not provide a period of limitations in the case of judgments; but the law governing and directly applicable to such cases is found in section 3577, which is no less explicit with respect to judgments than are the provisions of section 2920 with respect to other claims.

Section 3577 provides as follows: "On a judgment, execution may be issued within a year, and a scire facias or an action may be brought within ten years after the date of the judgment; and where execution issues within the year, other executions may be issued, or a scire facias or an action may be brought within ten years from the return day of an execution on which there is no return by an officer, or within twenty years from the return day of an execution on which there is such return; except that when the scire facias or action is against the personal representative of a decedent, it shall be brought within five years from the qualification of such representative."

The language of this statute is too clear to call for interpretation or construction. The provision is express and emphatic that, where the scire facias or action on a judgment is against the personal representative of a decedent, the proceeding must be taken within 5 years from the qualification of such personal representative. More than 11 years elapsed after the qualification of Chadwell Brittain's administrator before the present suit to enforce the judgment was instituted, and in the meantime the judgment had not been revived or any other action taken thereon.

At common law there was no limitation upon the right to enforce a judgment; but the statute, in effect as it now stands, has been in force for many years. The only practical difference between the law as it stood in the first Revised Code of 1819 and the statute now in force is that, in addition to the limitation imposed by the former, which went only to judgments where execution had not issued, the present statute imposes a limitation as to the writ of scire facias or action, although execution has issued. 1 Rev. Code 1819, c. 128, §§ 5, 17; Code 1887, § 3577 [Va. Code 1904, p. 1910].

As early as the year 1823 the present contention was made before this court, and it was held, under practically the same statute, that "a judgment obtained against a testator in his lifetime, and not revived against his personal representative after his death within five years from the time of his qualification, is barred by the statute of limitations."

This decision has stood without challenge for more than 80 years, and, if authority were needed, it would be all that was necessary in support of the proposition that the judgment asserted in this case is barred by the statute of limitations. Peyton's Adm'r v. Carr's Ex'r, 1 Rand. 436; Barton's Law Pr. vol. 1, p. 104.

It is contended that by virtue of section 3601, p. 1923, of the Code, a lien was created upon the claim of Chadwell Brittain against the government, which the appellant has the right to enforce.

Without passing upon the question whether or not a lien was created upon a mere claim for property taken by the Federal army during the war, but conceding, for the sake of argument, that such a lien was created, like all other liens it was capable of being lost, and in this instance was lost by reason of the failure to revive or take other action upon the judgment against the administrator within five years from his qualification.

The next section (section 3602, p. 1925) to that relied on furnishes a complete answer to this contention. It provides that the lien acquired under section 3601 "shall cease whenever the right of the judgment creditor to enforce the judgment by execution, scire facias or action ceases," showing a care on the part of the Legislature not to impinge upon the limitations it had placed upon actions against personal representatives. The right to enforce the judgment by execution ceased at the death of Chadwell Brittain. The right of scire facias or action ceased at the end of five years after the qualification of his administrator.

It is true there is a line of cases, following Taylor v. Spindle, 2 Grat. 44, which hold that it is not necessary to revive a judgment before filing a bill in chancery to enforce the lien of such judgment upon real estate; but these cases have no bearing upon the question of whether the judgment is barred. That is determined by the application of the statute, whenever any proceeding is taken to enforce it.

Whatever may have been the life of a judgment, had the debtor lived, before it was barred by the statute of limitations, it cannot be enforced after his death, unless the proceedings contemplated by the statute are taken against his personal representative within five years from the date of the qualification of such representative. The Legislature manifestly had in view, not only the protection of the estates of deceased persons against stale demands, but also a wise purpose to facilitate the settling and winding up of such estates within a reasonable time. The wisdom of such laws is ap-

parent, and, if we had the power, we would have no disposition to circumscribe their scope or impair in any degree their operation.

For these reasons, the decree appealed from must be affirmed.

(139 N. C. 273)

BYRD v. SOUTHERN EXPRESS CO.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. NEGLIGENCE—PROXIMATE CAUSE — NECESSITY OF ESTABLISHMENT.

The fact that defendant has been guilty of negligence, and that such negligence has been followed by an injury, does not render defendant liable for such injury, unless the connection of cause and effect is established and defendant's negligent act is shown to have been the proximate cause of the injury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 69.]

2. SAME—BURDEN OF PROOF.

Plaintiff, in an action for death by wrongful act, has the burden of showing that defendant's negligence proximately caused the death of plaintiff's intestate.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 228.]

3. SAME—CHARACTER OF PROOF REQUIRED.

Proof that defendant's negligence proximately caused the injury complained of must be of such a character as to reasonably warrant an inference of that fact, and it is not enough that it be merely sufficient to raise a surmise or conjecture as to its existence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 273.]

4. SAME—EVIDENCE—SUFFICIENCY.

In an action against an express company for negligently delaying the delivery of medicine intrusted to it for plaintiff's intestate, evidence *held* insufficient to show that defendant's negligence was the proximate cause of the death of plaintiff's intestate.

5. DEATH — ACTIONS — DAMAGES RECOVERABLE.

Under Code, § 1498, providing that whenever the death of a person is caused by a wrongful act of another, such as would have entitled the decedent to an action for damages had he lived, the person causing the death shall be liable to an action for damages by the administrator to the decedent, a father, who sues as his son's administrator to recover for the death of his son, is not entitled to recover damages for mental anguish, nor for the loss of the services of his son.

[Ed. Note.—For cases in point see vol. 15, Cent. Dig. Death, §§ 115, 118.]

Appeal from Superior Court, Cumberland County; Ferguson, Judge.

Action by Rufus Byrd, administrator, etc., against the Southern Express Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Plaintiff sued to recover damages for the death of his intestate, alleged to have been caused by the negligence of the defendant. The intestate, plaintiff's son, about 18 years old, was ill with typhoid fever at Wade, N. C., on September 11, 1903. His physician, early in the day, gave a prescription for him to a druggist at Fayetteville, who prepared the medicine and handed the package containing it to the agent of defendant company at that place, to be sent to Wade, a station on the railroad about 12 miles north of Fayetteville, where the plaintiff, with his family, resided. The package was received by defendant's agent about 55 minutes before the train was due to leave for Wade, and the agent was told that it was important to ship at once, as it contained medicine for a man who was sick. It was not forwarded that day, and plaintiff did not receive it until he came to Fayetteville the next morning and got it from the defendant. There was testimony, not necessary to be stated, which clearly shows that no contributory negligence was imputable to the plaintiff in not going to Fayetteville sooner than he did. The attending physician testified, in answer to a question as to the effect the delay in receiving the medicine had upon the patient, that the loss of time would necessarily cause a break "in the chain of treatment," and would in his opinion lessen the chances of recovery; that he had an aggravated form of typhoid fever, and in such case it is required that the patient should have his medicine as regularly as possible. When asked whether, if the medicine had been received in time and taken according to his directions, it would probably have effected a cure or saved his patient's life, he answered that the prognosis in all aggravated cases of typhoid fever is very grave, and he believed that, had there been no interruption in the course of treatment, the chances of recovery would have been better, and that was as far as he could go. He was then asked if, in the condition of the boy at the time, it was necessary for his recovery that the medicine he prescribed should be taken at noon on the 11th day of September, and he answered as follows: "I would say that was the hope. The medicine was needful and necessary." A motion by the defendant for a nonsuit was sustained. Plaintiff excepted and appealed.

Thos. H. Sutton, for appellant. Rose & Rose and Robinson & Shaw, for appellee.

WALKER, J. (after stating the case). If it is conceded that there was negligence on the part of defendant, we do not think there was sufficient evidence to be submitted to the jury that it caused the death of the plaintiff's intestate. There must always, in actions of this kind, be a causal connection between the alleged act of negligence and the injury which is supposed to have resulted therefrom. The breach of duty must be the cause of the damage. The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established; and the negligent act of the defendant must not only be the cause, but the proximate

cause, of the injury. Shear. & Redf. on Negligence (4th Ed.) §§ 25, 26. The burden was therefore upon the plaintiff to show that defendant's alleged negligence proximately caused his intestate's death, and the proof should have been of such a character as reasonably to warrant the inference of the fact required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact.

In State v. Vinson, 63 N. C. 335, this court thus states the rule: "We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." And in Brown v. Kinsey, 81 N. C. 245, it is said: "The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than material for a mere conjecture, the court will not leave the issue to be passed on by the jury." In the later case of Young v. Railroad, 116 N. C. 932, 21 S. E. 177, the court says: "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." Cobb v. Fogalman, 23 N. C. 440; Wittowsky v. Wasson, 71 N. C. 451; Sutton v. Maddre, 47 N. C. 320; Pettiford v. Mayo, 117 N. C. 27, 23 S. E. 252; Lewis v. Steamship Co., 132 N. C. 904, 44 S. E. 666. In the last-cited case, the subject is fully discussed by Connor, J., and the cases collected. It all comes to this: that there must be legal evidence of the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further, and offer at least some evidence which reasonably tends to prove every fact essential to his success.

This has not been done in the case now before us. The right of recovery turns upon the testimony of the physician. He nowhere says that, if the medicine had been administered at the time fixed in his directions, the child would have recovered, or that in his opinion its recovery was even probable. It is evident that the doctor was unwilling to hazard such an opinion, and well might he have refrained from venturing so far. It must be admitted that he prescribed what he thought was best for the child, and directed it to be taken as soon as possible, in the hope of arresting the rapidly increasing ravages of this terrible disease, which was fast sapping the life of his patient; but it was hardly within the range of his knowledge to tell afterwards, with any degree of certainty, what the result would have been if his directions had been strictly followed. Under the circumstances of this case, it would be barely more than a guess; there being no certain data or process of reasoning upon which he could rely for an intelligent opinion. At any rate, the doctor was cautious enough to reduce to the narrowest limit the scope of his answer to the plaintiff's question as to the probable result of a compliance with his directions, when he said "that the chances of recovery would have been better; that is as far as I can go." But this falls very short of tending to prove that the failure to receive the medicine caused the intestate's death. The witness does not say the boy would have recovered, nor that, if the chances of recovery had been increased by taking the medicine at the appointed time, they would still be in his favor or against him. The condition of the patient might have been somewhat improved, and yet the chances of recovery still have been decidedly against him, or the prospect of ultimate recovery hopeless. Nor do we think that this uncertain and most unsatisfactory proof was aided in the least by what was afterwards said by the witness. He plainly did not intend to go beyond what he had already said. All that can be legitimately inferred from his last answer is that he entertained a hope that the medicine would stay the progress of the malady, and that he deemed it necessary for the boy to take the medicine at the time indicated in his instructions to the father. But it could hardly be said that this evidence was of the kind required by the law as a sufficient and reliable basis for a verdict. It would not be at all safe to form a conclusion on such proof, as the jury must not guess, but decide. They must use, not their imagination, but their reason; and there is no room here for anything more certain than rank conjecture.

The plaintiff brings this action, as administrator of his son, to recover the value of his life under the statute (Code, § 1498); and, of course, he is not entitled to any damages for mental anguish in this form of action, nor for the loss of the services of his child. Such damages can be assessed only in an action brought in his own name, if at all. We think his honor was right in dismissing the action.

No error.

(139 N. C. 160)

HAWKINS v. GOLDSBORO LUMBER CO.

(Supreme Court of North Carolina. Sept. 26, 1905.)

LOGS AND LOGGING — DEEDS OF STANDING TIMBER—TIME FOR CUTTING.

An instrument granting, selling, and conveying to the grantee, his heirs and assigns, the timber of and above a certain size when the same is cut, now standing or which may be standing on certain land during the period of 15 years from and after the time when the parties of the second part shall begin to cut and remove it, "and the time in which to begin to cut and remove said timber shall be and is

limited," the parties of the second part being granted and assured the full term of 15 years as above set forth within which to cut and remove said timber, is a deed conveying a present estate of absolute ownership in the timber, defeasible as to all timber not removed within the time limited; the grantees having a reasonable time in which to commence cutting, and having at least the full term of 15 years in which to remove the timber, as the stipulation that the time in which to begin to cut is not limited should be rejected as indefinite and repugnant to what precedes, and because contrary to the intent and purpose of the parties as indicated by the entire instrument.

Appeal from Superior Court, Jones County; Webb, Judge.

Action by John L. Hawkins against the Goldsboro Lumber Company. From an order continuing an injunction, defendant appeals. Reversed.

Civil action to enjoin defendant from cutting timber on land claimed by plaintiff. The defendant seeks to justify under a deed from plaintiff, J. L. Hawkins, to J. W. Smith and John P. Moore, dated February 25, 1893; and, second, a deed from Smith and Moore to W. A. Winsatt, and a license from Winsatt to defendant. The judge below heard the evidence, and found the facts to be, first, that the instrument of writing under which defendant claims title to the timber in controversy was executed on February 25, 1893; second, that defendant did not begin to cut the timber until March 29, 1905—and thereupon declared the following conclusions of law: "Upon this finding the court is of opinion as a matter of law that the said instrument of writing, under which the defendant claims his right to cut the timber, is void for uncertainty, and for the further reason that the defendant and those under whom it claims failed to begin to cut the timber in dispute within a reasonable time from the date of the execution of the deed, February 25, 1893, and adjudged that the restraining order theretofore issued be continued to the hearing." Defendant excepted and appealed.

A. D. Ward and T. C. Wooten, for appellant. D. L. Ward, for appellee.

HOKE, J. (after stating the case). The rights of the parties to this controversy were made to depend on the true construction of the deed from plaintiff to Smith and Moore, dated February 25, 1892, and the fact that no cutting was commenced until March 29, 1905. The effective words of the instrument as to the interest conveyed are as follows: "Do give, grant, bargain, sell, and convey unto the said parties of the second part, their heirs, executors, administrators, and assigns, all the timber of every kind and description of and above the size of 12 inches in diameter at the base, two feet above the ground, when the same is cut, now standing or growing or which may be standing or on the herein-described land during the period of 15 years from and after the time when said parties of the second part, their heirs, executors, administrators, and assigns, shall begin to cut and remove said timber and commence to manufacture the same into wood or lumber, and the time in which to begin to cut and remove said timber shall be and is not limited. To have and to hold said timber as specified and described, together with all the privileges and rights of way hereinafter granted unto the said parties of the second part, their heirs, executors, administrators, and assigns. And the parties of the first part hereby grant and assure unto the parties of the second part, their heirs, executors, administrators, and assigns, the full term of 15 years as above set forth within which to cut and remove the timber herein conveyed, with the exclusive privilege of entering upon said land with servants and tenants for the purpose of removing the same."

It is an established principle in this state that growing timber is a part of the realty, and deeds and contracts concerning it are governed by the laws applicable to that kind of property. Mizell v. Burnett, 49 N. C. 249, 69 Am. Dec. 744; Moring v. Ward, 50 N. C. 272; Mizzell v. Ruffin, 118 N. C. 69, 23 S. E. 927. The true construction of this instrument now before the court is that the same conveys a present estate of absolute ownership in the timber, defeasible as to all timber not removed within the time required by the terms of the deed. White v. Foster, 102 Mass. 375, 378; Moring v. Ward, 50 N. C. 273; Bunch v. Lumber Co., 134 N. C. 116, 46 S. E. 24. A construction substantially similar has been placed on such deeds in the large timber-growing states, where contracts of this character are not infrequent. Strasson v. Montgomery, 32 Wis. 52; Williams v. Flood, 63 Mich. 487, 30 N. W. 93; Macomber v. Railroad, 108 Mich. 491, 66 N. W. 376, 32 L. R. A. 102, 62 Am. St. Rep. 713. In Williams v. Flood, supra, Campbell, C. J., delivering the opinion, says: "It is not very important to discuss the exact nature of the plaintiff's rights under the written contract. Whatever they were, they included an absolute sale of all the timber described, subject only to such qualifications of the right of removal as the contract mentions. At most, this condition would only operate by way of forfeiture. The timber had all been paid for, and all belonged to the plaintiff, unless lost by forfeiture for nonremoval." In Macomber's Case, supra, it is said that "the title to the timber remaining uncut at the expiration of the time limited reverts to the owner." And Walker, J., in Bunch's Case, supra, says that "at the expiration of that time the estate in so much of the timber as had not been cut and removed would revert to the vendor, or at least the timber would become his absolute property."

In the deed now before the court, the time fixed for the forfeiture is thus set forth: "All the timber now standing or which may be standing on said lands during the period of 15 years from and after the time when said

parties of the second part, their heirs or assigns, shall begin to cut and remove said timber, and the time in which to begin to cut and remove said timber is not limited." A proper construction of the first part of this clause, as intimated in Bunch's Case, supra, would fix the date of forfeiture at 15 years from the time of commencing to cut, allowing a reasonable time to begin such cutting, and granting, in any event, the full term of 15 years from the execution of the deed. By the last part of the clause the time allowed for removal is indefinite and unlimited. In the opinion of the court this latter part of the stipulation as to time should be rejected, because it is indefinite and repugnant to the first, and, again, because it is contrary to the intent and purpose of the parties as indicated by the entire instrument. In Devlin on Deeds, § 838, it is said that "the whole object is to construe the deed so as to give effect to it, if possible, as a conveyance, and clauses which are repugnant to the general intent of the deed must be declared void"; citing to same effect Wilcoxson v. Sprague, 51 Cal. 640. See, also, Proctor v. Pool, 15 N. C. 371. In a subsequent clause of the deed, reference is again made to the time of forfeiture as follows: "And the parties of the first part hereby grant and assure unto the said parties of the second part, their heirs, executors, administrators, and assigns, the full term of 15 years, as above set forth, within which to cut and remove the timber hereby conveyed." And the entire language and purport of the deed indicate a purpose and intent of the parties that the time allowed for removal shall not be unlimited, but that the correct interpretaion requires that the time is governed by the first and more definite stipulation of 15 years, allowing a reasonable time to commence the cutting, and granting in any event, the full term of 15 years from the execution of the instrument. This deed of the plaintiff, conveying the timber, bears date February 25, 1893, and the parties have at least the full term of 15 years within which to remove the timber bought by them, and which fills the description in the deed. Decisions on questions somewhat similar will be found in Carmichael v. Brown, 97 Ga. 487, 25 S. E. 357; Baxter v. Mattox, 106 Ga. 345, 32 S. E. 94.

The court is referred to Manufacturing Co v. Hobbs, 128 N. C. 46, 38 S. E. 26, 83 Am. St. Rep. 661. There is no doubt about the decision in the Hobbs Case being correct. The limit stated in that case was five years from the time the cutting should commence, and the grantees had commenced 13 years from the execution of the contract, 8 years beyond the time stipulated. The right of the grantee there was five years, the time stipulated, allowing a reasonable time to begin. Under the facts and circumstances of the Hobbs Case the court very properly held that the time of commencing was unreasonable, and, being eight years beyond the stipulated period, the rights of the parties under the contract had determined. But the opinion errs in holding that the deed was void. This conclusion was predicated on the assumption that the instrument in question was a lease and had no certain or definite beginning. As we have endeavored to show, this is not a lease—certainly not of the timber—but an absolute sale. As stated by Justice Walker, in Bunch's Case, supra: "While some of the cases in this and other states liken a contract of the kind we are construing to a lease, it may be true that it should not be technically so construed, but that it should be regarded as a conveyance of the timber, or an interest or estate in the timber, upon condition that, if it is not cut and removed within a given time, the interest or estate so conveyed shall revest in or revert to the grantor." There is also an intimation in Moring v. Ward, supra, that such an instrument is a lease. The point before the court in that case, however, was whether the contract was an estate or a license, and it was determined that the instrument conveyed a present estate. The character of the estate was not the question decided. Even if this were a lease, it would not be void. In the Bishop of Bath's Case, 6 Coke Rep. 36 (Library Ed. vol. 3, p. 325), it is said: "A lease was made to A. and B. for 60 years, with a clause of re-entry immediately after the deaths of A. and B., and of the longer liver of them, within the term. After the death of A., within the term, another lease of the same sort was made to C., habendum et occupandum when the former lease shall determine, after or by the death, surrender, or forfeiture of the said deed." And it was there resolved that, "while every lease for years ought to have a certain beginning, but that is to be intended when it is to take effect in interest or possession, then the commencement ought to be certain; for a lease for years may be made on a condition or contingent precedent, as, if I grant to you that, if you pay me £20 at Michaelmas next following, that you shall have my manor of D. for one and twenty years, now, it is uncertain whether it will commence or not, and in the meantime, till the payment of the money, it is not any lease, but it is sufficient that the commencement be certain when it is to take effect in interest or possession. So it is true that the continuance of it ought to be certain; but that is to be intended either when the term is made certain by express numbering of years, or by reference to a certainty, or by reducing it to a certainty by matter ex post facto, or by construction in law by express limitation." In this case, a present estate passed at the execution of the grant, and when the entry was made to begin cutting, which is required to be in a reasonable time, the ending was fixed at the definite term of 15 years. The court is of opinion that on the evidence offered the injunction should have been dis-

solved, and there was error in continuing the same to the hearing.

It will be noted that the only question presented on the hearing was on the construction of the plaintiff's deed. There is an allegation in the pleadings that the deed was procured by fraud and misrepresentation. No testimony was offered, nor was the cause considered in that aspect; and this decision is without prejudice to the right of the plaintiff to renew his motion for injunction on presenting testimony making out probable ground of fraud.

Error.

(139 N. C. 167)

HAWKINS v. GOLDSBORO LUMBER CO.

(Supreme Court of North Carolina. Sept. 26, 1905.)

Appeal from Superior Court, Jones County; Webb, Judge.

Action by Lavinia Hawkins against the Goldsboro Lumber Company. From an order continuing an injunction, defendant appeals. Reversed.

A. D. Ward and T. C. Wooten, for appellant. D. L. Ward, for appellee.

HOKE, J. The facts in this case are exactly similar to those presented in the appeal of John L. Hawkins v. Goldsboro Lumber Co., 51 S. E. 852, and, for the reasons given in the opinion in that case, the order continuing the injunction to the hearing will be set aside.

Error.

(139 N. C. 174)

HICKSON LUMBER CO. et al. v. POLLOCK et al.

(Supreme Court of North Carolina. Oct. 3, 1905.)

PLEDGE—COLLATERAL SECURITY — COLLECTION —EXPENSES.

A creditor holding a note and mortgage as collaterals for the payment of a debt, under an assignment authorizing him to collect them and apply the net proceeds to the debt, is, on the failure of the debtor to pay, entitled to be reimbursed for the reasonable expenses in collecting the collaterals.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, § 68.]

Appeal from Superior Court, Lenoir County; Moore, Judge.

Action by the Hickson Lumber Company and others against W. D. Pollock and another, as assignees of S. H. Loftin, and others. From an order allowing a claim in favor of the Norfolk National Bank, defendants W. D. Pollock and another, as assignees, appeal. Affirmed.

Y. T. Ormond, for appellants. Busbee & Busbee, for appellees.

BROWN, J. The Norfolk National Bank loaned S. H. Loftin a large sum of money, and took as collateral security certain notes and mortgages made by the Gay Lumber Company. Loftin failing to pay his debt, and the lumber company failing to pay its notes, the bank employed counsel and proceeded to collect the collaterals. Is the bank entitled to be reimbursed the reasonable and proper costs and expenses incurred in collecting the collaterals? We are of opinion that it is, and we affirm the judgment and order of his honor below.

The cases of Turner v. Boger, 126 N. C. 300, 35 S. E. 592, 49 L. R. A. 590, and others cited by the appellant have no application here. Those cases were controversies between creditor and debtor direct, and we affirm the principles settled in them. Here the question is presented before this court for the first time as to whether or not a bank, lending money upon collaterals and coming into court to defend their validity, is entitled to retain its necessary and reasonable disbursements out of the sum realized upon such collaterals. Questions of public policy, such as usury or encouraging litigation, are not involved. The bank occupied the relation of trustee, and as such it held the collaterals. It was its duty to protect them. Under the terms of the written instrument assigning the collaterals to the bank, the authority is given to collect them and apply the net proceeds to the debt due it by Loftin. No question is raised as to the reasonableness of the sum expended. Undoubtedly an unreasonable sum would not be allowed by the courts.

When a creditor takes a note of a third person as collateral security for his debt, he is bound to use due diligence in the collection of the collateral. He is responsible to his debtor for any loss occasioned by his laches. The creditor is entitled to receive all reasonable costs and expenses incurred in the protection and collection of the collateral to the same extent as any other trustee. These principles are supported by most abundant authority, and are founded in reason and justice. Jones on Pledges, §§ 400, 680; Griggs v. Howe, 2 Abb. Dec. 291; Starrett v. Barber, 20 Me. 457; Gregory v. Pike, 67 Fed. 837, 15 C. C. A. 33; Colebrook on Coll. §§ 90, 111, 114; Hurst v. Coley (C. C.) 22 Fed. 183; and many other cases. It would be inequitable to require the bank to protect and collect Loftin's property at its own expense, because Loftin owed it a debt which he had failed to pay.

Affirmed.

HOKE, J., did not sit on the hearing of this appeal.

(139 N. C. 135)

KIRKMAN et al. v. HOLLAND et al.

(Supreme Court of North Carolina. Oct. 8, 1905.)

1. EJECTMENT—EVIDENCE—ADMISSIBILITY.

In a suit for the recovery of real estate, plaintiff claimed as the child of a beneficiary in a deed to a trustee for the use of the grantor's wife, with direction to the trustee to surrender the land to her children on her death. Defendant claimed the land as remote grantee of a third person. *Held*, that evidence that the grantor in the deed of trust and his wife made a contract and turned over the land to one whose daughter thereafter made a deed to a grantee in defendant's claim of title was inadmissible; there being no connection shown between the making of the contract and the deed of the daughter.

2. SAME.

In a suit for the recovery of real estate by one claiming as the child of the beneficiary in a deed to a trustee for the use of the grantor's wife, with directions to the trustee to turn over the land to her children on her death, declarations of the wife to the effect that she had sold her life estate were incompetent against defendant, claiming as remote grantee from a third person; it not appearing that the declarations were made before defendant's remote grantor had taken possession of the land under his deed.

3. TRUSTS—CONSTRUCTION—EXECUTED TRUST.

Where a deed to a trustee imposed on him the duty of conveying the legal title when directed by the beneficiary, and in default of such direction to deliver it up to the children she might leave surviving, the trust was not executed by the statute, and the legal title remained in the trustee during the lifetime of the beneficiary, who did not direct a conveyance.

4. ADVERSE POSSESSION—LIMITATIONS.

Land was conveyed to a trustee, in trust for the grantor's wife, to be conveyed as she might direct, and on her failure to direct a conveyance to be surrendered to her children living at her death. Thereafter the land was taken possession of under a deed from a third person, and the grantee and those claiming under him remained in the adverse possession under a claim of ownership in fee for over 40 years. *Held*, that the right of the children of the beneficiary on her death to recover the land was barred by limitations.

Appeal from Superior Court, Craven County; W. R. Allen, Judge.

Action by Emeline Kirkman and others against J. B. Holland and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

This is an action for the recovery of two lots in the city of Newbern. Plaintiff claimed under the following chain of title: Deed from Joseph Merkell to John Peter Merkell, bearing date April 15, 1841, upon the following uses of trust, to wit: "In trust for the sole and separate use of Caroline M. Merkell, wife of the said Joseph Merkell, during the life of the said Caroline Merkell, so that said real estate hereby granted shall not be liable or in any manner subject to the debts, contracts, or engagements of the said Joseph Merkell, and further to grant and convey said property, or any part thereof, to such person or persons, for such considerations, and for such interests and estates as the said Caroline M. Merkell shall by any writing under hand and seal, during her coverture, direct, limit, or appoint, and upon the dissolution of the said marriage by the death of the said Caroline M. Merkell, and on her failure to make the appointment above mentioned in trust, to surrender and deliver up said property to such child or children of the said Joseph Merkell and Caroline M. Merkell, his wife, as may be living at her decease." By successive conveyances, the title to the said property was vested in R. A. Russell on the 4th day of August, 1855, upon the same trusts set forth in the deed of April 15, 1841. Caroline M. Merkell died on the 27th day of December, 1903. The plaintiff Emeline Kirkman is a daughter, and plaintiff Ella Moore is a granddaughter, of the said Caroline M. Merkell. The defendants claim title to the real estate in controversy under deed executed by T. G. Wall and wife, Janet, to Samuel Bishop during the year 1856. The said Janet Wall was a daughter of William Hollister. This deed recites that this lot had been contracted to be sold to Wm. Hollister. By mesne conveyances such title as Bishop acquired by said deed passed to and vested in the defendants. The defendants, and those under whom they claim by the said chain of title, have been in possession of the said property, under said deeds, claiming to own the same in fee simple, since the ——— day of ———, 1856. Plaintiffs and the trustees had no other notice of this claim than that which the law implies from actual possession and the registration of the deeds. The plaintiffs offered to show by R. A. Russell, the trustee and brother of Caroline Merkell, that he had knowledge of a contract entered into between Caroline Merkell and Joseph Merkell, under which the lot was turned over to William Hollister, a near relative of Janet Wall, who was soon in possession of said property. To this testimony the defendant objected. Objection sustained, and plaintiff excepted. Plaintiff also offered to show by said witness that from 1855, and up to the death of Caroline Merkell, his sister, he made no effort to recover the possession of the said property, because he was told by his said sister not to do so; that she had sold her life estate, but that her daughters would be entitled to the said property after her death. Defendants objected, objection sustained, and plaintiffs excepted. The defendants relied upon the statute of limitations to bar the action of the plaintiffs. Judgment was rendered for the defendants, and plaintiffs appealed.

W. D. McIver, for appellants. W. W. Clark, for appellees.

CONNOR, J. (after stating the facts). The first question to be disposed of is the admissibility of the proposed testimony. In respect to the first question, we concur with his honor. Assuming the fact to be proven, which we must do for the purpose of passing upon the exception, we do not see how it could affect the right of the defendants.

They do not claim under William Hollister, nor does it appear that he was to become the purchaser. The mere fact that Joseph Merkell and his wife made a contract, under which the lot was turned over to him prior to the execution of the deed from his daughter, Mrs. Wall, to Bishop, did not tend to show that either Mrs. Wall or her grantees were in possession under Mrs. Merkell. The contract may, so far as appears, have been a lease to Mrs. Hollister. The fact that he was "soon in possession" does not tend to show that he was a purchaser, and, if it did, there is no legal connection between that fact and the execution of the deed by his daughter to Bishop. If the fact were admitted, the deed from Wall and wife would have conveyed no estate, either legal or equitable, to Bishop. In respect to the second question we also concur with his honor. We do not perceive how Mrs. Merkell's declaration that she had sold her life estate can be competent against the defendant. If competent, the proposed testimony is too indefinite to base any conclusion upon. It does not appear to whom she said that she had sold, or when the declaration was made. If made after the entry by Bishop under his deed, it would be clearly incompetent.

With the proposed testimony excluded, the case as decided by his honor presents the single question whether the possession by Bishop and those claiming under him was adverse to the trustee, thereby barring the cestuis que trustent. It is clear that the trust declared in the deed to John Peter Merkell, which passed to Russell, was not one of that class which was executed by the statute. The duties imposed upon the trustee to convey the legal title when directed by Mrs. Merkell, and in default of such direction to "surrender and deliver it up" to such child, etc., "as she might leave surviving," prevented the operation of the statute. Perkins v. Brinkley, 133 N. C. 154, 45 S. E. 541. The legal title remained in the trustee until the death of Mrs. Merkell. This being so, it would seem that the case comes directly within and must be governed by the decision of this court in King v. Rhew, 108 N. C. 696, 13 S. E. 174, 23 Am. St. Rep. 76. There is but one possible difference between the two cases. In that case it was admitted that the defendant had been in the actual, open possession of the land, claiming adversely under said deed, and such possession was adverse, unless in law it was not so. In our case it is admitted that the defendants and those under whom they claim have been in possession under such deeds, claiming to own said property in fee simple, since 1856. We are unable to see any substantial difference between the two cases. When one has a deed conveying no title, interest, or estate, and enters under said deed, claiming to own the land in fee simple, it is difficult to see why such possession is not adverse to the owner. The learned counsel for the defendant call our attention to section 146 of the Code. It is not necessary to consider the effect of this section, because, conceding the presumption raised thereby, it is rebutted by the admission in the case agreed.

The counsel suggest that the decision in King v. Rhew, supra, is based upon subtle refinement, rather than upon plain reason. However this may be, the opinion of Mr. Justice Shepherd shows clearly that in this state, at least, the authorities are uniform. The discussion in that opinion leaves nothing to be said by us upon the subject. It would seem that, accepting, as we must do, the doctrine as announced in that case, the facts in this record bring the case clearly within it. There the defendant grantors entered under a deed attempted to be made by the owner of the equitable life estate. There was in fact no ouster of the life tenant. She and her husband undertook to sell the lot and put the purchaser in possession, yet the court held that, because the deed was void by reason of a defect in its form and execution, the entry of the grantee was an ouster of the trustee, and the possession adverse. In our case, if the proposed testimony were competent, it would not show any deed or paper title to Mr. Wall. If Russell had owned the land free from any trust, there would be no question that upon the admitted facts he would be barred. This being so, the cestuis que trustent are also barred. It is a hardship on the plaintiffs, and, if it were an open question, we should attach much weight to the able argument and brief of their counsel; but we cannot unsettle rights acquired under decisions which have become rules of property.

The judgment must be affirmed.

(139 N. C. 176)

HAWKS v. HALL.

(Supreme Court of North Carolina. Oct. 3, 1905.)

JUSTICES OF THE PEACE—APPEAL—FAILURE TO SIGN RETURN—EFFECT—AMENDMENT IN APPELLATE COURT.

Since an appeal from a justice's judgment is perfected by notice and payment of the justice's fees, without any further action on appellant's part, an appellant, giving the notice of appeal and paying the justice's fees, cannot be deprived of his right, after a trial without objection in the appellate court, because of the failure of the justice to sign his name to the return of the appeal; the judge being authorized, by Code, § 879, providing that, if the return be defective, the judge may direct an amended return, to summon the justice and permit him to sign the return at any time during the trial or after judgment.

Appeal from Superior Court, Sampson County; O. H. Allen, Judge.

Action by A. K. Hawks against A. M. Hall. From a judgment of the superior court in favor of plaintiff, rendered on appeal from a judgment in justice's court against him for costs, defendant appeals. Affirmed.

This action was begun in a justice's court, and was to recover the sum of $34.75, with interest thereon from the 12th day of September, 1903. Summons was issued on May 16, 1904, and case was tried before R. H. Hubbard, J. P., on May 24, 1904. The justice rendered judgment for the defendant against the plaintiff for costs. Plaintiff gave verbal notice of appeal in open court when judgment was rendered, and paid the justice the appeal fee. The justice sent up to the court all the papers in the case, with a paper entitled "A. K. Hawks v. A. M. Hall," purporting to be a return to notice of appeal. This paper is dated May 24, 1904, and is not signed by any one. It recites that it was issued pursuant to annexed notice of appeal, but no notice is annexed, and none was sent up in the papers. The notice being given in open court, as above stated, upon this unsigned return, the case was docketed in the superior court on July 18, 1904. No written pleadings were filed in the justice's court, and there was no pleading in the superior court, except as contained in the unsigned "return to notice of appeal" and the original summons. The next court after the appeal was docketed was in October, 1904. There was also a court in February, 1905, prior to the trial term, May, 1905, and the defendant never made any motion to dismiss for failure to docket in time, and never made any motion in the cause for any purpose, but made a general appearance in the superior court at the trial in person and by attorney. After the rendition of the judgment, from which the defendant appealed, and after court had adjourned for the term, it was found that the paper purporting to be a "return to notice of appeal" was not signed by any one.

F. R. Cooper, for appellant. Geo. E. Butler, for appellee.

CONNOR, J. (after stating the facts). This record presents the somewhat remarkable feature of an appeal from a judgment to which there is no exception and no suggestion of any error committed at any stage of the trial. The point upon which we are asked to reverse the judgment was not made below, and the fact upon which the motion is based was not known to counsel until after the judgment was rendered and the court adjourned. To meet this condition the defendant's very ingenious counsel insists that the failure of the justice to sign the return on appeal deprives the superior court of any jurisdiction to hear or determine the case and that the proceedings had in that court are absolutely void. We cannot concur with this view. It is not to be questioned that the superior court has no other than appellate jurisdiction. The appeal perfected by notice and the payment of the justice's fee takes the case into the superior court without any further action on the part of the appellant. If the justice fails to discharge his duty to make his "return of the appeal," he may be compelled to do so by attachment, and if the return be defective the judge may direct a further or amended return. Code, §§ 878, 879. It will be observed that the return to be made is "of the appeal"; clearly showing that it constitutes no essential element in the appeal, but simply a statement of what was done in the inferior court. It would be trifling with the administration of justice to permit an appellant, who had done everything required of him to take and perfect an appeal, to be deprived of his right after a trial in the appellate court because of an inadvertent failure of the justice to sign his name to "the return of the appeal." If the attention of the court had been called to the omission, it would have summoned the justice and permitted him to sign the return at any time during the trial, or even after judgment. If either party was not content with the return as made, the court, upon motion, would have directed a "further or amended return," as provided by section 879.

There is no merit in the defendant's contention, and the judgment must be affirmed.

(139 N. C. 549)

STATE v. DANIEL.

(Supreme Court of North Carolina. Sept. 26, 1905.)

1. HOMICIDE — PREMEDITATION — DELIBERATION—TIME.

Where the design to kill is formed with premeditation and deliberation, it is not necessary for it to exist any definite length of time before the killing takes place.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 20.]

2. SAME—EVIDENCE.

In a prosecution for homicide, evidence *held* sufficient to sustain a finding that the killing was deliberate and premeditated.

Appeal from Superior Court, Martin County; Ward, Judge.

Preston Daniel was convicted of murder in the first degree, and he appeals. Affirmed.

The Attorney General, for the State.

WALKER, J. The defendant was indicted for the murder of William Eborn. He was convicted of murder in the first degree, and from the judgment rendered upon the verdict he appealed.

There is but one exception. At the close of the testimony the defendant's counsel requested the court to charge the jury that "there is not sufficient evidence of premeditation and deliberation on the part of the defendant, and that upon the evidence the jury is not warranted in convicting the defendant of a graver offense than murder in the second degree." The court refused to give this instruction, and the defendant excepted. The court then charged the jury fully upon

the law and the evidence, and explained to them the different degrees of homicide as defined by the statute, but did not in its general charge give the instruction requested by the defendant. It is well settled that, if there was any evidence to support the verdict, the defendant must fail in his contention. We think there was not only some, but abundant, evidence of premeditation and deliberation. To demonstrate this requires us to state the substance of the testimony.

The defendant and the deceased were on an excursion train going to Parmalee. When they arrived at that place, the defendant got off the train and went to a bar for some whisky. When he came back to the car, the deceased was sitting by Gertrude Little, who was escorted by the defendant. The latter then told the deceased that he must not sit by his girl when he was out. The deceased got up and walked over to the other side of the car and sat down, saying, at the time: "This is a diabose crowd." When the defendant heard that remark, he drew his pistol from his left pocket and put it in his right hand, and then "hollered, 'Look out!' as the deceased turned his head"; the ball striking the latter over the eye. When the defendant shot, he threw his head back twice and then left the car, and sang a song, "I am going where I have never been before." A witness, Almira Little, testified that she saw the defendant with the pistol in his hand, and when he shot Eborn, and that "it was not any time hardly" after she saw him with the pistol before he fired, and that Eborn was not doing anything when the defendant shot. He had the pistol in his hand when she first saw him, and his hand was resting on his knee. There had been no previous quarrel or altercation between the parties. Another witness saw the defendant take his pistol from his left pocket and carry it around his body to his right hand and hold it behind him, "or so that the witness could not see it, long enough to shake hands." He then pointed it, and said, "Look out!" and fired at Eborn, who had a cigar in his mouth. This witness also stated that they had not been mad with each other. Gertrude Little testified: "I was on the excursion that day. Prisoner was my company. Just a little before the train got to Parmalee, prisoner came in and sat in front of me. The seat I was in faced his. Eborn had not been sitting with me at all. I looked out of the window."

The case was not argued in behalf of the defendant in this court, and therefore we are at a loss to know upon what ground it was contended below that there was no evidence of premeditation and deliberation. We can only conjecture that it was thought a sufficient time had not elapsed to weigh the matter and form a definite and deliberate purpose to kill, or that the absence of any previous animosity towards the deceased disproved premeditation, or that the defendant was suddenly aroused to anger when he saw the deceased sitting with his girl, and shot immediately in hot blood, being under the influence of "furor brevis," and without time to think and form a cool and deliberate purpose to kill. All of these contentions, while somewhat differently stated, are practically one, and the same in substance and in law. It will, of course, not be denied that, where the design to kill is formed with premeditation and deliberation, it is not necessary for it to exist any definite length of time before the killing actually takes place. State v. Spivey, 132 N. C. 989, 43 S. E. 475.

Now, as to the other question. In State v. Lipscomb, 134 N. C. 694, 47 S. E. 45, we said: "There was ample time for deliberation and premeditation by the defendant according to any rule that has been laid down upon the subject. No particular time is required for this mental process of premeditation and deliberation. The question always is whether, under all the facts and circumstances of the case, the defendant had previously and deliberately formed the particular and definite intent to kill, and then and there (or at any time afterwards) carried it into effect. This is a question for the jury to determine [citing State v. Johnson, 47 N. C. 247, 64 Am. Dec. 582, and State v. McCormac, 116 N. C. 1034, 21 S. E. 693]." "The question whether or not there has been deliberation," says Kerr, in his work on Homicide (section 72), "is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense," or, we may add, to be aware of what he is about to do and its consequences. And again: "Where a prisoner who has killed a person displayed thought, contrivance, and design in the mode of possessing himself of the weapon used or of disposing of it immediately after the blow was struck [or, we will say in this case, in the manner of securing and handling his weapon, as the defendant did], such exercise of contrivance and design denotes deliberation—the presence of judgment and reason, rather than violent and ungovernable passion." Page 72. We have uniformly held that the existence of premeditation and deliberation is a fact to be found by the jury, when there is any evidence to warrant the finding. Can it be said there is no such evidence here? Without any provocation in law or in fact, the defendant, who is carrying a concealed and loaded weapon on an excursion train, takes it from his left pocket, transfers it behind his back (a fact which indicates a purpose to conceal his action) to his right hand, in which he could use it more readily and effectively, raises it, and points it at the deceased, warning him to "Look out!" and then fires the fatal shot. When we consider these facts in connection with the utter and cold indif-

ference of the defendant after the shooting, what more deliberate act upon previous reflection and meditation, we may well ask, could be imagined than this one.

The evidence was quite as strong as it was in State v. Hunt, 134 N. C. 684, 47 S. E. 49; State v. Teachey, 138 N. C. 587, 50 S. E. 232; State v. Exum, 138 N. C. 599, 50 S. E. 283; State v. Conly, 130 N. C. 683, 41 S. E. 534; State v. Lipscomb and State v. McCormac, supra—in which convictions for the capital felony were sustained. Indeed, the defendant's intent to kill was more calmly and deliberately conceived and executed than was the intent of any one of the defendants in the cases above cited. There was some ground to argue in those cases that the slayer might have committed the act in a transport of passion, but there is no evidence in this case to indicate anything but coolness of design and a deliberate purpose causelessly and wantonly to take human life, all of which was prompted by a bad heart, desperately wicked, and fatally bent upon mischief. The mere fact that the defendant accomplished his purpose within a comparatively short space of time can make no difference. What he did just before he killed, and his conduct just afterwards, coupled with what he then said and the manner of saying it—his flippant song—all tended to show that he was cool and deliberate when he shot, and in the full possession of his faculties, being not at all under the influence of any violent or ungovernable passion. The slight provocation, if provocation it may be called, upon which he may have acted, was not calculated, as it seems to us, to arouse his anger to such a degree as to dethrone his reason for the time, or to render him incapable of deliberate thought, even in view of the shortness of time which elapsed. "The celerity of mental action is such that the formation of a definite purpose may not occupy more than a moment of time; hence the important question in such a case is to determine whether the external facts and circumstances, at the time of the killing, as well as before and after that time, having connection with or relation to it, furnished satisfactory evidence of the existence of a calm and deliberate mind on the part of the accused at the time the act was committed. If they show a formed design to take the life of the person slain, or to do him serious bodily harm, which in its necessary or probable consequences may end in his death, he is guilty of murder in the highest degree." Kerr on Homicide, § 72. If the defendant slew on a principle of revenge for a fancied wrong, which was very trivial in its nature, having made up his mind fully to kill to avenge it, he is still guilty of the capital felony. "For let it be observed that in all possible cases deliberate homicide upon a principle of revenge is murder. No man, under the protection of the law, is to be the avenger of his own wrongs. If they are of such a nature for which the laws of society will give him an adequate remedy, thither he ought to resort; but, be they of what nature soever, he ought to bear his lot with patience." Foster's Crown Law, 296.

The defendant was not entitled to the instruction he requested the court to submit to the jury, and it follows that there was no error committed on the trial below. It will be so certified.

No error.

(73 S. C. 336)

HUNTER v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Sept. 6, 1905.)

CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

Where a passenger on a train at night passed from one coach to another and by the conductor and porter, who were in the rear car, in search of water, and stepped off the back platform of the rear coach, thinking he was going into another, there being no light or guard chain on such rear car, he cannot recover for the injuries received; the proximate cause of the injury being his own negligence.

Appeal from Common Pleas Circuit Court of Clarendon County; Purdy, Judge.

Action by Robert Hunter against the Atlantic Coast Line Railroad Company. From a judgment sustaining demurrer, plaintiff appeals. Affirmed.

A. Levi and W. C. Davis, for appellant. J. T. Barron and Wilson, Du Rant & Muldrow, for respondent.

WOODS, J. The defendant demurred to the complaint in this case on the ground that it failed to state facts sufficient to constitute a cause of action, in that: "(1) The allegations of fact in the complaint do not show any actionable negligence. (2) The allegations of the complaint show contributory negligence on the part of the plaintiff. (3) The complaint shows that the gross negligence of the plaintiff, in wrongfully going upon an alleged dangerous and improperly lighted platform, was the direct and proximate cause of the injury to plaintiff." The demurrer was sustained, and the plaintiff appeals, relying on the following allegations of the complaint as stating a good cause of action: "(2) That on or about the 18th day of August, 1903, the defendant received the plaintiff into one of its railroad trains running between the places hereinafter mentioned, and then and there undertook and agreed to safely carry and convey him therein as a passenger, from Manning, S. C., to Savannah, Ga., and return, for two dollars, paid by plaintiff to one E. W. Dines, who was a manager of an excursion from Sumter, S. C., to Savannah, Ga., and return; said train being in charge of and under the control of the servants and employés of the defendant. (3) That the train on which the plaintiff was riding as a passenger, under said contract to safely transport him, was

in an insecure, dangerous, and unsafe condition, in that there was no chain or guard rail on the rear platform of the last car of said train, where passengers walk in passing from one car to another, and there was only a very dim light in said car and none upon the rear of said car. (4) That at the time of the injury hereinafter referred to the train of defendant was at some point on its line between Santee River and Ashley Junction, and the conductor and porter of said train were sitting near the rear of the last car of said train, and in a position where they could see plaintiff as he approached the rear of said car, and they did not warn him of the dangerous condition of the rear platform of said car. (5) That it was the duty of the defendant to provide its cars with drinking water for its passengers, and to keep them so provided, but it negligently failed so to do, and this plaintiff, becoming thirsty after eating a lunch provided by the defendant in one of its cars near the front of its said train, sought a drink of water in all of its cars, going back towards the rear of the train, and, finding none up to and in what plaintiff afterwards learned was the last car of the train, he attempted to pass on to what he believed was a car in the rear of this car, when, because of the carelessness and gross negligence of the defendants, its servants, and employés, in failing to properly light its said car and rear platform, and to warn plaintiff of the dangerous condition of the rear platform, and to provide the said chain or guard rail, as it was in duty bound to do, the plaintiff walked off the rear of said car and was violently hurled to and precipitated upon the crossties, iron rails, and track of defendant, breaking both of his arms, one of his legs in two places, and the knee-cap of the other leg in three places."

We extract from the argument of appellant's counsel the six particulars in which it is charged the defendant was negligent: "(1) A failure to provide drinking water for this passenger; (2) an improperly lighted last car; (3) no lights on rear platform; (4) a failure to provide a chain or guard rail on rear platform; (5) a failure to warn plaintiff of dangerous condition of rear platform, although conductor and porter were sitting where they could see actions of plaintiff, and in a few feet of the danger he was going into; (6) negligent and wanton conduct in leaving plaintiff upon track after being notified of his accident by friends." It is the duty of a railroad company to provide drinking water for passengers, and it cannot be said it would be negligence under ordinary circumstances for a passenger to go from one coach to another, if necessary, in search of water. It is also the duty of a railroad company to provide safe platforms as a means of ingress and egress from its passenger cars. Passengers already on the cars are not invited or expected, however, to use the rear platform of a train while it is in motion, and it is not the duty of railroad officials to request persons apparently in their senses not to take the risk of doing so. As was said in Jarrell v. Ry. Co., 58 S. C. 491, 494, 36 S. E. 910, 912: "The train was not at any station or place where persons are invited to use the platform as a means of entering or leaving the car, when, as to such persons, the defendant would owe the duty to so light the platform and landing as to insure safety in their use. Under the circumstances in this case the defendant owed no duty to plaintiff to light up the platform and adjacencies outside the car for his benefit." Plaintiff, having the notion that there was another car in rear of the one he was in, walked out into the dark and off the platform. There is no pretense that the defendant did any positive act tending to delude the plaintiff into supposing there was still another car behind that from which he fell. On the contrary, his failure to see in front of him any car or any light in a car was express notice to the plaintiff that he had reached the end of the train; and when, in the face of the warning of the absolute darkness which met him at the car door, the plaintiff went on, he recklessly and blindly took his life into his own hands. We do not see how the dim lights in the car could be regarded a proximate cause of the fall. If they had been brighter, they might have made the absence of any car in the rear still more manifest; but without this aid the darkness was sufficient warning to stop any reasonable man. The proximate cause of the injury plainly was the plaintiff's own want of care. "The complaint not showing that the injury was caused by any act of omission or commission of the servants of the railroad company, or from any defects in the instrumentalities of transportation, there is no presumption of negligence on the part of the defendant. Steele v. Ry. Co., 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756. But, if such presumption existed, it is completely rebutted by the allegations of the complaint, which show the injury was due to plaintiff's own recklessness or negligence." Assuming, however, for argument's sake, that the defendant was guilty of breach of duty to the plaintiff in all the particulars set out in the complaint, it is manifest the injury would not have been received but for the negligence of the plaintiff in endeavoring to step from one car into another without having any reason to believe there was another car. The plaintiff thus shows that his own negligence at least contributed to the injury as a proximate cause.

The sixth paragraph of the complaint, alleging breach of duty by the conductor in not backing the train, and endeavoring to find plaintiff when he was missed, was not

considered by the circuit judge, and has not been brought before this court by the exceptions.

The judgment of this court is that the judgment of the circuit court be affirmed.

(72 S. C. 341)

FRIERSON v. JENKINS et al.

(Supreme Court of South Carolina. Sept. 6, 1905.)

RES JUDICATA—JUDGMENT IN CRIMINAL PROSECUTION.

In a civil action to establish dower, acquittal of the alleged husband on a trial for bigamy in having married the plaintiff in the suit for dower does not support the plea of res judicata.

Appeal from Common Pleas Circuit Court of Lee County; Purdy, Judge.

Action by Eliza Frierson against Mary Jenkins and others. From an order striking out portions of defendants' answer, they appeal. Affirmed.

McLauchlin & Herndon, for appellants. A. B. Stuckey, for respondent.

WOODS, J. In this action for dower the plaintiff claims to be the widow of Richard Frierson, who was the owner of the land described in the complaint. The defendant Mary Frierson alleges in her answer that she, and not the plaintiff, was the lawful wife of Richard Frierson, and that her daughter, the infant defendant, Katie Frierson, was born of her marriage with him; that Frierson left a will in force, and that she and her child are entitled to all his property as his devisees and only heirs. The circuit judge on motion struck out the following, constituting the third paragraph of the answer, as irrelevant: "That during the year 1903, at the June term of the court of general sessions, the plaintiff herein prosecuted Richard Frierson for bigamy in the criminal courts of Lee county, alleging and claiming that Richard Frierson, as her lawful husband, had intermarried with this defendant, Mary Frierson; that after a fair trial before an intelligent white jury of Lee county the said Richard Frierson, admitting his marriage with this defendant, Mary Frierson, and denying any marriage with the plaintiff, Eliza Frierson, was acquitted, thus making the question, 'Who was his lawful wife?' res adjudicata, which is herein and hereby pleaded as an absolute bar to the plaintiff's right of recovery." On the same ground the corresponding paragraph in the answer of the defendant Nathan Barnett, who claimed to be a mortgagee and executor of the will of Richard Frierson, was also struck out. The defendants appeal.

It is well established that a judgment in a criminal proceeding does not support the plea of res judicata in a civil action. The reason is thus clearly stated in 2 Black on Judgments, § 529: "Since the parties to a criminal prosecution and those in a civil suit are necessarily different, and as the objects and results of the two proceedings and the rules of evidence which apply to them, respectively, are equally diverse, it follows that the judgment in the former cannot be used by way of estoppel in the latter, save for the single purpose of proving its own existence, if that becomes a relevant fact." Van Fleet on Former Adjudication, § 485 et seq.; 24 A. & E. Ency. Law, 831; Wharton on Evidence, § 777.

The judgment of this court is that the judgment of the circuit court be affirmed.

(72 S. C. 330)

SYMMES v. CAUBLE et al.

(Supreme Court of South Carolina. Sept. 2, 1905.)

1. JUDGMENT—RELEASE OF JOINT DEBTOR.

Where one signs a note as surety and for a valuable consideration, and he and another guaranty its payment, and judgment is obtained against the three, they are joint debtors, and the judgment creditor can make a separate composition with the surety and guarantor, under Civ. Code 1902, § 2841, providing that a creditor may release a separate joint debtor by an instrument exonerating him therefrom.

2. SAME.

Civ. Code 1902, § 2841, passed in December, 1883, providing for release by a judgment creditor of one of two or more judgment debtors without releasing the other, applies to a note executed in December, 1883, where the guaranty was indorsed thereon in March, 1884.

Appeal from Common Pleas Circuit Court of Greenville County; Gage, Judge.

Action by Whitner Symmes against J. O. Cauble and another. From the circuit decree, defendant Cauble appeals. Affirmed.

Haynesworth & Patterson, for appellant. M. F. Ansel, for respondent.

POPE, C. J. On the 21st day of December, 1883, the following note was made to the plaintiff, to wit: "$2,195.00. One day after date, I promise to pay to Whitner Symmes twenty-one hundred and ninety-five dollars, value rec., interest after date at the rate of ten per cent. per annum. Witness my hand and seal this the twenty-first day of Dec., A. D. (1883) eighteen hundred and eighty-three. T. E. Harris. [L. S.] Belton Gilreath, Surety." The following indorsement was on the back of the note: "For value rec'd we guaranty the payment of the within note. March 12th, 1884. Belton Gilreath. [Seal.] J. O. Cauble. [Seal.]" No payments having been made, the plaintiff brought his action against the defendants, T. E. Harris, Belton Gilreath, and J. O. Cauble, on the 27th day of July, 1886, in the court of common pleas for the county of Greenville, in the state aforesaid, and obtained his judgment against all three of said parties for the sum of $2,774.62, together with $30.05 for his costs. On the

2d of May, 1887, Cauble paid the sum of $235 in part payment thereof, and on the 1st day of June, 1900, the defendant Belton Gilreath paid the sum of $1,300, leaving a large part thereof unpaid. The defendant T. E. Harris is insolvent, and his whereabouts are unknown. The payment by the defendant Belton Gilreath of the said $1,300 was made by him under section 2841 of the Civil Code, was in full payment of his liability as a joint debtor, and with no impairment of the liability to the plaintiff for the balance remaining due of the judgment that covered the other parties, after deducting the said sums of $235 paid on the 2d of May, 1887, and $1,300 paid on the 1st of June, 1900. The plaintiff, after obtaining leave of the court, commenced his action in July, 1904, against the defendants, J. O. Cauble and T. E. Harris, to recover judgment against them for the sum of $4,082.73, as the balance due on said original judgment, with interest on the same from the 1st of June, 1900. The defendant J. O. Cauble answered, wherein he alleged that the payment by Belton Gilreath, under section 2841 of the Civil Code of 1902, operated to discharge the said J. O. Cauble from any and all liability, as he was but a guarantor, while Belton Gilreath was a surety and a guarantor. The cause came on to be heard by Judge Geo. W. Gage, who on December 24, 1904, passed the following decree:

"Judgment against the three contractors was had July 22, 1886. About 1890 Gilreath paid plaintiff a sum of money, in consideration whereof the plaintiff released Gilreath from further liability on the claim. The plaintiff holds that the receipt of the money and the release was justified under the law. Civ. Code 1902, §§ 2841, 2842, 2843. The defendant holds the release of Gilreath discharged the defendant. So that is the issue. There is, however, a primary issue of law first to be determined, and that is, was the relationship of the contracting parties changed by judgment? A judgment is the final determination of the rights of the parties to an action. In this case the court in 1886 finally determined that Cauble, Gilreath, and Harris were debtors of Symmes. Incident to that, the statute makes a debt a lien, and prescribes for it a length of life. But the thing determined was that the paper sued on was what it appeared to be. If that paper fixed by their own contract the relationship of the parties to each other, a court could not change the relationship. If the parties agreed that Harris should be principal debtor, that Gilreath should be surety for him, and that Cauble and Gilreath should be guarantors for Harris and Gilreath, a court could not rightly change that contract; and the record does not show that the court literally attempted it. [Some writers and some judges do speak about the debt being "merged into a judgment." It has always seemed to me an indefinite expression. On the other hand, a truer conception is that the judgment is but a photograph of a transaction which fixes its character beyond cavil.] I am therefore of the opinion that, whatever was the legal relationship to each other of the parties to the paper, that relationship was not altered, but fixed, by the judgment. 1 Black, Judg. § 8 et seq. This leads to the further inquiry, what legal relationship betwixt the three obligors does an inspection of the paper disclose? There is no dispute but that Harris is principal, and that alone; Gilreath is both surety, or security, as he puts it, and guarantor; Cauble is guarantor, and that alone. It may be that the composition by Symmes with Gilreath as surety discharged Cauble from liability to Symmes; but it does not follow that the composition with Gilreath as guarantor so discharged Cauble. On the back of the paper Gilreath and Cauble guarantied payment of the note signed by Harris. That is a secondary contract, and independent of the primary contract written in the face of the note. On this secondary contract Gilreath and Cauble are joint makers, joint because they are united; and they are joint debtors. If that be so, then the statute provides that 'any joint debtor may make a separate composition with his creditor. * * * Such composition shall discharge the debtor making it and him only. * * * [Such composition] shall not impair the creditor's right of action against any other joint debtor,' etc. Acts 1883, p. 431; Civ. Code 1902, § 2841. That statute was the authority for Symmes to settle with Gilreath and still hold Cauble legally bound as the other joint debtor. The term 'joint debtor,' used in the statute, is broader and more comprehensive than that of 'surety' or 'guarantor.' The statute was enacted to prevent an injustice which had followed a technical and strict construction of the mutual rights of the makers of one obligation. The composition by Symmes with Gilreath was not operative to discharge Cauble, 'unless an intent to release or exonerate him appears affirmatively,' etc. It does not so appear. This is the justice of the case, and I am satisfied ought to be the law of it. It is therefore ordered that the plaintiff have judgment against the defendant J. O. Cauble, for $4,082.73, the sum claimed in the complaint."

From this decree the defendant J. O. Cauble has appealed on the following seven grounds: "(1) It is submitted that his honor should have held that Gilreath, in his capacity as a surety upon the note which was the foundation of the judgment, was a primary obligor, and was primarily liable as between himself and Cauble, who was only a guarantor, and that he erred in not so holding. (2) He should have held that the release of a surety upon an obligation

will discharge one who guaranties the payment of such obligation, and he erred in not so holding. (3) He erred in holding that the statute (Code of Laws, § 2841) authorized Symmes, [the creditor], to settle with Gilreath and still hold Cauble liable. (4) He erred in holding that the composition with Gilreath was not operative to discharge Cauble. (5) He erred in not holding that when Symmes, the creditor, undertook to settle with Gilreath, who was liable as a surety, this operated to discharge Cauble from liability upon the indebtedness. (6) It is submitted that the statute (Code of Laws, § 2841) has no application to this note, which was executed prior to the date when said statute went into effect. (7) He erred in charging Cauble with the entire judgment, less the amount actually paid, where at most he should have held Cauble liable for only one-half of said judgment, less the payment made by Cauble on June 1, 1890, of $235." We will notice these grounds of appeal.

1. It seems to us that, when the plaintiff obtained his judgment against all the parties to the original note, so far as the plaintiff was concerned, his judgment wiped out any distinction between the parties, so far as he (the plaintiff) was concerned, and the defendants became as to him joint judgment debtors. As between the surety and the guarantors, they preserved amongst themselves certain rights which were enforceable both in law and in equity. So, therefore, we do not see that the circuit judge erred, as herein complained of. This exception is overruled.

2. The rights of the appellant depend upon the solution of the question whether Gilreath and Cauble became joint debtors. If they were joint debtors, so far as the plaintiff is concerned, it was in his power to make a separate composition with Gilreath, without endangering the plaintiff's ability to still hold Cauble liable to pay the balance due. It must be remembered that this is a judgment held by the plaintiff against Harris, Gilreath, and Cauble. So, therefore, the question of the release of a surety as between such a party and a guarantor need not be considered. This exception is therefore overruled.

3. We do not think the circuit judge erred in holding that section 2841 of the Code of Laws authorized Symmes to settle with Gilreath and still hold Cauble liable. This provision of our laws was passed in December, 1883, whereas, the guarantors became such on the 12th of March, 1884, and was designed to afford the very relief extended to Gilreath without impairing Symmes' rights as to the balance of his debt, so far as Cauble is concerned. The text of this section is as follows: "Sec. 2841. Any joint debtor may make a separate composition with his creditor as prescribed in this section. Such a composition shall discharge the debtor making it, and him only. The creditor must execute to the compounding debtor a release of the indebtedness or other instrument exonerating him therefrom. * * *" It seems to us that this section covers the issue here. This exception must be overruled.

4. We do not think that the composition with Gilreath operated to discharge Cauble. We do not pass upon the rights of Cauble and Gilreath as between themselves, and not in this suit, and not in connection with the rights of the plaintiff. We therefore overrule this exception.

5, 6. We do not think that the judge erred as pointed out in these two exceptions, for we have just held that in this action the suretyship of Gilreath, so far as the rights of Symmes are concerned, has no effect. These two exceptions are overruled.

7. We do not think that the circuit judge erred as here complained of. What Cauble's rights may be as to Gilreath we do not here venture to express an opinion. We only intend to adjudicate the rights of Symmes. Therefore we overrule this exception.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

(58 W. Va. 108)

STATE v. ST. MARY'S FRANCO-AMERICAN PETROLEUM CO.

(Supreme Court of Appeals of West Virginia. June 27, 1905.)

CONSTITUTIONAL LAW—PROCESS—SERVICE ON CORPORATIONS—LIBERTY TO CONTRACT.

That provision of chapter 39, p. 401, Acts 1905, requiring the corporations specified to appoint the Auditor as attorney to accept service of process and notice, is not unconstitutional.

Sanders, J., dissenting.

(Syllabus by the Court.)

Application by the state for writ of mandamus to the St. Mary's Franco-American Petroleum Company. Writ awarded.

Clark W. May, Frank Lively, Frank W. Nesbitt, and Brown, Jackson & Knight, for petitioner. L. E. McWhorter and Chilton, McCorkle & Chilton, for respondent.

BRANNON, P. By chapter 39, p. 401, Acts 1905, the State Auditor was constituted the attorney in fact for every foreign corporation doing business in this state and for every nonresident domestic corporation, and every such corporation is required, by power of attorney duly executed by it, to appoint the Auditor its attorney in fact to accept service of process and notice in this state for it, and by the same instrument to declare its consent that service of any process or notice in this state on said attorney, or his accepting, shall be equivalent to, and shall be, due and legal service upon the corporation. The act requires the corporation to pay yearly $10 to the Auditor for acting, to be turned into the treasury by him. The defendant refusing to execute such power of attorney, the state asks a mandamus to compel it to do so.

The corporation asserts that no duty rests upon it by reason of said act, because it is unconstitutional. The corporation says that the act denies it freedom of contract and freedom of choice of its agent, compels it to pay money, and deprives it of property without due process of law, contrary to both the state and federal Constitutions. We cannot concede this. We shall not discuss the general power of a state over corporations taking charters under it or foreign corporations coming to the state by its grace to do business in it. It might be plausibly said that, a foreign corporation or a nonresident domestic corporation having no office or officers in the state, the state, under power to regulate corporations, and particularly to see to it that judicial process to answer suits by proper means be made available, has the power assumed in the statute. It is a duty, and must be a legitimate power, that the state render effective the jurisdiction of its courts against corporations accepting its charter and doing business in the state, or chartered by another state and doing business in the state, but having, perhaps, no officer to be readily found in the state. We can see how often the service of process, without which court procedure would be ineffectual and not due process, may be delayed, or be inconvenient, or be frustrated; and we can see how the state must have wide power in such case to secure service of the process of its courts, so its legislation do not deprive of the just right of the corporation. It ought to answer suitors in the courts. If the state deprives the corporation of an essential right, its action would not be held good. But what right does this act take away? If the Auditor were clothed with discretion to do an act harmful to the corporation, complaint might be justly made; but the Auditor does nothing but accept service, a mere ministerial act. He does not confess judgment, nor does he do any discretionary act. Doubtless, if he fail to warn his corporation of the suit, he would be liable on his bond, just as to any person for failure to perform a legal duty. Before the act of 1905, the Code required a corporation to appoint such attorney. This act changes this so far as to make the Auditor such attorney, thus taking from it the choice of person, sometimes a valuable right, but in this instance not so. But whether, but for section 8, c. 53, Code 1899, this act would be valid, we need not, do not, say. That section reads thus: "Where the Legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint-stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the right is hereby reserved to the Legislature to alter any charter or certificate of incorporation hereafter granted to a joint-stock company, and to alter or repeal any law applicable to such company." When the defendant obtained its charter, that section was in force, and this charter is subject to it. Under such a reservation of right, either to amend a charter or to change the law regulating it, there is no limit to legislative power. It even includes right of repeal. In this instance the state has simply amended the law as to the appointment of an agent; has only made a public officer attorney, so that there be one particular person, at a fixed place, always to be found, and known to all to be the attorney, dispensing with the inconvenience and uncertainty of ascertaining persons for service. 7 Am. & Eng. Enc. L. (2d Ed.) 671; Citizens' Bank v. Owensboro, 173 U. S. 636, 19 Sup. Ct. 571, 43 L. Ed. 840, and other cases cited in Brannon's Fourteenth Amendment, 365. When a charter issues under such law, the state has this right of amendment of the law in force before the charter. It is a condition of the charter as fully as if that right were in words in the charter. The law inserts or reads it into the charter. 10 Cyc. 1087; Cross v. Railroad Co., 35 W. Va. 177, 12 S. E. 1071. If the corporation do not see proper to conform to it, it must discontinue business, as the Legislature cannot

force it to do business under the change. Yeaton v. Bank, 21 Grat. 593. It cannot be said that the fourteenth amendment is violated because the act discriminates, requiring certain corporations, and not others, to appoint the Auditor. As to domestic corporations having offices and officers in the state on whom service of process can be had, there is not need of such a statute; but as to those not so situated there is need. The classification is based on the reason of their being differently circumstanced, and this justifies such discriminating classification. Copper Co. v. Scherr, 50 W. Va. 533, 40 S. E. 514; Magoun v. Illinois, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037. As to the exaction of $10 for the service of the Auditor, if his appointment is valid, this feature cannot render the statute invalid as taking property without due process. The Auditor is paid by the state, and the state, by its officer, renders valuable service to the corporation. South Carolina instituted a commission for regulation of railroads, and required the company to pay salaries of its members, on the theory that the state had power of regulation and the service redounded to the benefit of the railroad company. The act was held not to violate the fourteenth amendment, either as taking property without due process of law or as denying the company the equal protection of the law. Charlotte Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051. To the same effect, People v. Squire, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666. That feature of the act providing that the corporation shall not be required to pay any fee to any one who may have been before appointed such attorney was mentioned in oral argument as violating the Constitution in impairing the obligation of a contract. That does not arise in this case. It is a matter between different persons. Further, that is a provision separable from the clause requiring the corporation to appoint the Auditor, and, if unconstitutional, would not touch or infect that provision. 26 Am. & Eng. Enc. L. (2d Ed.) 570.

SANDERS, J. (dissenting). I cannot concur in holding that chapter 39, p. 401, Acts 1905, wherein it requires nonresident domestic corporations to appoint the Auditor attorney in fact to accept service of process and notice, is constitutional. The defendant here was organized and now exists by virtue of a charter issued to it by the Secretary of State on the 18th day of January, 1902; and on the 17th day of February, 1902, by power of attorney duly executed, filed, and recorded, as provided by section 24, c. 54, of the Code of 1899, it appointed Wm. M. O. Dawson, a resident of the county of Kanawha, in this state, its attorney in fact to accept service of process and notice in its behalf and as a person upon whom service might be had. There is no complaint that the defendant did not fully comply with the statute as it existed prior to the passage of chapter 39, p. 401, Acts 1905; but it is the provisions of this act it is alleged to have violated, and application is made to this court for a writ of mandamus to enforce compliance therewith. The defendant contests the right of the state to compel it to comply with the provisions of chapter 39, and urges as the reason why it should not be compelled to do so that it is in violation of both the federal and state Constitutions, in this: That it deprives it of the liberty to contract and select its own attorneys and agents, and that it is calculated to deprive and may deprive corporations of their property without due process of law. The law, prior to the passage of this act, was entirely adequate to make process available against foreign and nonresident domestic corporations, and completely protected suitors against such corporations by providing for the appointment of an attorney in fact to accept service of process, etc., and by requiring the power of attorney by which the appointment was made to be recorded; and just what called for the passage of chapter 39 is difficult to determine, unless it was for the purpose of increasing the state's revenues. It does not afford any additional or more efficacious means of serving process than existed prior to its enactment. Therefore the act under consideration could be declared unconstitutional without in the least impairing the rights of any person who may desire to resort to the courts of this state for the enforcement of his rights against such corporation.

The selection by a corporation of its officers and agents for the purpose of managing and conducting its business, of all kinds whatsoever, is the highest and most important right which can be exercised by it, because its business is conducted solely by its officers and agents; and under the provisions of the act in question the defendant is deprived of this paramount right, and instead thereof the state has imposed upon it the duty of selecting the State Auditor as such agent. The right to have notice of suit brought against it is an exceedingly important right—so important that it should have the right of selecting its own agents for this purpose. It should be left to the corporation to determine whether or not the agent is competent to transact the business, and one in whom it would repose so important a trust; and to deny it this right is to clearly invade that constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. When the state selects one of its officers and compels his appointment as attorney in fact for the corporation, any judgment obtained against such corporation under a service upon such agent is not a judgment obtained by due process of law. Judge BRANNON, in delivering the opinion of the court, says: "If the state deprive the corporation of an essential right, its action

would not be held good." In determining the rights of a corporation, I fail to see what right or power is more essential to the successful management and safety of its business than the selection of its agents and servants, and especially in the selection of an agent to accept service of process for it, or upon whom service of process may be had in any suit which may be filed against it. A failure to notify a corporation of a suit pending against it may mean absolute destruction to the corporation, without remedy. If the act in question is constitutional, and the state has the power to select an agent to accept service of process, then where does such power end? Would it not have the power to select any other officer or agent of the company? If the corporation can be deprived of the agent of its own choosing in one instance, why cannot the state deprive it of the selection of all its agents? There is as much reason to say that the state can appoint all as to say it can appoint one. There is no public necessity for the appointment of an agent to receive service of process until after the right of selection has first been given to the corporation and it fails or refuses to exercise it. What remedy is given the corporation, where the Auditor fails to notify it of any suit brought against it? Judge BRANNON says: "Doubtless, if the Auditor fails to warn the corporation of the suit, he would be liable on his official bond." I know of no law that fixes any such liability on the Auditor. The act in question does not do so. While it is true he is a state official, yet he is not a state official when acting as attorney in fact for the corporation. The corporation is required to appoint him as its agent, and in this respect he is not the agent of the state nor acting for the state. But, suppose he could be held liable on his bond; the penalty of it, as fixed by statute, is $20,000. Is this adequate to meet any such liabilities as may arise by reason of his failure to perform his duties in this respect? In what way can it be determined? The statute does not contemplate that the Auditor's bond is taken to cover any such liability.

None of the authorities cited by the attorney for the state apply to this case. They refer to foreign corporations entirely, and in some of the cases the power of selection is first given to the corporation, with the provision that, if it fail to make the appointment, service may be had upon some state official, while in the other cases it is held that a foreign corporation can exercise the right to do business in a state only by comity, or as an act of grace on the part of the state, and the condition upon which the power is extended goes with it, and cannot be separated from it, so that, if the privilege is enjoyed, the condition must be performed, and all corporations referred to in these cases were permitted to do business in the state upon the express condition that they appoint a certain person to accept service of process, etc. The case of Fisher v. Traders' Mutual Life Ins. Co. (N. C.) 48 S. E. 667, is attempted to be applied here. It has no application, because it gives the corporation first the power to select its own agent, and provides that, if it fails to make the selection, process may be served on the secretary of the corporation commission. No such right was extended to this defendant. If so, it would have no just ground of complaint, and doubtless would not be complaining. And upon an examination of all the authorities cited by counsel for the state it will be found that they do not support the state's contention. The state should have the right to require nonresident domestic corporations to appoint an agent or representative in the state to receive service of process and notices in legal proceedings instituted against them, and to provide, upon their failure to make such appointment, that service may be had upon a public official designated for that purpose, or in some other prescribed way. But the state has no power to compel a nonresident domestic corporation to appoint any particular officer or person as its agent to accept service of process, etc., until it has been given the right to select some one of its own choosing, and a failure upon its part to do so. "Judgment against corporation on leaving summons with recorder of deeds, though authorized by statute, is not by due process under the fourteenth amendment." Brannon's Fourteenth Amendment, 263. And the author cites Pinney v. Providence Co. (Wis.) 82 N. W. 308, 50 L. R. A. 577, 80 Am. St. Rep. 41, which decides that a statute authorizing service of process on a corporation by leaving a copy of such process with the register of deeds is unconstitutional, as in violation of the Constitution of the United States, declaring that no state shall deprive any person of life, liberty, or property without due process of law. There are much stronger reasons for holding in this case that chapter 39 is unconstitutional than there were for holding unconstitutional the act in the case just cited; for by the Wisconsin statute it was required that on or before October 1, 1898, the corporation file in the office of the register of deeds a list of the names of its officers therein mentioned on whom service of process, notices, or orders might be made, as provided by another section of the statute, and provided, further, that in all cases where such list of officers was not filed as aforesaid service of all legal process, notices, or other legal proceedings might be lawfully and effectually made upon any such corporation by giving to and leaving with said register of deeds true copies of such legal process, orders, notices, or proceedings, in which case service so made should be valid.

Then, again, the defendant is required by this act to pay to the Auditor, as its attorney, the stipulated sum of $10 for his services.

Not only is the right to select its own agent taken away from the corporation, but it is deprived of the liberty to contract with its agent as to the compensation which such agent is to receive for his services. Judge BRANNON says: "The Auditor is paid by the state, and the state, by its officer, renders valuable service to the corporation." This may be true; but still it is no reason why the defendant can be deprived of the liberty to contract, as guarantied to it by the Constitution. In Brannon's Fourteenth Amendment, p. 110, the author says: "But what does the word 'liberty' mean in American Constitutions? This is the test question here, for it means in the fourteenth amendment just what it means in the state Constitution. It means personal liberty. This includes more than mere exemption from imprisonment. I should say that it means exemption or immunity from unlawful imprisonment or detention of the body; freedom to go or come on lawful business or pleasure, commonly called the right of locomotion; the right to acquire, hold, and convey property; the right to make contracts and to labor in any lawful calling to earn a living," etc. In State v. Peel Splint Coal Co., 36 W. Va. 856, 15 S. E. 1018, 17 L. R. A. 385, Judge Brannon, in delivering the opinion of the court, says: "The word 'liberty,' as here used, does not mean simply exemption from bodily imprisonment, but liberty and freedom to engage in lawful business, to make lawful contracts therein, to the end of earning a livelihood for self and family, and of acquiring and enjoying property, and of obtaining happiness. The right to contract and be contracted with is indispensable to these indispensable objects. * * * Vain would be the pursuit of happiness if the right of contract necessary to secure the bread of life and raiment and home be taken away. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system —indeed, under all civilized governments —than this right of contract." I fully concur with the court in construing this constitutional provision and defining the word "liberty" as embracing the right to contract and be contracted with; and, if this is the proper construction, then it seems to me that no argument is necessary to show that the act in question is unconstitutional, because it deprives the defendant of its right to contract with its agent.

The validity of the act in question is upheld by the court by virtue of section 8, c. 53, Code 1899; for Judge BRANNON, speaking for the court, says: "But for said section 8, we need not, do not, say whether or not the act would be valid." If chapter 39, p. 401, Acts 1905, is unconstitutional but for said section 8, I fail to see how this section can rob it of its unconstitutional features and render constitutional an unconstitutional act. It is true the state, in said section 8, reserved the power to alter any charter or certificate of incorporation, and to alter or repeal any law applicable to a joint-stock company. This is a legislative, and not a constitutional, reservation; and, while the state has reserved such powers, yet it cannot reserve to itself the right to pass an act in derogation of the Constitution. Therefore section 8, c. 53, Code 1899, cannot relieve the act in question of its unconstitutional features. Mr. Justice Cooley, in Detroit v. Howell Plank Road Co., 43 Mich. 140, 5 N. W. 275, speaking of the provision of the Constitution of the United States which forbids the impairment of obligations of contracts, says that, but for this provision, "the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the state where any sovereignty would be, if unrestrained by express constitutional limitations and with the powers it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained; but it could not do what would be inconsistent with constitutional principles." In Citizens' Bank v. Owensboro, 173 U. S. 636, 19 Sup. Ct. 571, 43 L. Ed. 840, and many other cases, it is said, in upholding the reserved powers to alter or repeal the charter of a corporation, that under such reservation the Legislature may exercise the right without impairing the obligation of the contract. This is because the reservation qualifies the grant, and, whenever the Legislature exercises the power which it has expressly reserved, it does not impair the obligation of its contract, because it is a part of the contract that it shall be at liberty to exercise that power. It is not claimed that chapter 39 is invalid because it impairs the obligation of a contract, but because it is in conflict with the fourteenth amendment to the Constitution of the United States. The state cannot reserve unto itself the power to pass an unconstitutional act. Whatever power the state may possess over corporations in their creation, or in passing or amending the laws under which they are formed, it cannot withdraw from them the guaranties of the federal Constitution.

The object of the reservation, in whatever form expressed, was to preserve to the state control over the corporate franchise, rights, and privileges which in her sovereign or legislative capacity she had called into existence; in other words, to enable her to annul or modify that which she had created. It was not its object to interfere with contracts which the corporation, when once created, might make, nor with the property which it might acquire. With respect to everything else, it gives no power that the state would not have had without it. The artificial body created by the Legislature is composed of natural persons who have combined their property to obtain an object beyond their individual resources, and who

are clearly entitled, under the guaranties of the Constitution, to be secured in the possession and use of their property thus held, with the liberty to contract in regard thereto, as before they had associated themselves together. Mr. Justice Field says: "Whatever the state may do with the creations of its own will, it must do in subordination to the inhibitions of the federal Constitution. It may confer by its general laws upon corporations certain capacities of doing business and of having perpetual succession in its members. It may make its grant in these respects revocable at pleasure. It may make it subject to modifications. It may impose conditions upon its use and reserve the power to change these at will. But whatever property the corporation acquires in the exercise of these capacities conferred it holds under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law. Nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances."

For the foregoing reasons, I would refuse the writ.

(58 W. Va. 102)

WALLACE et ux. v. DOUGLAS et al.

(Supreme Court of Appeals of West Virginia. June 16, 1905.)

1. SALE—WARRANTY—BURDEN OF PROOF.

As a general rule, the burden of proof rests on the buyer, who sets up a warranty of quality or soundness in the sale of personal property, to establish the fact that the warranty was made and that a breach of it has occurred.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1258–1260.]

2. APPEAL—REVIEW—QUESTIONS OF FACT.

A decree determining a question of fact will be reversed upon an appeal, where it clearly appears that such decree is against the weight and preponderance of the evidence, but not where the evidence is of such conflicting and doubtful character that different minds and different judges, equally fair, might reasonably arrive at different conclusions from such evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3979–3992.]

(Syllabus by the Court.)

Appeal from Circuit Court, Putnam County.

Bill by C. L. Wallace and wife against Oscar Douglas and another. Decree for plaintiffs, and defendant Oscar Douglas appeals. Reversed.

C. E. Hogg, W. L. Higgins, and John E. Beller, for appellant. Bowyer & Green, for appellees.

COX, J. In June, 1899, Charles L. Wallace purchased by parol contract from Oscar Douglas a secondhand and well-worn traction engine and boiler at the price of $280, to be paid in 4 equal payments, in 6, 12, 18, and 24 months, with interest, for which Wallace and his wife, Frances, executed their notes, secured by a deed of trust bearing date the 10th day of June, 1899, on the engine and boiler purchased and on a tract of land owned by the wife. Default having been made in the payment of some of the notes, Perry Buxton, the trustee named in the deed of trust, upon request of Douglas, gave notice of sale of the trust property, and was about to make sale thereof, when Charles L. Wallace and his wife, Frances E. Wallace, filed their bill in equity in this cause against Douglas and Buxton, trustee, alleging the foregoing facts, and, in addition, substantially the following: That the purchase of the engine and boiler was made by Wallace from Douglas, relying upon certain representations and promises made by the latter as to the quality and soundness of the engine and boiler, constituting a warranty on his part to the effect that said engine and boiler were all right and as good as new, and, if they were not all right and as good as new, he would make them all right and as good as new; that such representations and promises were repeated to the wife when the notes and trust deed were executed; that there was a breach of said warranty; that at the time it was made the said engine and boiler were imperfect, out of repair, and would not work as well as a new engine and boiler, and were not as good as new; that, upon the discovery of the defective and unsound condition of the engine and boiler, the plaintiff C. L. Wallace gave notice in writing to Douglas of the misrepresentation of the engine, and that it was then at Frazier's Landing, subject to his order, etc.; and praying that the sale by the trustee be enjoined, and that defendant Douglas be restrained from negotiating and transferring said notes, and that said notes be canceled and delivered to plaintiffs, and that the trust deed be declared null and void, and that a release thereof be directed. Upon this bill a preliminary injunction was awarded, and Douglas filed his answer, denying the representations, promises, and the warranty, to which answer there was a general replication. Depositions were taken by both sides, and such proceedings were had in the cause that upon final hearing a decree was entered perpetually enjoining the sale under the trust, except as to the engine and boiler in controversy, and restraining Douglas from negotiating the notes and canceling the same, and declaring the trust deed null and void, and directing it to be released. From this decree, defendant Douglas appealed.

The first question presented is one of fact. Was the sale of the engine and boiler made by Douglas with the warranty alleged in the bill? As a general rule the burden of proof rests on the buyer, who sets up the warranty, to establish the fact that it was made and that a breach of it has occurred. Cook v. Tavener, 41 Ill. App. 642; Morris v. Wibaux, 47 Ill. App. 630; Cunningham v.

Hall, 4 Allen (Mass.) 268; McKendry v. Sinker, 1 Ind. App. 263, 27 N. E. 506. This was not a sale by sample. The burden of proving the warranty is on the plaintiff. The evidence upon the question of warranty is conflicting. Charles L. Wallace testified substantially that the warranty was made by Douglas as alleged in the bill, and that it was relied upon by him in the purchase. On his direct examination C. L. Wallace said that his son, John E. Wallace, was present at the time of the purchase. On cross-examination he said that there was no one present. His son, if present, was not called as a witness. On direct examination the following question was propounded to C. L. Wallace: "You state in the bill your wife, Frances E. Wallace, hesitated about signing the same, and asked Mr. Douglas about the boiler and engine. What did she say to Mr. Douglas, and what did he say in reply?" To which he answered: "She asked him all about the boiler, and he claimed that the boiler was all right and as good as new; that he did not want her to take out the boiler and engine for people to say that they had some old trap or another." The deed of trust and notes were executed at the home of Mrs. Ewers, on the Frazier's Landing side of the river, after the engine and boiler had been taken across the river. On cross-examination C. L. Wallace, when asked what statements, if any, were made to him or his wife which caused him to execute the notes and deed of trust, said: "Mr. Douglas might have made statements to my wife, but he never to me." And when asked: "Were you present all the time that your wife and Mr. Douglas were together on that day at Mrs. Ewers'?" he answered: "No, sir. I was in the store most of the time." The plaintiff Frances E. Wallace testified that just before she signed the notes and deed of trust Mr. Douglas told her that he had sold Mr. Wallace an engine and boiler, and that it was just as good as new, and that he would warrant that it was all right. It will be observed that she did not testify to the further representation alleged to the effect that, if the engine and boiler were not all right and as good as new, Douglas would make them all right and as good as new. The evidence of George Runnels was taken for the plaintiffs, in which he testified to a conversation had with Douglas as to the condition of this engine and boiler anterior to the sale to Wallace, which conversation, so far as we can see, has no connection with the sale to Wallace and is not material in this cause. The defendant Douglas in his evidence denied substantially that he ever made any of the representations and promises or the warranty alleged by plaintiffs, either to Charles L. Wallace or to his wife, Frances E. Wallace.

The evidence of A. P. Click was taken on behalf of the defendants. Click was called to repair the engine after the contract of sale had been made and before the engine was delivered. Douglas testified that Click was called as a witness to the contract. C. L. Wallace testified in effect that Click was called as a witness only to that part of the contract indicating the place of delivery. We quote from Click's evidence as follows: "Q. You may state what, if anything, you may know regarding a contract between C. L. Wallace and Oscar Douglas in respect to an engine and boiler made in June, 1899? A. Mr. Wallace came to my place; wanted me to come to Mr. Douglas. He said he had partly contracted for that engine of Mr. Douglas, and he wanted me to come in and fetch my tools and help repair the engine. I went and worked a day or so—got up steam; and this bracket and bolts they talked so much about wouldn't work satisfactorily for Mr. Wallace, so he said he wouldn't receive the engine till he got the other necessary repairs. We got the new bracket then, put it on with new bolts in babbitted up boxes, cleaned it up, put water in and raised steam, run it around over the yard there. Everything seemed to be all right. Mr. Douglas then asked Mr. Wallace what he thought about it, and he seemed to think it was all right, except one casting that they hadn't got yet. Mr. Douglas says, 'You take the engine and go to work with it, and I will get the other casting for you,' and he agreed to do that. That is all I know about it. Q. You may state whether or not you were called by Mr. Douglas or Mr. Wallace in the presence of each other about that time as a witness to the contract. A. Yes, sir; I was. Q. You may state which of them called you, and what was stated as the contract, and by whom. A. Mr. Douglas, I believe, called me. The contract was, Mr. Wallace was to receive the engine as it was; Mr. Douglas to get the missing casting, put it on the boat for him; was to pay in 4 notes, 6, 12, 18 and 24 months, $280, secured by a deed of trust on real estate." The evidence of James R. Ewers was taken on behalf of the defendants. We quote from his evidence as follows: "Q. Plaintiffs in their bill state that at the time of the signing of said note and trust deed Frances E. Wallace, one of the plaintiffs, hesitated about doing the same, and would not do so until she asked and inquired of the said Oscar Douglas if the said engine and boiler were all right, and said Douglas then and there, and before she executed said notes and deed of trust, answered her and said that 'they were all right, and that he would warrant them as good as new.' You may state what you know about this. A. Well, there was no hesitancy on her part in signing said deed of trust, and if such a conversation occurred it was not in my presence." This witness further testified that he did the writing on that occasion, and was the notary who took the acknowledg-

ment of Wallace and wife to the deed of trust.

From the whole evidence it appears that there was no person present when the contract of purchase was made except Charles L. Wallace and Oscar Douglas. Wallace said there was, and Douglas said there was not, a warranty. The evidence of Click, called as a witness to the contract, sustained Douglas. After the engine and boiler had been brought across the river, at the time the notes and trust deed were executed, Mrs. Wallace said that Douglas represented that he had sold Wallace the boiler and engine, and that it was just as good as new, and that he would warrant that it was all right. Mr. Douglas denied this in toto. Mr. Wallace did not sustain his wife as to this conversation. On the other hand, witness Ewers, who did the writing and took the acknowledgment, sustained Douglas in his contention that no such conversation occurred. If the direct evidence stood alone, we must conclude that the plaintiffs have failed to prove a warranty by a preponderance of the evidence. In addition to the direct evidence, there are certain facts appearing, potent in their character, which tend strongly to corroborate the defendant's contention that there was no warranty: First, the price at which the engine and boiler were purchased was not the value of those articles, if they were "all right and as good as new." In other words, the price was not a "sound price," as shown by the evidence. Second, the plaintiff Charles L. Wallace had an opportunity of examining the engine and boiler before delivery, and before the execution of the notes and deed of trust, and, according to the weight of the evidence, did examine them and saw them operated. If his evidence be true, he not only saw them operated before they were delivered to him, but he knew, when the trust deed and notes were executed and delivered, that the engine and boiler were not all right and not as good as new. We quote from his evidence given on cross-examination as follows: "I saw that it had been used. I saw that it wasn't as good as new. It was not all right prior to the purchase. The bolts was rusted. I wanted to look at the flue head and crown sheet, and he said it wasn't no use to do that, and he objected." Also: "I saw the boiler when fire was put in it, but they had me go down into the field until after the boat whistled for the landing. I came up out of the field. They just let it down to the landing and put it on is all the running that I ever saw it do. No, sir; it did not appear to work all right." And when asked, "What appeared to be wrong about it?" he answered, "It didn't work right, it didn't seem to me." And also, when asked, "What seemed to you not to work right?" he answered, "The whole thing." These facts seem to us to be conclusive against the claim of a warranty.

There are other facts appearing in the record tending to corroborate defendant's contention, to which we deem it unnecessary to advert. The decree of the circuit court is clearly against the weight and preponderance of the evidence. While conflicting, it is not doubtful. Different minds, equally fair, could not reasonably reach different conclusions; and while the rule is that we will not reverse a decree determining a question of fact, where the evidence is of such conflicting and doubtful character that different minds and different judges, equally fair, might reasonably arrive at different conclusions from it, yet a decree determining a question of fact will be reversed, where it clearly appears to be against the weight and preponderance of the evidence.

For the reasons stated, the decree of the circuit court of Putnam county, entered in this cause on the 2d day of October, 1903, is reversed, and the plaintiffs' bill is dismissed, without prejudice to defendants to enforce the deed of trust and the collection of the notes mentioned and referred to in the plaintiffs' bill.

(58 W. Va. 98)

SMITH v. VINEYARD et al.

(Supreme Court of Appeals of West Virginia. June 16, 1905.)

1. PARTITION — JURISDICTION — CONFLICTING CLAIMS.

Where, in a suit in equity for partition, it appears that the plaintiff asking partition and the defendants against whom partition is asked are tenants in common, joint tenants, or coparceners in the real estate sought to be partitioned, and as such compellable under the statute to make partition, the circuit court has power to pass upon all conflicting claims to the title to such real estate of the parties so compellable to make partition.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 53.]

2. HUSBAND AND WIFE — DEED BY WIFE — VALIDITY.

A deed for real estate, made by a married woman to her husband while they were living together, in which deed the husband did not join, passed no title or interest, either legal or equitable, in such real estate to the husband.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 242.]

(Syllabus by the Court.)

Appeal from Circuit Court, Roane County.

Bill by Aristotle Smith against Pocahontas Vineyard and others. Decree for defendants. Plaintiff appeals. Reversed.

Schilling & Harper, for appellant. J. A. A. Vandale and Walter Pendleton, for appellees.

COX, J. This is an appeal from a decree of the circuit court of Roane county, entered on the 6th day of May, 1904, in a suit in equity instituted on the 6th day of January, 1904, wherein Aristotle Smith was plaintiff and Pocahontas Vineyard and others

were defendants. The object of the suit is to partition a tract of two acres of land in Roane county between the children and heirs at law of Elizabeth A. Smith, deceased, or between two of the children and the alienee of the other child. Upon demurrer the bill was dismissed. Of this action of the court the plaintiff complains.

It appears from the bill as follows: I. D. Smith died November 3, 1894. Elizabeth A. Smith, his wife, died intestate November 29, 1896. This two-acre tract of land was conveyed by B. J. Taylor to Elizabeth A. Smith by a deed bearing date the 18th of June, 1869. Elizabeth A. Smith made a deed, bearing date the 8th day of January, 1894, for this land to her husband, I. D. Smith, in which deed he did not join. This deed was recorded. I. D. Smith made a deed, bearing date the 24th of January, 1894, for this land to his daughter Ann E. Looney, intermarried with William L. Looney. Ann E. Looney and husband in turn made a deed, bearing date the 28th of March, 1903, for this land to defendant Elizabeth Stump. Aristotle Smith, Pocahontas Vineyard, and Ann E. Looney are the only children and heirs at law of Elizabeth Smith, deceased.

It is contended by the counsel for the defendants that a court of equity has no jurisdiction to partition this land, because in so doing it would be necessary to pass upon an adverse and hostile claim of title by Ann E. Looney and her alienee, Elizabeth Stump, to the whole tract. Section 1 of chapter 79 of the Code provides that tenants in common, joint tenants, and coparceners shall be compellable to make partition, and the circuit court of the county wherein the estate or any part thereof may be shall have jurisdiction in cases of partition, and in the exercise of such jurisdiction may take cognizance of all questions of law affecting the legal title that may arise in any proceedings. This enabling provision of our statute has many times been passed upon by this court. At first glance there seems to be an apparent conflict in our decisions as to the extent of the power of a court of equity to pass upon conflicting claims to real estate in a partition suit, which upon closer examination disappears. Our earlier cases appear to give a very broad interpretation to the statute in this regard. In Hudson v. Putney, 14 W. Va. 561, it was said that under this section, when the title is doubtful, a court of equity should decide it, observing the general rules of practice in equity for ascertaining facts, either by a jury or otherwise, as may be most proper. In Moore v. Harper, 27 W. Va. 362, it was said that under this section a court of equity in a suit for the partition of lands may take cognizance of all questions of law affecting the legal title that may arise in the proceedings, such as removing a cloud from the title or passing upon an adverse claim to the land. These cases seem broad enough to enable a court of equity to pass on and determine the claim of a stranger holding a wholly adverse and hostile title; but our later cases, reviewing the former decisions, have not so construed them. Carberry et al. v. W. Va. & P. R. Co., 44 W. Va. 260, 28 S. E. 694; Cecil et al. v. Clark et al., 44 W. Va. 659, 30 S. E. 216. In the latter case Judge Brannon, delivering the opinion of the court, said, in relation to the construction given the statute by the cases of Hudson v. Putney and Moore v. Harper, that "this is broad enough in words to allow a stranger's title to be tried, but it does not mean that; but it surely does mean that an adverse claim to the same title may be passed upon." In the opinion in Carberry et al. v. W. Va. & P. R. Co., it was said: "It is needless to expand here upon the proposition that equity will not entertain a bill which is but an action of ejectment, and thus try adverse title, unless it be incidental to relief under a known head of equity jurisdiction." Under this provision of the statute and under our decisions, as we understand them, the circuit court has the power to pass upon questions of law affecting the legal title, only in the exercise of its jurisdiction of partition. If it appears as a jurisdictional fact, in a suit in equity for partition, that the party or parties asking partition and the party or parties against whom partition is asked are tenants in common, joint tenants, or coparceners in the real estate sought to be partitioned, and as such compellable under the statute to make partition, the circuit court has power incident to its jurisdiction to pass upon all conflicting claims to the title to such real estate of the parties so compellable to make partition arising in the suit. If the jurisdictional fact, viz., the existence of one of the forms of co-tenancy mentioned appears, the jurisdiction of the court is not defeated by the claim of one or more of the defendants that the fact does not exist. One of the defendants may claim the whole of the real estate sought to be partitioned, and may claim to have ousted the other and to be in sole possession, yet, if the fact appears that one of the forms of co-tenancy mentioned actually exists, the court may pass upon the conflicting claims to title of the co-tenants as long as the plaintiff's right of entry is not barred by the statute of limitations. Cecil et al. v. Clark et al., supra; Hudson v. Putney, supra; Carberry et al. v. W. Va. & P. R. Co., supra; Davis v. Settle, 43 W. Va. 17, 26 S. E. 557; Pillow v. Southwest Improvement Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; Code, c. 79, § 1.

Upon the facts alleged, had the circuit court jurisdiction of partition in this case? This leads us to consider the deed made by Elizabeth A. Smith to her husband, I. D. Smith, while they were living together. We must presume that they were living together; the contrary not appearing. The

husband did not join in this deed. Under our law this deed had no legal effect as to the real estate sought to be conveyed thereby. It did not divest Mrs. Smith of her title and estate in the land, and did not pass any title or interest, legal or equitable, to her husband. Austin v. Brown, 37 W. Va. 634, 17 S. E. 207; Cecil et al. v. Clark et al., supra. No title having passed by this deed to the husband, I. D. Smith, his deed to his daughter, Ann E. Looney, passed no title or interest to her. Upon the death of Elizabeth A. Smith this land passed by descent to her children and heirs at law, Aristotle Smith, Pocahontas Vineyard, and Ann E. Looney, share and share alike. Whether or not the one-third interest, which descended to Ann E. Looney upon the death of her mother, passed by her (Ann E. Looney's) deed, in which her husband joined, to Elizabeth Stump, does not appear from the allegations of the bill. Neither the deed nor a copy of it is exhibited. The provisions of this deed should be made to appear in the cause. If the one-third interest which descended to Ann E. Looney passed under her deed to Elizabeth Stump, then Elizabeth Stump is a co-tenant with Aristotle Smith and Pocahontas Vineyard, and partition lies at the suit of the plaintiff. If this one-third interest did not pass under the deed to Elizabeth Stump, then Ann E. Looney is still a coparcener with Aristotle Smith and Pocahontas Vineyard, and partition lies at the suit of the plaintiff. In either case it is obvious that the plaintiff is entitled to partition; his right not having been barred by the statute of limitations at the time this suit was brought. The circuit court, having jurisdiction under the facts alleged in the bill, may settle the questions of law affecting the title arising in this cause. It follows that the demurrer to the plaintiff's bill should not have been sustained and the bill should not have been dismissed.

The decree of the circuit court of Roane county complained of, being erroneous, is reversed, and the demurrer to plaintiff's bill is overruled, and this cause is remanded, to be further proceeded with in accordance with the principles announced in this opinion and the rules governing courts of equity.

(72 S. C. 322)

STATE ex rel. BATTLE v. CAPE FEAR LUMBER CO. et al.

(Supreme Court of South Carolina. Aug. 5, 1905.)

1. CONTEMPT—ISSUE OF RULE—JURISDICTION.
Under Code Civ. Proc. 1902, § 402, subd. 8, providing that orders made out of court without notice may be made by the judge of the court in any part of the state, a circuit judge has jurisdiction to issue a rule for contempt proceedings in a county in which he resides in chambers against a party residing in another county, the return to be made in such other county.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, §§ 100, 107.]

2. SAME—RULE TO SHOW CAUSE.
Failure to serve with a rule to show cause in contempt proceedings a copy of the order alleged to have been disobeyed is immaterial, where a copy of the order was served immediately after its issuance.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, § 156.]

3. SAME—RETURN.
Though the return in contempt proceedings is sufficient on its face, the truth of the statements may be inquired into.

4. SAME—ADDITIONAL AFFIDAVITS.
In contempt proceedings, the court may give relator further time to file additional affidavits and to reply to the return, if new matter is not set up.

5. SAME—DISCHARGE OF CERTAIN DEFENDANTS.
In proceedings for contempt against a corporation and its agents, finding return of the rule on the agents to show cause to be sufficient and discharging the rule as to them is not prejudicial as to the corporation, and it may be adjudged in contempt without specifications as to the agents or the place or the time when the order was violated.

6. SAME—HEARING.
The return to a rule to show cause may be heard in open court without being placed on the calendar.

Appeal from Common Pleas Circuit Court of Horry County; Watts, Judge.

Action by James Battle against the Cape Fear Lumber Company and others. Rule to show cause why defendants should not be in contempt. From an order adjudging it in contempt, the lumber company appeals. Affirmed.

Johnson & Quattlebaum and M. C. Woods, for appellant. Robert B. Scarborough and Fred. D. Bryant, for respondents.

GARY, A. J. The facts are thus stated in the record: "This was a proceeding against Cape Fear Lumber Company and certain of its agents and servants, issued by his honor, Judge R. C. Watts, February 18, 1904, requiring Cape Fear Lumber Company and certain of its agents, to wit, Benjamin Tinch, W. O. Dunbar, Henry Martin, George Martin, Will Hammond, Arch Bullard, and John F. Stevens, to show cause before him at Conway, S. C., on March 7, 1904, at 10 o'clock a. m., or as soon thereafter as counsel could be heard in open court, if any they could, why they should not be attached as for contempt for disobedience to an order of injunction issued in said cause, dated October 20, 1902, and signed by his honor, J. C. Klugh, circuit judge. Upon calling the rule, respondents' attorneys moved to dismiss the rule on the ground that the same was issued by his honor out of the county of Horry, without Judge Klugh's order or a certified copy thereof before him, and without anything before him showing that Judge Klugh had issued an order of injunction in the cause, except an ex parte affidavit of the relator, James Battle, the proceeding being irregular and void on its face; that the only papers served on respondents, or any of them, was the order of his honor, Judge Watts, and the affidavit

of James Battle. Motion refused, because a certified copy of Judge Klugh's order was before Judge Watts at the time he made the order to show cause herein, and that fact is stated in the order itself, and, besides, the order of Judge Klugh had been served upon Cape Fear Lumber Company immediately after it was granted. Exception entered. Relator's attorneys then read the order of Judge Klugh, which respondents' attorneys objected to on the ground that relator could not now add to his case in chief, but must stand upon the papers which respondents had been called upon to answer. Objection overruled and exception entered. Relator's attorneys then read the pleadings on which Judge Klugh's order was based, which respondents' attorneys objected to on the same grounds. Objection overruled, and exception entered. The return of respondents was then read; the answer and a proposed amended answer being a part of their return. At the conclusion of the reading of the return respondents' attorneys moved to discharge the rule on the showing made. Relator's attorneys objected to the discharge of the rule and asked for further time in which to reply to the return. Respondents' attorneys took the position that respondents were entitled to open and reply in evidence and argument in a cause of this nature, and his honor so held, but over objection of respondents he allowed relator further time, to wit, until 9:30 a. m. the following morning, to file additional affidavits, at the time granting respondents until 3 p. m. the same day to reply to the additional affidavits, at which time the rule was to and did come up for final hearing. At the final hearing respondents' attorneys objected to the additional affidavits being read on the grounds that they were not in reply, were cumulative, and contained new matter to bolster up the case in chief, including a plat made by one of relator's attorneys, without courses and distances or acreage, to which respondents could not possibly reply in the time allowed, as the scene of the trespass was over 20 miles distant. Objections overruled and exceptions entered. Additional affidavits of relator and reply of respondents thereto were read. The rule to show cause was not docketed on any of the calendars of the court, but no objection was taken, and the trial judge had not heard of that until the case for the Supreme Court came before him for settlement. The original case on which injunction pends was on docket and was called for trial and continued on terms at the same term. After argument of counsel, respondents opening and replying, the order appealed from was granted. Within 10 days after the date of such order respondent Cape Fear Lumber Company duly served notice of its intention to appeal, together with exceptions."

The first exception is as follows: "(1) Because his honor erred in granting the rule at chambers at Cheraw, S. C., outside of the county of Horry, on an affidavit of relator, James Battle, without having the order of Judge Klugh before him, or other knowledge thereof, except what is contained in affidavit of relator." The appellant first contends that his honor, Judge Watts, did not have jurisdiction to grant the rule to show cause at chambers. Cheraw is in the circuit of which his honor was the resident judge. Section 2733 of the Code of Laws provides: "The circuit court shall be deemed always open * * * for making and directing all interlocutory motions, orders, rules and other proceedings whatever, preparatory to the hearing of all causes pending therein, upon their merits. * * *" Subdivision 3, § 402, of the Code of Civil Procedure of 1902, is as follows: "Orders made out of court, without notice, may be made by the judge of the court, in any part of the state." A rule to show cause adjudges nothing. Sims v. Davis, 70 S. C. 362, 49 S. E. 872. These authorities show that Judge Watts had jurisdiction to issue the rule to show cause. The appellant also contends that Judge Watts erred in granting the rule to show cause without having the order of Judge Klugh before him. By reference to the statement hereinbefore set out, it will be seen that the exception was taken under a misapprehension of the facts, as the order of Judge Klugh was before Judge Watts when he issued the rule.

2. The second exception is as follows: "(2) Because his honor erred at the hearing of the rule in refusing to dismiss the rule on respondents' motion as soon as the order to show cause and the affidavit on which the same was based were read, on the grounds that no copy of the order of Judge Klugh was annexed thereto or served therewith on respondents, or any of them." It is true a copy of Judge Klugh's order was not served on the defendants at the time a copy of the affidavit and rule to show cause were served upon them, but the record shows that a copy of said order was served upon the appellant immediately after it was granted. Under these circumstances the failure to serve a copy of the order was not prejudicial error.

The third exception is as follows: "(3) Because his honor erred in permitting relator to read the order of Judge Klugh as a part of his moving papers and thus add to his case in chief, without any notice to respondents, overruling respondents' objection to such reading and to such unnoticed addition to his case." The record shows that the order of Judge Klugh was one of the papers upon which the rule to show cause was granted.

3. The fourth exception is as follows: "(4) Because his honor erred in refusiug to dismiss the rule at the conclusion of the reading of the return of respondent; it being submitted that the said return was sufficient to the original rule and exhibit." The affidavit upon which the rule was issued al-

leges that the appellant, through its servants, went upon the lands of the plaintiff after the order of injunction and cut and carried away wood and timber therefrom in large quantities, in value $200 or $300; that the plaintiff warned them to stop, and posted notices in various places on said land and on piles of wood and crossties cut by them, forbidding them to move it after it had been piled; but that they continued their wrongful acts in disregard of the order of injunction. Conceding that the contempt was criminal, in so far as it offended the dignity of the court, it was nevertheless civil to the extent it violated the rights of the plaintiff protected by the order of injunction. Lorick & Lowrance v. Motley, 69 S. C. 567, 48 S. E. 614. In 7 Enc. of Law, 76, the rule is thus stated: "When the contempt consists in a failure to comply with or the disobedience of an order, injunctional or otherwise, resulting in loss or damage to the adverse party, it neither purges the contempt nor repairs the wrong done for the contemnor to avow or to show that he acted from bona fide motives and with no intention of being guilty of a contempt. In such case the question of contempt vel non is purely a question of law." See, also, note 2 on that page. In Re Corbin, 8 S. C. 390, relied upon by the appellant, the court uses the following language: "Every material allegation in the 'suggestion upon the record' in the above-entitled case against David T. Corbin * * * has been specially denied by his answer to the rule to show cause why he should not be attached and otherwise punished for contempt of this court; and, there being no action taken on such return by the counsel for the relators, the answer must be taken as true and the rule dismissed." That authority is not decisive of this question, for the reason that action was taken on the return by the relator in this case. The appellant likewise cites the case of Oster v. People (Ill.) 61 N. E. 469, 56 L. R. A. 462. But that was a case in which the contempt was held to be criminal in its nature, and, furthermore, the denial of the facts alleged in the return was held to be insufficient. The appellant also relies upon 9 Cyc. 44, in which it is said: "At common law, where the answer of the accused squarely met and denied the alleged contempt, such answer was conclusive, and no further evidence could be received; and this rule has been followed in many cases. Authority, however, is not wanting in support of the chancery rule, which permits inquiry to be made into the truth of the answer filed by the accused." Sound reasoning is in favor of the chancery rule.

4. The fifth exception is as follows: "(5) Because his honor erred in permitting relator, over objections of respondents, further time, to wit, until 9:30 a. m. the following day, within which to procure and file additional affidavits charging contempt against respondents." The circuit judge had the right to exercise his discretion, which was not abused.

The sixth exception is as follows: "(6) Because his honor erred in permitting relator time and opportunity to reply to the return and the affidavits submitted therewith." What we have just said disposes of this exception.

The seventh exception is as follows: "(7) Because his honor erred in receiving and hearing additional affidavits containing entirely new matter, not in reply to return or affidavits submitted by respondents, over the objections of respondents." While the additional affidavits were explanatory and set forth the facts more fully, we do not regard them as setting forth entirely new matter.

The eighth exception is as follows: "(8) Because his honor erred in only allowing respondents from 9:30 a. m. to 3 p. m. the same day, to reply to various new and additional matter permitted to be brought in as aforesaid by and on behalf of relator, while the scene of the alleged trespass was over 20 miles distant, and a portion of the new matter was a plat based on an alleged survey made by one of the relator's attorneys, and the affidavits alleged new facts that could not be replied to without an investigation of the premises, thus precluding respondents from making such investigations on which to make a reply." This exception is disposed of by what was said in considering the fifth and seventh exceptions.

There is no ninth exception.

5. The tenth exception is as follows: "(10) Because his honor erred in, after having found the return sufficient as to the only agents and servants of the corporation who were alleged to have committed trespass in violation of the order of injunction, not to have discharged the rule as to the corporation itself." We do not see how the appellant was prejudiced by the action of the circuit judge in discharging the rule as to its servants.

The eleventh exception is as follows: "(11) Because his honor erred in making the rule absolute as to Cape Fear Lumber Company, a nonresident corporation, without evidence other than a suspicion to base such finding upon, as all of its resident agents and servants had been found not to have violated the order of Judge Klugh." This is disposed of by what was said in considering the tenth exception.

The twelfth exception is as follows: "(12) Because his honor erred in finding this respondent guilty of contempt, without embracing in his finding any specification as to the time and place where, and person or persons, agent or agents, by whom, this artificial person violated the order of Judge Klugh." The cases of May v. Cavender, 29 S. C. 598, 7 S. E. 489, and Stepp v. Association, 37 S. C. 418, 16 S. E. 134, show that this exception cannot be sustained.

6. The thirteenth exception is as follows:

"(13) Because his honor erred in granting such order practically at chambers; it being an order growing out of an equity cause and not placed upon any of the dockets or calendars of the court." The record shows that the return to the rule was ordered to be heard in open court and was actually heard in open court. Furthermore, the record shows that no such objection was interposed when the case was called for hearing.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 295)

TUCKER v. TUCKER et al.

(Supreme Court of South Carolina. Aug. 2, 1905.)

1. ESTOPPEL — ASSIGNMENT OF MORTGAGE — RIGHTS OF ASSIGNOR.

Where the assignee of a note and mortgage had notice that the mortgagor had only a leasehold estate, or had notice of facts which would put him on inquiry, the assignor was not estopped from claiming that the assignee had only such an interest where after the expiration of the leasehold interest she purchased the fee, where there was no evidence that she assigned the mortgage with the intent to purchase the fee, or that she failed to give the assignee notice of any existing right which she possessed at the time of the assignment.

2. APPEAL — REVIEW — DISCRETION OF TRIAL COURT.

A ruling of the circuit court that no foundation had been laid for reception of secondary evidence is discretionary and will not be reviewed, where no abuse is shown.

Appeal from Common Pleas Circuit Court of Anderson County; Klugh, Judge.

Action by W. H. Tucker against J. B. Tucker and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The following is the circuit decree:

"One James H. Brown on 1st January, 1886, made his note for $50 in favor of Mrs. C. E. Irby, and executed a mortgage of 12 acres of land in Anderson county to secure the payment thereof. On 1st June, 1892, Mrs. Irby assigned the note and mortgage to W. W. Smith in the following terms indorsed on the mortgage: 'For value received I hereby assign, transfer, and set over the within mortgage and the note it was given to secure to W. W. Smith.' On May 1, 1893, W. W. Smith assigned the same note and mortgage in identical terms to W. H. Tucker. The description of the land in the mortgage is as follows: 'Twelve acres of land, more or less, situated in the county of Anderson and state aforesaid, on the public road leading from Anderson to Greenville C. H., bounded on the north by lands of James Martin, on the east by James Martin, on the south and west by lands of Mrs. C. E. Irby, more fully described in a deed from D. H. Hammond to James H. Brown.' The deed from Hammond to Brown thus referred is in evidence, and describes the lands as 'a portion of the Wadsworth survey, bounded,' etc. The date of this deed is November 12, 1885, and it was duly recorded. Hammond derived his title to the land from Harvey Waldrop through a deed dated May 16, 1879, and recorded January 22, 1881, which refers to 'the old deeds made to said Waldrop by James Martin and Jeremiah Tims.' 'The old deeds' thus referred to appear to be lost, and there is no evidence that they were ever recorded; but it appears from the testimony of R. P. Martin and J. H. Elrod, the one a son and the other a grandson of James Martin, who reside in the neighborhood of the said land, that James Martin conveyed 12 acres of this land to Jeremiah Tims more than 40 years ago, before the Civil War, that Tims conveyed to Waldrop the 10 acres, and that James Martin conveyed 2 more acres of the original tract to Waldrop about the year 1870. The interest of James Martin in the said land was derived through a deed dated March 18, 1836, and recorded September 2, 1839, from Benjamin F. Sloan and George Seaborn, executors of the will of Gen. John Baylis Earle, deceased, by which they leased to James Martin, his heirs and assigns, for the term of 65 years, a tract of 470 acres, 'being land of the estate of Thomas Wadsworth, deceased, left for the benefit of his Poor School.' By the recitals of another deed in evidence, that of R. G. Wallace and others, as trustees to Mrs. Beulah C. Brown, it appears that this land was granted to Thomas Wadsworth on May 4, 1785, and that it was leased from the treasurer of the Wadsworth Poor School by Gen. Earle on March 20, 1831. The said 12 acres of land was mortgaged by James H. Brown, signing himself as J. H. Bryant, on August 8, 1891, to the Sylvester Bleckley Company, and this mortgage has been assigned to W. H. Tucker, the plaintiff herein. The Hammond deed is referred to, also, for the description and identification of land. The amount for which the said mortgage was given was $66, with interest at 8 per cent., payable annually; and there was paid on it $11 on May 2, 1892. It appears that W. H. Tucker took possession of the land at the time the mortgage was assigned to him and received the rents and profits therefrom for seven years. It should have been stated above that there were credits on the Irby mortgage debt of $5 paid on December 25, 1886, $5 on December 26, 1887, $20 on December 12, 1888, and $3.50 on April 15, 1889, and that said debt bore interest at 10 per cent. per annum until paid in full. In the year 1892 the trustees of the Wadsworth Poor School had the tract of land, of which the 12 acres involved in this suit are a part, resurveyed, and by a deed bearing date January 9, 1893, conveyed the same to Mrs. Beulah C. Brown; and on August 23, 1890, Mrs. Brown conveyed the 12 acres in question to Mrs. C. E. Irby, who is now in possession under said conveyance.

"This action is brought against the administrator of James H. Brown, who died in October, 1901, and Mrs. C. E. Irby and W. W. Smith. It is alleged that the said Irby

and Smith each guarantied the payment of the mortgage debt first above mentioned at the time the same was assigned by them, respectively. The plaintiff seeks a judgment for the amount of the two mortgage debts and against the defendants Irby and Smith on their alleged guaranties of the first-mentioned mortgage, and for foreclosure and sale of the mortgaged premises. It will be observed that the heirs of James H. Brown are not made parties, but no question is made upon that ground. Only Mrs. Irby answered the complaint. She denies that either she or W. W. Smith guarantied the payment of the mortgage assigned by them, and alleges that Brown had only a leasehold of the mortgaged premises, which the plaintiff well knew; that the same expired in the year 1900, and that the said mortgagees now have no lien on the land; that she now owns said land under the deed of Beulah C. Brown. For a second defense she alleges that the plaintiff is guilty of laches, in that he held the said mortgage for more than six years, and until it ceased to be a lien by reason of the expiration of the lease above mentioned, although he well knew that the said lease would expire in the year 1900, and failed and neglected to foreclose the same; for a third defense, that the action was not brought within six years from the time the note was due; and, lastly, that the plaintiff had possession of the mortgaged land for eight years, and during that time he received the rents, which more than paid the mortgage debts. The case was heard by me on the pleadings, the testimony taken by a referee, and argument of counsel. The evidence does not show that there was any contract or guaranty independent of or separate from the written assignments indorsed on the mortgage. No guaranty is expressed in the assignments, nor can any be implied. Walker v. Scott, 2 Nott & McC. 268, note; Tryon v. De Hay, 7 Rich. Law, 12. It is clear that the interest of Brown in the land mortgaged was only a leasehold. Of this fact the plaintiff had constructive notice through the registry of the antecedent deeds in the chain of title, and, even if he, living as he did in the neighborhood of the mortgaged premises, had not actual notice, the references in the very mortgages which he took by assignment to the Hammond deed and the recital in that deed were sufficient to put him on inquiry leading easily to the knowledge of the fact. The lease having expired, the land is no longer subject to the lien.

"It is contended by the plaintiff that Mrs. Irby's acquisition of the title to the mortgaged premises after her assignment of the mortgage, which contained a clause of general warranty, inured to the benefit of plaintiff, and that she is now estopped by the covenants contained in said warranty. But the said warranty was not her warranty. We have seen that she cannot be held even to have guarantied the payment of the mortgage debt, still less the mortgagor's title. Her assignment carried with it whatever right she had under the mortgage, and nothing more. The estate of the mortgagor was a leasehold, which expired by the terms of the lease itself, and was no whit defeated or diminished by her act in purchasing the fee-simple estate left after the expiration of the lease. Not being a party to the mortgagor's warranty, and having done nothing to impair the rights of the plaintiff as assignee of the mortgage, she is not estopped to assert her title. Since the defendant is not bound as guarantor of the debt or as warrantor of the title, the defense of laches can hardly arise or be sustained in her behalf. Nor, in my opinion, is the statute of limitation a bar. Under the view which I have taken of the liability of Mrs. Irby and Mr. Smith, the liability of the plaintiff to account for the rent of the mortgaged premises does not concern them. The administrator of Brown, the mortgagor, has not answered, and makes no question against the plaintiff's claim. The plaintiff admits having received rent from the mortgaged land, but testifies that the same was used by Brown, and that none of it was applied to the mortgage debt. There is no evidence in rebuttal of this testimony. Under the evidence he is only liable for the rent actually received, not for rental value; and his account of the disposition of what was so received must be taken as the fact. The amount due on the note set out in the first cause of action is $76.90, and that due on the note set out in the second cause of action $110.64.

"It is ordered and adjudged that as to Mrs. C. E. Irby and W. W. Smith the complaint be dismissed with costs, and that the plaintiff have judgment against J. B. Tucker, as administrator of James H. Brown, deceased, for the sum of $187.54, with leave to issue execution therefor. It is further adjudged that the mortgages set forth in the complaint are no longer liens on the real estate described therein."

The plaintiff appeals on the following exceptions:

"(1) Because the circuit judge erred in not sustaining the objections of plaintiff to the whole of the testimony of R. P. Martin and J. H. Elrod, and erred in predicating his decree upon any part thereof, because said testimony was incompetent and irrelevant and had been objected to when offered, on the grounds: (a) That Mrs. Irby having assigned in writing a mortgage deed which contained a clause of warranty of title in fee, she was estopped to introduce any evidence to show a leasehold estate in the mortgagor; (b) that this testimony was largely hearsay; (c) that it was incompetent to prove by parol the existence and the termination of a lease, no foundation having been laid for the introduction of secondary evi-

dence, and no notice to produce the lease being given, and no evidence of its loss being offered; (d) that it was leading; (e) that it was incompetent to prove by parol evidence the contents of deeds describing the location, boundaries, and amount of lands, where the foundation had not been laid for the introduction of secondary evidence.

"(2) Because the circuit judge erred in finding as follows: 'It appears from testimony of R. P. Martin and J. H. Elrod, one a son and the other a grandson of James Martin, who reside in the neighborhood of said land, that James Martin conveyed 10 acres of this land to Jeremiah Tims more than 40 years ago, before the Civil War; that Tims conveyed to Waldrop the 10 acres; and that James Martin conveyed two acres more of the original tract to Waldrop about the year 1870.' There being no competent evidence to sustain such finding: (a) Mrs. Irby is estopped by her assignment of the mortgage from attacking the fee-simple title of the mortgage. (b) Because no sufficient foundation was laid to entitle defendant to offer evidence of the contents of the deeds from James Martin to Jeremiah Tims, and from Tims to Harvey Waldrop, and from James Martin to Harvey Waldrop; there being no sufficient foundation laid for the introduction of secondary evidence of the contents of such deeds. (c) Because such evidence was hearsay, and because the questions which elicited it were leading.

"(3) Because the circuit judge erred in finding that: 'The interest of James Martin in said land was derived through a deed dated March 18, 1836, and recorded September 2, 1839, from Benjamin Sloan and George Seaborn, executors of the will of Gen. Baylis Earle, deceased, by which they leased to James Martin, his heirs and assigns, for the term of 65 years, a tract of 470 acres, being land of the estate of Thomas Wadsworth, deceased, left for the benefit of his Poor School'—there being no competent evidence upon which to predicate said finding, in that: (a) The deed from said Sloan and Seaborn, as executors to Baylis Earle, was not put in evidence; (b) no proof of its loss was offered; (c) no notice to produce this deed was given to plaintiff, along with notice as to other deeds; (d) no sufficient foundation was laid for the introduction of secondary evidence of the contents thereof; (e) no notice was given that a certified copy of said deed would be offered in evidence.

"(4) Because the circuit judge erred in finding as follows: 'By the recital of another deed in evidence, that of R. G. Wallace and others, as trustees, to Mrs. Beulah C. Brown, it appears that this land was granted to Thomas Wadsworth on May 4, 1785, and that it was leased from the treasurer of the Wadsworth Poor School by Gen. Earle on March 20, 1831'—because (a) no such deed is in evidence; (b) if such deed was offered in evidence, it was incompetent, because Mrs. Irby was estopped to deny the title of the mortgagor; (c) because no foundation was laid for the introduction of a copy of that deed and no notice was given to produce it; (d) because, if it were permissible in evidence, it would be incompetent evidence to prove a grant by the state; (e) because, even if the deed were in evidence, it would not be competent evidence to prove a lease.

"(5) Because there is absolutely no competent evidence that this land, covered by this mortgage, was ever a part of the Wadsworth lease, and there is no competent evidence that such a lease ever existed, or, if it existed, that it has expired, and the circuit judge erred in not so holding; and because the deed of R. G. Wallace and others, trustees, to Mrs. Beulah Brown, is not competent evidence, for the reason that Mrs. Irby is estopped to deny the validity of the title of the mortgagor, whose mortgage she assigned in writing, which mortgage contained a clause of warranty, and there is no evidence to identify this land as a part of that conveyed to Mrs. Beulah Brown.

"(6) Because the circuit judge erred in holding that 'the evidence does not show that there was any contract of guaranty independent of the written assignment indorsed on the mortgage'; the testimony of W. H. Tucker and the admission of Mrs. Irby showing that there was such guaranty, and the evidence of W. W. Smith showing that he assigned to W. H. Tucker with the same guaranty given to him by Mrs Irby.

"(7) Because the circuit judge erred in holding that no guaranty could be inferred from the written assignments; there being no saving clause in the assignments, such as 'without recourse on me,' or the like.

"(8) Because the circuit judge erred in holding, 'It is clear that the interest of Brown in the land mortgaged was only leasehold'; whereas, there is not a particle of competent evidence that this land was ever a part of the leased land, and it being incompetent for Mrs. Irby to introduce such evidence.

"(9) Because the circuit judge erred in holding that 'plaintiff had constructive notice through the registry of antecedent deeds in the chain of titles'; whereas, it is submitted there is no competent evidence of any chain of title by which it appears that this lot of land was held on lease, nor is there anything whatever in the mortgage itself to suggest a doubt of the truth of the warranty therein contained.

"(10) Because the circuit judge erred in holding that, 'the lease having expired, the land is no longer subject to the lien,' for the reasons: (a) There is no competent evidence that this land was ever a part of the Wadsworth lease. (b) Even if it be held to

be proved that it was covered by the Wadsworth lease, there is no competent evidence as to the time of the beginning and the expiration of the Wadsworth lease.

"(11) Because, it being undisputed evidence that Mrs. Irby assigned in writing, without any clause of reservation, the mortgage sought to be foreclosed, which mortgage contains a clause of warranty of title, it was error in the circuit judge not to hold that Mrs. C. E. Irby was estopped to deny that the mortgagor's estate was that of a fee simple and is estopped to set up a leasehold estate in the mortgagor.

"(12) Because, it being undisputed evidence that Mrs. Irby had, subsequent to the assignment by her in writing for valuable consideration of the mortgage sought to be foreclosed, acquired the title to the land covered by the mortgage, it was error on the part of the circuit judge to hold that such acquisition of title did not inure to the benefit of plaintiff and render the land subject to the lien of the mortgage.

"(13) Because the circuit judge erred in holding that the warranty contained in the mortgage was not the warranty of Mrs. Irby, but should have held that it was her warranty.

"(14) Because the circuit judge erred in not holding that, even if the warranty was not hers, Mrs. Irby, by assigning the mortgage in writing for valuable consideration, had estopped herself to deny the correctness of the warranty.

"(15) Because the circuit judge erred in holding, 'the estate of the mortgagor was a leasehold, which expired by the terms of the lease itself, and was no whit defeated or diminished by her act in purchasing the fee-simple estate after the expiration of the lease'; because: (a) There is no competent evidence that the mortgagor had only a leasehold. (b) There is no competent evidence that the lease, if it ever existed, had expired. (c) The mortgagee, having assigned in writing and for valuable consideration the mortgages sought to be set up, and having concealed from her assignee that the estate was one of leasehold, has estopped herself to deny that the estate was, as appears upon the face of the paper assigned and in the general clause of warranty, an estate in fee simple.

"(16) Because the circuit judge erred in holding that 'Mrs. Irby not being a party to the mortgagor's warranty, and having done nothing to impair the rights of the plaintiff as assignee of the mortgage, she is not estopped to assert her title'; whereas, it is submitted (a) that it appears from the evidence that she is a party to the mortgagor's warranty; (b) that by concealing from her assignee that this was leasehold property she misled him to his injury, and thereby impaired the rights of plaintiff as assignee, and is now estopped to assert her title against him.

"(17) Because the circuit judge erred in ordering that the complaint be dismissed as to Mrs. Irby and W. W. Smith, but should have given judgment against them on the mortgage debt, which they had assigned in writing, for value received, and guarantied its payment, and which was never repaid to plaintiff.

"(18) Because the circuit judge erred in finding that there was due on the mortgage of James H. Brown to Mrs. Irby, assigned to plaintiff, only the sum of $76.90, whereas, he should have found that there was due thereon the sum of $108.09 at the time of the filing of his decree; and in finding that the amount due on both mortgages was $187.54, whereas, he should have found that there was due on both mortgages the sum of $218.73.

"(19) Because the circuit judge erred in not giving judgment against Mrs. C. E. Irby and W. W. Smith for the amount due on the Brown mortgage; they having assigned the same in writing for valuable consideration, and having guarantied its payment.

"(20) Because the circuit judge erred in dismissing the complaint as to Mrs. C. E. Irby and W. W. Smith, because, they having received valuable consideration for the assignment of the note and mortgage and having guarantied the payment thereof, and Mrs. Irby having concealed from her assignee and he being ignorant that the mortgagor had only a leasehold interest in the land, and Mrs. Irby having acquired title to this land, it would be grossly inequitable to permit them to retain the consideration of the assignments, and to permit Mrs. Irby to hold the land absolved from the lien of the mortgage, without requiring them to pay the mortgage debt.

"(21) Because the circuit judge erred in holding that the title of James H. Brown in the mortgaged premises was only that of a leasehold, since it appears by the evidence introduced by Mrs. Irby that this land was conveyed in fee simple to D. H. Hammond by Harvey Waldrop by a deed dated November 19, 1879, and recorded in R. M. C. office January 22, 1881; and Hammond having conveyed the same land to J. H. Brown by deed dated November 12, 1883, recorded in R. M. C. office November 15, 1881, and Brown having in 1886 mortgaged the said land to Mrs. C. E. Irby, and in 1892 to Sylvester Bleckley Company, which mortgages were recorded, it is evident that J. H. Brown, the mortgagor, and those under whom he claimed, had continuous, open, notorious, and adverse possession thereof, under claim of title in fee simple, for more than 20 years, and had acquired title by prescription.

"(22) Because the circuit judge erred in considering and predicating his decree upon the recitals contained in the deed from R. G. Wallace and others, trustees, to Mrs. Beulah C. Brown, for the reason that the deed was not properly before the court, and that (a)

the original deed was not offered in evidence; (b) no notice to produce was given; (c) no proof of its loss was offered; (d) no foundation was laid for the introduction of a copy, or of other secondary evidence of its contents; and (e) it was not competent for Mrs. Irby to offer such evidence designed to assail the mortgagor's title.

"(23) Because the circuit judge erred in holding that the reference in the mortgages assigned to the Hammond deed and the recitals in that deed were sufficient to put plaintiff on inquiry, and that they gave him constructive notice that this land was a part of the Wadsworth lease, because there was nothing in the recital of the mortgage to suggest a doubt that the warranty of title therein contained was false, and plaintiff had right to rely upon that warranty and to trust that the assignor would not assign to him a mortgage purporting to be on land held in fee simple, but which was only a leasehold estate, without giving him notice thereof."

Bonham & Watkins, for appellant. Breazeale & Rucker, for respondents.

GARY, A. J. This is an action to foreclose two mortgages. The record contains the following statement: "On May 24, 1902, W. H. Tucker filed in the court of common pleas for Anderson county his complaint to foreclose two mortgages, as follows: A mortgage of 12 acres of land, executed by James Brown, sometimes known as James Bryant, to Mrs. C. E. Irby, on 1st January, 1886, and by her assigned to W. W. Smith in writing for valuable consideration on 1st day of June, 1892, and by him assigned in writing for valuable consideration to W. H. Tucker on 1st day of May, 1893; also a mortgage executed by said James Brown, signing himself as James Bryant, to Sylvester Bleckley Company, on the same tract of land, on August 6, 1891, for the sum of $66, with interest from date at 8 per cent. per annum, which mortgage was, for value received by them, duly assigned in writing by Sylvester Bleckley Company to W. H. Tucker on 26th June, 1893. Various payments are credited on the mortgages. That said James Brown died some time in October, 1901, and J. B. Tucker was duly appointed administrator of his estate, which consisted solely of this tract of land. W. H. Tucker began his action May 24, 1902. Mrs. C. E. Irby answered the complaint, setting up the defenses: (1) That the said James H. Brown had only an interest in the land mortgaged till the expiration of the lease known as the 'Wadsworth lease'; that said lease expired in 1900; that plaintiff knew these facts when the assignment was made to him. (2) Laches of plaintiff and payment. (3) The statute of limitations. The original deed from Sloan and Anderson, as executors of the estate of James Martin, and from R. G. Wallace and others, trustees, to Mrs. Beulah Brown, were not offered in evidence, but certified copies thereof were offered, and no notice to produce the original was given plaintiff or his attorneys, and no proof of loss was made, and no foundation laid to introduce secondary evidence of the contents. It is fair to state that defendants' attorneys think that it was understood at the reference that they could offer these certified copies without objection. But plaintiff's attorneys think the only agreement between counsel was that plaintiff's attorneys would not require defendants' attorneys to prove the execution of their deeds. It was referred to the judge of probate, as special referee, to take the testimony and ascertain the amount due on the mortgage debts. Upon the evidence reported by him the case was heard by Hon. J. C. Klugh, circuit judge, who rendered a decree filed June 10, 1904, dismissing the complaint as to Mrs. C. E. Irby and W. W. Smith, and adjudging that the mortgages set forth in the complaint are no longer liens on the real estate described in the complaint. In due time plaintiff gave notice of his intention to appeal from said decree." The facts are more fully set out in the decree of his honor, the circuit judge, which, together with the exceptions, will be incorporated in the report of the case.

1. We will first consider these exceptions assigning error on the part of the circuit judge in ruling that Mrs. C. E. Irby was not estopped from interposing the plea that she acquired title to the land after the assignments of the mortgages. Mrs. Irby was a stranger to the mortgage executed by Brown to Sylvester Bleckley Company, which was assigned to the plaintiff. There was therefore nothing in that transaction to prevent her from purchasing the land. This phase of the question does not call for further discussion, and we proceed to consider the effect of the transactions, in which she took part before becoming the purchaser of the land.

The testimony does not show that W. W. Smith did not have notice of the fact that Brown held only a leasehold estate at the time Mrs. Irby assigned the note and mortgage to him; and he says: "I never expected to have any recourse on Mrs. Irby." He certainly was not misled by her. We are furthermore satisfied that the plaintiff, at the time W. W. Smith assigned the note and mortgage to him, either had actual knowledge of the fact that Brown had only a leasehold estate, or that he had notice of such facts as were sufficient to put him on inquiry, which, if pursued with due diligence, would have led to knowledge of Brown's interest; and this was equivalent to notice. The assignment of the note and mortgage, and the purchase of the land by Mrs. Irby, were entirely separate and distinct transactions. There is no testimony tending to show that she assigned the note and mortgage in contemplation of purchasing the land and thereby defeating the lien of the mortgage; nor that she failed to give notice of any existing right which she then possessed. The

principle is well settled in this state that the assignee of a note and mortgage cannot invoke the equitable doctrine of purchaser for valuable consideration without notice, when his assignor had notice. Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831; Westbury v. Simmons, 57 S. C. 467, 35 S. E. 764. Nor did the assignment import a guaranty. In the case of Colburn v. Mathews, 1 Strob. 232 (affirmed in Jones v. Garlington, 44 S. C. 536, 22 S. E. 741), the court says: "That in the sale of an unnegotiable security there is no implied warranty of either its goodness or money value is too plain a proposition to require law to sustain it." It cannot be successfully contended that there was any fact stated in the assignment (which was in the usual form) calculated to mislead the assignee. As said by this court in the case of Westbury v. Simmons, 57 S. C. 467, 480, 35 S. E. 764: "The form of the assignment by Rentz to Rion was such as is usually employed in transferring the title to nonnegotiable instruments, and we see nothing upon the face thereof that could reasonably have been expected to mislead Simmons; he being presumed to know that the assignee of a nonnegotiable chose in action takes it subject to the set-offs and defenses existing at the time of the assignment." In 4 Cyc. 83, it is said: "By the mere fact of assignment, the assignor further guaranties that he will not interfere with the chose thereafter, and, if he does interfere to the damage of the assignee, he renders himself liable to the assignee for any damage resulting from such interference." Conceding that the principle prevails in this state, it is not applicable to the facts of the case under consideration. If the action for foreclosure had been instituted while the leasehold estate was in existence, and Mrs. Irby had attempted to show that the mortgagor had but a leasehold estate, it might be that this would be regarded as an interference with the collection of the claim which she had assigned. She, however, does not contest the fact that the mortgagor had a leasehold estate, but sets up the plea that it has expired. The admission that the mortgagor had a leasehold estate at the time the note and mortgage were assigned is not inconsistent with the defendants' contention that the leasehold estate, although existing at that time, has since expired and ceased to have any legal existence.

We will next consider those exceptions assigning error on the part of the circuit judge in ruling that the deeds therein mentioned were properly introduced in evidence. When the deeds were offered, the appellant's attorneys admitted the execution thereof, but objected to their introduction on the ground that Mrs. Irby was estopped from setting up title to the land, or from disputing the title of the mortgagor. The views hereinbefore expressed in considering the other exceptions show that this ground is untenable.

2. The next question for consideration is whether the presiding judge erred in his ruling as to the testimony of R. P. Martin and J. H. Elrod. The record shows that the following took place during the examination of R. P. Martin as a witness for the defendants: "Q. Did Harvey Waldrop ever own that land? (Mr. Bonham objects to this question on the ground that it is incompetent for Mrs. Irby to introduce any testimony intended to attack the validity of the title of J. H. Brown, because her assignment of her note and mortgage on that land estops her from so doing. I object on the further ground that Waldrop's deed is the best evidence of his ownership of the land, and, if it be claimed that that deed be lost, no sufficient foundation has been laid for the introduction of the contents of the lost deed. Taken subject to objection.) A. Yes. Q. Who did Harvey Waldrop get that land from? (Mr. Bonham objects on same grounds as stated above.)" The appellant's attorneys objected to other testimony of this witness on similar grounds. When J. H. Elrod was on the stand as a witness, like questions were propounded and similar objections interposed by the appellant's attorneys. It will be observed that objection was made to the admissibility of the evidence on two grounds: (1) Because Mrs. Irby was estopped from setting up title to the land; and (2) because the deeds were the best evidence of title, and no sufficient foundation had been laid for the introduction of secondary evidence of the contents of the lost deeds. The first objection has already been disposed of. The ruling of the circuit judge that sufficient foundation had been laid for the introduction of secondary evidence is not appealable, unless there was an abuse of discretion, which does not exist in this case. Hobbs v. Beard, 43 S. C. 370, 21 S. E. 305.

Lastly, we will consider the exceptions raising the question whether the circuit judge erred in ruling that the mortgagor had simply a leasehold interest in the land; the appellant contending "that the mortgagor, and those under whom he claimed, had continuous, open, notorious, and adverse possession of the land under claim of title in fee simple for more than 20 years, and had acquired title by prescription." The preponderance of the testimony shows, as contended at first by the appellant, that the mortgagor had only a leasehold estate in the land. These conclusions practically dispose of all the questions involved under the appeal.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(72 S. C. 264)

BIGGERS v. CATAWBA POWER CO.

(Supreme Court of South Carolina. July 29, 1905.)

1. OPINION EVIDENCE.

A witness, having personal knowledge of the facts relating to the question of time within which an act may be done, may testify thereto.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2196, 2269.]

2. MASTER—DUTIES TO SERVANT.

A master must furnish safe and suitable appliances and a safe place to work, and employ a sufficient number of competent persons to perform the work.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 178, 179, 327.]

3. SAME—FELLOW SERVANTS.

Where a master employs competent servants to give notice of the danger to the other servants, they are fellow servants; and he is not responsible for their negligence in failing to give notice of danger arising from the operation of the appliances.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 418, 419.]

4. SAME—ASSUMPTION OF RISK.

Where the duties of a servant's employment were dangerous, but he was informed of the danger, he assumed the ordinary risk incident to the work.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 550, 574–600.]

Appeal from Common Pleas Circuit Court of York County; Watts, Judge.

Action by Samuel Biggers against the Catawba Power Company. From judgment for plaintiff, defendant appeals. Reversed.

The following are the exceptions referred to in the opinion:

"(1) Because his honor erred in allowing the plaintiff's witness Cope Williamson to testify against the objection of defendant as follows: 'No, sir; you could have prevented the danger if it [the bucket] had been let down slower. It [the bucket] was coming in so fast he could not have gotten out of the way under no circumstances.' And also: 'Yes, sir; they [the buckets] were coming faster than usual that day'—the error being that all of said testimony was a mere opinion of the witness, who was a mere onlooker, and had not worked in this department.

"(2) Because his honor erred in overruling defendant's motion for a nonsuit on both the following grounds: First, that the evidence failed to show any negligence on the part of defendant company causing or being the proximate cause of the injury to the plaintiff; and, secondly, that the evidence showed that, if the plaintiff's injury was due to negligence, it was the negligence of his fellow servants.

"(3) Because his honor erred in charging plaintiff's first request, as follows: 'That the employer or master owes his employé or servant a positive duty to see that no harm comes to him, while in the performance of the master's work, from servants charged with the performance of the master's duty or by unsafe or unsuitable machinery or appliances'—the error being that said charge makes the master absolutely liable to his servant while at work for all injuries caused by servants in the performance of the master's duty, or by unsafe or unsuitable machinery or appliances, without reference to the care of the master in furnishing such machinery, appliances, and servants, and fails to show or explain when and how a servant performs his master's duty, as distinguished from his own duty as a servant.

"(4) Because his honor erred in charging plaintiff's third request, as follows: 'If a servant is wantonly and negligently hurt while in the discharge of his duty by a foreman, manager, or boss controlling or directing the work, such person is the representative of the master and the master is liable, inasmuch as the acts of his representative are his own acts'—the error here being that his honor tells the jury that a foreman, manager, or boss is a vice principal, which is a question of fact, depending upon the evidence, circumstances, and work, and should have been left to the jury.

"(5) Because his honor erred in charging plaintiff's sixth request, as follows: 'It is the duty of the master, and not of the servant, to exercise due care and diligence to ascertain whether the appliances furnished and the systems and methods adopted and used are safe and suitable; and a servant has the right to assume, without inquiry or examination, that the appliances and methods furnished and used are safe and suitable'—the error being that said charge takes from the consideration of the jury the assumption by the servant of the risks of obvious imperfections and inherent dangers in the methods and means of carrying on the work in which he is engaged.

"(6) Because his honor erred in charging subdivision 'e' of plaintiff's ninth request, as follows: '(e) And, generally, the master must manage the work and the appliances with which the work is conducted in such a reasonably safe and prudent manner as to avoid injury to the servant. This means that the master may have careful agents and servants employed to manage the work; but, if the system of management is faulty and dangerous, while more reasonably safe means and methods might have been adopted by the master, and the servant is injured in consequence, the master is liable'—the error in said charge being, first, in that it makes the master liable, even if his appliances should be used and his work managed by fellow servants of the injured party, and it excludes the assumption of risks on the part of the servant; second, in that it makes the master liable for his system of management, if the jury believe a better system might have been adopted, and therefore the master would be liable if the jury believe he had not used the very best system; and, third, in that it

excludes the assumption of risks by a servant in working by a system, when he contracted and entered upon the work according to said system then in use."

A. G. Brice, for appellant. Jno. R. Hart, for respondent.

GARY, A. J. This is an action for damages, in which the complaint alleges: "That on the 10th day of November, 1903, the plaintiff was employed by the defendant as a laborer in and upon its construction works near Catawba river, in said county. And on said date, while so employed, the plaintiff was directed by the agent, foreman, and manager of the defendant to leave certain work on which he was then employed, and, with other laborers of the defendant, to enter a deep excavation and assist in digging and removing earth therefrom. That said earth was removed by shoveling the same into a large and heavy iron bucket suspended from a boom, and was made to swing around and to ascend and descend into the excavation by ropes connected with a hoisting engine near by. That shortly after beginning work in said pit or excavation the large iron bucket, suspended as aforesaid, was, by direction of defendant's agents and servants specially charged with the movements of the same, let down into the pit or excavation where the plaintiff was at work with such speed, force, and want of control, and without warning to the plaintiff, that he was, without fault on his part, struck by the said heavy bucket, his leg broken, and his body bruised and lacerated, whereby he suffered and continues to suffer great bodily pain and injuries, disabling him from earning a livelihood by his labor. That said pain, suffering, and disabling injuries were caused by the negligence, gross negligence, and wanton and reckless conduct of the defendant, its officers, and agents (1) in ordering and directing plaintiff to work in a place and premises known by it to be attended with great personal danger, without warning him, who was ignorant of the danger; (2) in employing dangerous and unskillful methods, machinery, and appliances in and about the said excavation work, and in using the same in a reckless, careless, and hazardous manner; (3) in causing and permitting the bucket used to remove the excavated material to be lowered with great speed and force into the pit where the plaintiff was working, and causing the said bucket to swing and oscillate over the bottom area of the said pit, and against the plaintiff's person, whereas, if the defendant had caused the said bucket to be managed with reasonable care, plaintiff's injuries may have been avoided; (4) in employing and retaining reckless and incompetent agents and servants to manage and control the machinery for removing the excavated earth; (5) in not providing certain safe and sufficient control of the dangerous hoisting machinery and appliances used in and about the said excavation." The defendant denied the allegations of negligence and set up the defenses of contributory negligence, assumption of risk, and the negligence of fellow servants. At the close of the plaintiff's testimony the defendant made a motion for a nonsuit, which was refused. The jury rendered a verdict in favor of the plaintiff for $1,500. The defendant appealed upon exceptions which will be set out in the report of the case.

1. First exception: The witness testified from his personal knowledge of the facts, which related to the question of time. It is only necessary to refer to the case of Easler v. Ry., 59 S. C. 311, 37 S. E. 938, to show that it was competent for him to give his opinion under such circumstances.

2. It will not be necessary to consider the other exceptions separately. It is the duty of the master (1) to furnish safe and suitable machinery and appliances, and to see that they are kept in proper repair; (2) to provide a safe place to work; (3) to employ a sufficient number of servants to perform the labors of their employment; (4) to select competent servants. When there is a failure to perform any of these duties, and a servant is injured as a direct and proximate result of such failure, it constitutes prima facie evidence of negligence on the part of the master. If it is necessary, in order to conduct the work in a safe manner, for the master to employ servants to give notice of danger during the progress thereof to other servants, and injury results from such failure, the master is liable for damages; but, when the master employs competent servants to give notice of danger to the other servants, they are fellow servants, and he is not responsible for their negligence in failing to give notice of danger arising from the operation of the appliances, as this is one of the risks assumed by the servant. The servant likewise assumes the usual and ordinary risk incident to the operation of the machinery. But, if the danger is latent or unusual, or the servant is youthful, or the master knows he is inexperienced, it is his duty to give warning of the danger.

3. In the present case there was testimony tending to show that the place where the plaintiff was required to perform the duties of his employment was dangerous; but he was fully informed of the danger, and therefore assumed the ordinary risk incident to the work. There was no testimony tending to prove that the machinery and appliances were unsafe and unsuitable, nor that the servants employed by the defendant were incompetent, nor that a sufficient number of servants were not employed to give notice of danger. The testimony tends to show that the injury was the result of negligence on the part of the servant whose duty it was to give notice of danger. The exception assigning error in refusing the motion for nonsuit must be sustained. The principles which we have announced dispose of the other exceptions

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

(72 S. C. 312)

CORBETT et al. v. FOGLE et al.

(Supreme Court of South Carolina. Aug. 3, 1905.)

1. APPEAL—REVIEW—FINDINGS OF FACT.
The Supreme Court, on appeal from a decree in partition, cannot review the findings of fact, where the answer denied the tenancy in common and the right to partition, and raised issue of title by claiming possession and use of the lands exclusively.

2. WITNESS — COMPETENCY — TRANSACTIONS WITH DECEDENT.
In partition against a husband of lands claimed by him through his deceased wife, he is incompetent to testify as to payment to the wife of a certain sum for her interest, under Code Civ. Proc. 1902, § 400; it relating to a transaction with a decedent.

3. JUDICIAL SALE — ACCEPTANCE OF DEED—ACQUIESCENCE IN LIMITATIONS.
Where a person entered into possession of land under a judicial deed, and lived on the premises for 20 years, there was a presumption of acquiescence on his part in any limitations in the deed.

4. RES JUDICATA.
Where a person bought land at judicial sale, and directed a conveyance to be made to a third party with certain limitations, and the report of sale was confirmed, and such third party accepted the deed, the order confirming the sale was res judicata as to the limitations.

Appeal from Common Pleas, Circuit Court of Orangeburg County; Dantzler, Judge.

Action by Bernard Corbett and James Corbett against John W. Fogle, Orrie D. Tarrant, and Dennis S. Fogle. From circuit decree, defendants appeal. Reversed.

This is an action for partition. The facts are thus set out in the decree of his honor, the circuit judge:

"Emiline O. Fogle, now dead, whose maiden name was Gleaton, a daughter of Absalom Gleaton, now deceased, intermarried first with one John Martin; the product of that marriage being one child, a daughter, Docia Martin. Docia Martin intermarried with one James Corbett, one of the plaintiffs herein, and at her death left surviving her her mother, Emiline O. Fogle, her husband, James Corbett, and the following named children: Bernard Corbett, a plaintiff herein, and the defendants, John Corbett, Julia Martin, and Emma Corbett, and a son, Lewis Corbett, who died after his grandmother, Emiline O. Fogle, leaving as his only heirs at law his father, James Corbett, and his brothers and sisters above named. John Martin having died, Emiline O. Fogle intermarried with one John W. Fogle, a defendant herein, and died on the 23d day of June, 1897, intestate, leaving surviving her as her only heirs at law, her husband, the defendant John W. Fogle, Orra D. Fogle (now Orra D. Tarrant, wife of D. L. Tarrant, called in the complaint Orrie D. Tarrant), and Dennis S. Fogle, children of her second marriage, and her grandchildren hereinbefore named. Thereafter this action was commenced by the plaintiffs herein against the defendants for the partition of the tract of land mentioned and described in the complaint, and in the answer of John W. Fogle, Orra D. Tarrant, and Dennis S. Fogle, defendants, of which it is alleged by the plaintiffs the said Emiline O. Fogle was seised and possessed at the time of her death, and also for an accounting against the defendants, John W. Fogle, Dennis S. Fogle, and Orra D. Tarrant, for rents and profits alleged to have been received by them since her death. The defendants, John W. Fogle, Dennis S. Fogle, and Orra D. Tarrant, by their joint answer, among other things, allege substantially that neither the plaintiffs nor the defendants, John Corbett, Julia Martin, and Emma Corbett, or either of them, have any interest in the premises sought to be partitioned, and that they 'are not and never have been tenants in common' with them in said lands. And by paragraph 2 of the second defense of their answer they allege: 'That on the 2d day of January, 1871, one Thad. C. Andrews, then being the judge of probate in and for the county of Orangeburg, in the state aforesaid, in consideration of the sum of $635, made, executed, and delivered to the said Emiline O. Fogle, as such judge of probate and at her instance and request, his deed, and thereby conveyed to the said Emiline O. Fogle and her heirs, children of John W. Fogle, all that certain tract or parcel of land, containing 122 acres, more or less, situate, lying, and being in the county and state aforesaid, and bounded by lands of Thomas W. Gleaton, Jr., R. S. Morgan, Tindal, and Argoe, and tracts 1 and 3 of estate lands of Absalom Gleaton, deceased [which is the same tract or parcel of land mentioned and described in the second paragraph of the plaintiff's complaint], and that the habendum of said deed of conveyance is as follows: "To have and to hold all and singular the said premises unto the said Emiline O. Fogle and her heirs, children of J. W. Fogle, and assigns, forever." And they pray that said deed of conveyance be construed by this court, contending that by virtue of said deed of conveyance they have the legal title to said tract of land, and are entitled to the possession of the same, and to the issues and profits arising therefrom, and that at the commencement of this action, neither the plaintiffs, or either of them, nor the defendants, John Corbett, Julia Martin, and Emma Corbett, or either of them, were "the owners of the premises alleged, or any part thereof, or of any interest therein, of any nature or kind soever, * * *." ' The infant defendants, John Corbett, Julia Martin, and Emma Corbett, by their duly appointed guardian ad litem, filed a formal answer, submitting their rights and interests to the protection of this court.

"Subsequently, by an order of this court, it was 'referred to judge of probate for Orangeburg county, as special referee, to take the testimony and report the same to this court, together with any special matter that may arise.' The testimony so taken has been reported to this court, and counsel in the cause have been heard in argument as fully as they desired. The tract of land sought to be partitioned was formerly a portion of the estate of Absalom Gleaton, deceased, the father of Emiline O. Fogle, and was sold for partition among his heirs at law, the distributees of his estate. The vital question in this case is, who purchased the land in question at such sale? In the sheriff's report on sales of certain of the lands of Absalom Gleaton, deceased, it appears that a tract of 101 acres is reported to have been sold to J. W. Fogle for $605. In the account of the administrator of the estate of Absalom Gleaton, deceased, for final settlement, the following is a copy of a statement appearing therein:

To pay		
E. O. Fogle shares.....	262.85	
Bot land 635-per pro. 71.26..		
adv. 46.50.....	752.76	489.91

"In the deed of conveyance from Thad. C. Andrews, judge of probate, of the tract of land in question to Emiline O. Fogle, it is recited that the same was sold and disposed of 'to Emiline O. Fogle for $635, she being at that price the highest bidder for the same.' In his testimony John W. Fogle, in relation to the deed, said: 'I was present when the deed was executed in Thad. C. Andrews' office. When it was first drawn up, it did not have the "children of J. W. Fogle" in it. I suggested that he put them in it. I saw him put them in. I paid for the land. I bid off the land, directed how the deed should be drawn, and paid for the land.' "

The circuit judge then proceeds to state his findings of fact and conclusions of law as follows:

"I am satisfied, and so find and hold, from the testimony, that John W. Fogle, in the bidding off of this tract of land, was acting for his wife, Emiline O. Fogle; that she was the purchaser of it; and that Thad. C. Andrews, judge of probate, had no authority whatever to add any limitations to the deed of conveyance referred to, and that his injection into it of the words 'children of J. W. Fogle' must be disregarded. Iseman v. McMillan, 36 S. C. 28, 15 S. E. 336. The testimony shows that the interest of Emiline O. Fogle in the estate of her father, Absalom Gleaton, deceased, was paid on the purchase of the land; that the sum of $458.91 was borrowed from Emiline Gleaton by her, and was applied to the purchase money thereof, leaving a small balance, which was paid presumably by her. The recitals in the deed of conveyance drawn under the direction of John W. Fogle, the statement in the final account of the administrator of the estate of Absalom Gleaton, deceased, evidencing that the interest of Emiline O. Fogle in such estate was applied as part payment for the land bought by her, and the circumstances of the case, convince me that Emiline O. Fogle was not only the purchaser of the land, but that she paid for it, and more than rebut any presumption to the contrary, arising from the sheriff's report on sales and the confirmation thereof.

"The testimony of John W. Fogle, to wit: 'I paid my wife the $100, her interest which she paid on the place,' is clearly incompetent under section 400 of the Code of Civil Procedure of 1902, and the objection to its introduction is sustained. There is no testimony showing, or tending to show, that John W. Fogle had any authority from his wife, Emiline O. Fogle, to direct any limitations to be added to the deed or incorporated in it, and therefore he had no authority to make any such direction. And there is no sufficient testimony that Emiline O. Fogle ever saw the limitations in the deed or in any way confirmed the deed after its execution; but the testimony shows that John W. Fogle kept the deed, never recorded it, refused to allow it to be seen, and produced it, for the first, it seems, during the progress of a hearing of this case before the referee. Therefore John W. Fogle had no authority to direct, and Thad. C. Andrews, judge of probate, had no authority to make, the interlineation and insertion of the words 'children of J. W. Fogle' in the deed referred to. The law did not commit to Thad. C. Andrews, judge of probate, the power of placing such foreign matter in the deed, and his attempt to exercise such power was not binding on the purchaser, Emiline O. Fogle, and is not on her heirs at law. Iseman v. McMillan, supra. I seriously question the right of Thad. C. Andrews, judge of probate, to have executed the deed. I know of no warrant of law for his act. At the time of the sale of the property, it was the duty of the sheriff to have executed the conveyance to the purchaser, Emiline O. Fogle; and, after the lapse of 20 years, the presumption is that he did so.

"I conclude that at the time of her death Emiline O. Fogle was seised in fee, and possessed of the land mentioned and described in the pleadings and sought to be partitioned herein, and that the plaintiff Bernard Corbett and the defendants as her heirs at law and distributees of her estate, and the plaintiffs and the defendants, John Corbett, Julia Martin, and Emma Corbett, as the heirs at law of Lewis Corbett, deceased, are entitled to a partition thereof, according to their respective rights and interests therein. * * * "

The defendants appealed from said decree.

J. F. Izlar and Raysor & Summers, for appellants. Bowman & Wanamaker and Abial Lathrop, for respondents.

GARY, A. J. (after stating the facts). 1. It is contended by the respondents that the pleadings raise an issue of title, and that, as such issue is of a legal nature, the findings of fact by the circuit judge are final, and cannot be reviewed by this court. The third paragraph of J. W. Fogle's answer alleges: "That the plaintiffs and defendants, John Corbett, Julia Martin, and Emma Corbett, are not, and never have been, tenants in common with these defendants in said lands; that the plaintiff and his brother, John Corbett, and his sisters, Julia Martin and Emma Corbett, have no interest whatsoever in said lands, are not entitled to partition thereof, or to the possession and use of the same; and that the possession and use of the same, and the rents and profits arising therefrom, belong exclusively to these defendants, who by virtue of the premises have the legal title thereto, and are the sole owners in common thereof." This was sufficient to raise an issue of title, and we sustain the objection that the facts cannot be reviewed. The decree, however, shows that the circuit judge, in applying the law to the facts of the case, made certain rulings which are assigned as error; and, of course, they may properly be made the subject of appeal.

2. The first question that will be considered is whether the circuit judge erred in ruling that the following testimony of J. W. Fogle was incompetent, under section 400, Code Civ. Proc. 1902, to wit: "I paid my wife the $100, her interest which she paid on the place." In the case of Monts v. Koon, 21 S. C. 110, 112, the court says: "The foundation of the defense was payment, payment by certain notes, which Koon in his answer claimed that he had placed in the hands of Fort for collection, and the evidence admitted was intended to sustain this defense. It showed that Koon had placed these notes in the hands of Fort, and it involved, not only the act of Koon in putting the notes in Fort's hands, but also the act of Fort in receiving them. This was certainly a transaction between the two, and therefore the testimony was in violation of the section of the Code under consideration." If Fogle had simply testified that he placed $100 in the hands of his wife, the testimony would have been admissible; but, when he further testified that the $100 was in payment of a certain interest, then this involved the act of the wife in so receiving it, and rendered the testimony incompetent.

3. We will next consider the exception assigning error on the part of the circuit judge in ruling "that there is no testimony showing or tending to show that John W. Fogle had any authority from his wife, Emiline O. Fogle, to direct any limitations to be added to the deed, or incorporated in it, and therefore he had no authority to make any such direction." There was testimony tending to show that the deed was executed on the 2d of January, 1871, and the report of sale confirmed on the 10th of January, 1871, and that Emiline O. Fogle entered into possession under said deed, and lived on the land continuously until her death, on the 23d of June, 1897—a period of more than 20 years. In the case of Riddlehoover v. Kinard, 1 Hill, Eq. 376, the court says: "The lapse of 20 years is sufficient to raise the presumption of a grant from the state, of the satisfaction of a bond, mortgage, or judgment, of the grant of a franchise or the payment of a legacy, or almost anything else that is necessary to quiet the title of property." The lapse of 20 years afforded evidence of acquiescence on the part of Emiline O. Fogle in the terms of the deed, and likewise of any fact necessary to give it full force and efficiency. The ruling of the circuit judge was therefore erroneous.

4. The next question for consideration is whether the circuit judge erred in ruling that "John W. Fogle had no authority to direct, and Thaddeus C. Andrews, judge of probate, had no authority to make, the interlineation and insertion of the words 'children of J. W. Fogle' in the deed referred to. The law did not commit to Thaddeus C. Andrews, judge of probate, the power of placing such foreign matter in the deed, and his attempt to exercise such power was not binding on the purchaser, Emiline O. Fogle, and is not on her heirs at law." The record shows that the land was bid off by J. W. Fogle, the deed was executed to Emiline O. Fogle and the children of J. W. Fogle on the 2d of January, 1871, and the report of sale was made and confirmed on the 10th of January, 1871. Ordinarily the deed will be made to the person bidding off the property; but the right to the deed may be assigned, in which case it will be made to the assignee. 17 Am. & Eng. Enc. Law, 1031. The deed may also be made to such person as the purchaser directs, when the rights of third parties would not thereby be prejudicially affected. The rule is thus stated in section 438 of Rorer on Judicial Sales: "Ordinarily the conveyance is to be made to the purchaser, if not desired by him to be made to some one else; but in judicial sales, as the whole matter remains under the control of the court until the delivery of the deed, and the purchaser by his purchase becomes a party to the proceedings, and is therefore in court, the court has full power at his request to order the deed to be made to another person as grantee in his place on full payment of the purchase money. A deed to such other person, made under such sale and substitution, if otherwise sufficient, will be valid, without prejudice, however, to any equities, rights, or liens which may have become vested before such assignment of his bid, and subject to all liens which in the meantime may have vested against the original purchaser." When J. W. Fogle bid off the land, and Emiline O. Fogle accepted the conveyance,

they became parties to the proceedings, and the order confirming the sale was res adjudicata as to them. Kibler v. McIlwain, 16 S. C. 550; Ex parte Qualls, 71 S. C. 87, 50 S. E. 646; 17 Am. & Eng. Enc. Law, 1025. At most, the insertion of the words "children of J. W. Fogle" was a mere irregularity, which was cured by the confirmation of the report of sale. Lyles v. Haskell, 35 S. C. 391, 14 S. E. 829; 17 Am. & Eng. Enc. Law, 1033.

In the case of Jenkins v. Hogg, 2 Tread. Const. 821, the court says: "Many persons become bidders at sales by the agency of others, and if they have not given authority, or if the agent exceeds his powers, they are bound to disclaim immediately." The circuit judge based his ruling upon the case of Iseman v. McMillan, 36 S. C. 27, 34, 15 S. E. 336; but our interpretation of that case is that it decides otherwise. The circuit judge in that case said: "I must hold as a matter of public policy and good law that when a mere executive officer of the court undertakes on his own authority to add limitations to a deed, even with the consent of the purchaser, which in any way incumber the rights of the parties in interest in the fund arising from the sale, such limitations are void as to all persons *other than such purchasers or his privies* in estate." (Italics ours.) And this ruling was approved by the Supreme Court, which also uses this language: "It was in the power of the court, when the sale was made by the sheriff in 1870, * * * to enforce compliance with the terms of its order or judgment for the sale, either by rescinding the sale, by reselling the property, or by bringing an action for the price. Burris v. Gooch, 5 Rich. Law, 5. Nor is it at all inconsistent with the rule laid down for the court to disregard any injection by its officer of foreign matter into such deed." If the court had seen fit, it had the power to refuse to confirm the sale, unless the injected words were struck out of the deed. But, instead of doing so, it allowed them to remain in the deed, and its order was res adjudicata as to such question. The exception and assigning error in the ruling under consideration is sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

(139 N. C. 309)

GREEN v. HARTFORD LIFE INS. CO.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. LIMITATION OF ACTIONS—NONRESIDENTS—FOREIGN INSURANCE COMPANIES.

Under Code, § 162, providing that if, when a cause of action accrue, the defendant shall be out of the state, the cause of action may be commenced within the time limited after defendant's return, and that the time of his absence shall not be counted a part of the time limited for the commencement of such action, limitations do not run in favor of a nonresident insurance company, notwithstanding Laws 1901, p. 66, c. 5; Laws 1899, p. 175, c. 54, § 62 (3), authorizing service of summons against nonresident insurance companies on the Commissioner of Insurance.

2. INSURANCE—CORPORATIONS—CHARACTER OF BUSINESS—CHANGE.

Where the charter of an insurance company authorized it to issue different kinds of policies, it was authorized to discontinue the writing of assessment insurance as against an assessment policy holder whose policy contained nothing requiring the company to continue writing such insurance.

3. SAME—ABANDONMENT OF POLICY—CANCELLATION—DAMAGES.

Where an assessment policy holder voluntarily ceased payment of assessments and abandoned his policy, he could not thereafter recover damages for its cancellation.

4. SAME—ACTIONS—EVIDENCE.

Where, in an action to recover damages for the wrongful cancellation of a policy, plaintiff had testified that he had ceased to pay assessments thereon because he "saw he could not keep up," his motives, or the method of reasoning by which he arrived at his conclusion to abandon his policy, and whether he subsequently took out other insurance in lieu of that abandoned, was irrelevant.

Appeal from Superior Court, Craven County; W. R. Allen, Judge.

Action by Thomas A. Green against the Hartford Life Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A. D. Ward, M. De W. Stephenson, and C. L. Abernethy, for appellant. John W. Hinsdale and W. W. Clark, for appellee.

CLARK, C. J. This is an action for the wrongful cancellation of a policy issued to the plaintiff in 1882 by the defendant upon the assessment plan. The defendant was incorporated in the state of Connecticut and its charter is set out in the complaint. It appears therefrom that the defendant was authorized to issue legal reserve insurance policies, as well as accident and assessment insurance, and it was provided therein that the charter might be repealed or amended at the will of the Legislature. In 1897 the defendant ceased writing assessment policies altogether, and restricted itself entirely to old line, or legal reserve, insurance, leaving the assessment members in a class to themselves, but not subdividing them, as in Strauss v. Insurance Co., 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699. The plaintiff became alarmed at the defendant's ceasing to write policies on the assessment plan and the increasing annual assessments, and in 1901 he ceased to pay his assessments, whereupon the defendant declared his policy forfeited.

The defendant's plea of the statute of limitations, that more than three years had elapsed between the time his policy was declared forfeited and the bringing of this action, cannot avail. The statute of limitations does not run in favor of a nonresident.

whether it is an individual or a corporation. Code, § 162; Alpha Mills v. Engine Co., 116 N. C. 804, 21 S. E. 917; Grist v. Williams, 111 N. C. 53, 15 S. E. 889, 32 Am. St. Rep. 782. What is said at the conclusion of the opinion in Williams v. B. & L. Asso., 131 N. C., at page 270, 42 S. E., at page 608, is in no wise an intimation that chapter 5, p. 66, Laws 1901, or chapter 54, § 62 (3), p. 175, Laws 1899, which authorizes service of summons against nonresident insurance companies upon the Commissioner of Insurance, in any way abrogates or affects the suspension of the running of the statute in such cases. It merely holds that by reason of those statutes summons can hereafter be so readily and promptly served that no question as to the bar from the lapse of time is likely to arise; not that it will be a bar, if presented. That service can thus be had upon a nonresident corporation may be a reason why the General Assembly should amend section 162 of the Code, so as to set the statute running in such cases, but it has not done so and the courts cannot.

But we agree with his honor below in his granting the judgment of nonsuit. The plaintiff failed to show that his assessments were increased by reason of the defendant's ceasing to write assessment insurance, or that he was in any wise injured thereby. The charter of the defendant authorized it to issue the different kinds of policy, and there is nothing in the charter or in the plaintiff's policy which required the defendant to continue writing assessment insurance after the company should think it advisable to discontinue that kind of insurance. The annual premiums in assessment companies necessarily grow larger with age of the assured and the reluctance of young men to come in to prevent by their premiums the increase of rates which come to an aging and diminishing class. This is the peculiar weakness of that particular kind of insurance. The plaintiff had no right, under its contract or under the defendant's charter, to require it to continue to struggle for "new blood," as it is called, to keep down his assessments. His reliance must be upon the "safety fund" created out of the excess of premiums, invested for the purpose of making good the payment of policies, which, in a dwindling class, would otherwise require assessments too heavy to be carried solely by the survivors. In Wright v. Insurance Co., 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832, the court sustained the validity of a statute which authorized assessment companies to convert themselves into old line or legal reserve companies; but here the defendant in its original charter had the right to issue either kind of policy, and there was no provision requiring it to continue to issue both. In Polk v. Life Asso. (C. C.) 137 Fed. 273, a company which had been purely assessment changed to old-line insurance against the protest of a dissatisfied member; the company keeping up, as in this case, its separate machinery and system for its assessment members. A bill was filed charging insolvency, and that the change in its plan of insurance was a violation of the insurance company's contract of insurance. The court dismissed the bill, and said that the insured had "no vested right in a continuance of a plan of insurance which experience might demonstrate would result disastrously to the company and its members." Here all the provisions of the original articles for carrying out the contracts between the assessment members and the company are continued unimpaired. The change of business relates only to future contracts to be made thereafter. The defendant had the charter right to issue both assessment and old line policies, and there is nothing in its contracts with assessment members that it shall continue to do that kind of business, when experience may have satisfied the company that it was unsafe. In Strauss v. Insurance Company, supra, the contract with the plaintiff provided that "assessments should be made upon the entire membership," and the court held that the company violated this when it arbitrarily divided its assessment members into classes, and arbitrarily increased Strauss' assessment, when it continued to assess other members of the same age, in other classes, at much lower rates. In this case there is no evidence that the defendant arbitrarily increased the plaintiff's assessment or discriminated in the amount as between him and other assessment members. There was no contract that only an assessment business would be done, but the plaintiff knew from the defendant's charter that it was authorized to issue both kinds of policy.

The plaintiff voluntarily ceased payment and abandoned his policy. He cannot now be heard to ask damages for its cancellation. Insurance Co. v. Phinney, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088; Insurance Co. v. Sears, 178 U. S. 345, 20 Sup. Ct. 912, 44 L. Ed. 1096; Ryan v. Insurance Co. (C. C.) 96 Fed. 796. In every case where damages have been allowed for the cancellation of a policy of insurance, it was alleged and proved that the cancellation was wrongful. Braswell v. Insurance Co., 75 N. C. 8; Lovick v. Life Asso., 110 N. C. 93, 14 S. E. 506; Burrus v. Insurance Co., 124 N. C. 9, 32 S. E. 323; Hollowell v. Insurance Co., 126 N. C. 398, 35 N. E. 616; Strauss v. Life Asso., 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; Simmons v. Life Asso., 128 N. C. 469, 39 S. E. 966.

The exceptions to evidence are without merit. The plaintiff had already stated that he had ceased to pay because he "saw he could not keep up," and when again asked why he had written the company discontinuing his policy the court correctly held that the witness might state any facts connected with the matter. His motives, or the method

of reasoning by which he arrived at his conclusion to abandon his policy, was irrelevant, as was also the other excluded question, whether the plaintiff subsequently took out other insurance in lieu of this which he had abandoned. The answer, whether it had been "Yes" or "No," could have thrown no possible light upon this controversy.

No error.

(139 N. C. 214)

SMITH et al. v. PROCTOR et al.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. DEED—DESCRIPTION.

A deed purporting to convey 40 acres of a tract of 150 acres, but in no way indicating the shape of the 40 acres, or giving data by which the division line can be located, is void.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 70.]

2. TRUSTS — CONVEYANCES TO TRUSTEE — ESTATE CONVEYED.

Though, in a deed in trust executed prior to act of 1879 (Code 1883, § 1280), conveying to S., trustee, or his survivors, land in trust for H. during his life, and, in the event of H. not leaving issue, empowering the trustee to make title of the premises to the heirs of G., but, in case of issue of H., then the trustee to make title to the heirs of H., the word "heirs" is not used in connection with the trustee's estate, the general purpose of the deed, the terms in which the estate is declared, and the general context conclusively show that it was the intent to pass the absolute ownership of the property, and that the trustee is given an estate commensurate with the exigencies of the trust.

3. SAME—RULE IN SHELLEY'S CASE.

In a deed to S., to hold in trust the land for the benefit of H. during his natural life, and, in the event of H. not leaving lawful issue, empowering the trustee to convey to the heirs of H., but, in case of lawful issue of H., then the trustee to make title to the "heirs of H.," H. does not take a fee; the words "heirs of H." being simply a designatio personæ, meaning the lawful child or children of H. living at his death.

4. SAME—STATUTE OF USES.

Under a deed to S., in trust to hold the land for the benefit of H. for life, and, in case of his leaving lawful issue, then the trustee to make title to the heir of H., the exigencies of the trust being executed on the death of H. leaving lawful children, the statute of uses will execute the unnecessary portion of the estate.

5. TAXATION — SALE — PROPERTY LISTED TO LIFE TENANT.

A tax sale under the revenue law of 1874–75 (Laws 1874–75, p. 213, c. 184), which speak throughout of the sale of delinquent's interest of land listed as that of H., the life tenant, for his default in payment of taxes, did not convey the interest of the remaindermen.

6. ADVERSE POSSESSION—COLOR OF TITLE.

A tax deed of land sold for default in payment of taxes by the life tenant, in whose name it was listed, and conveying his title, but not that of the remaindermen, is not color of title as against them.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 459–462.]

7. SAME—LIFE TENANT AND REMAINDERMEN.

Possession under a tax deed conveying the title of the life tenant is not adverse to the remaindermen till death of the life tenant.

8. REMAINDERS—ACTIONS AGAINST REMAINDERMEN—LIMITATIONS.

Limitations against an action to recover for remaindermen land held by persons under a tax deed conveying the title of the life tenant only do not commence to run till death of the life tenant.

Appeal from Superior Court, Nash County; W. R. Allen, Judge.

Action by Mattie Lee Smith and others against Nancy Proctor and others. Judgment for defendants. Plaintiffs appeal. Reversed.

Civil action heard on case agreed. The facts pertinent to the questions involved are as follows: In 1867 Isaac Sessums, being seised and possessed of an undivided tract of land in Nash county, containing 150 acres, undertook to convey same to B. H. Sorsby, Sr., trustee, by two deeds, for the purposes therein set forth; the first deed in the portion material to the controversy being as follows: "This indenture, made and entered into this 2d day of July, 1867, between Isaac Sessums, of the county of Nash and state of North Carolina, of one part, and B. H. Sorsby, Sr., trustee, and his survivors, of the second part, witnesseth: That for and in consideration of the sum of one dollar to me in hand paid by the said trustee, the receipt whereof is hereby fully acknowledged, have bargained, sold, and conveyed to the said trustee and his survivors a certain portion of land lying and being in the county of Nash, adjoining the lands formerly belonging to Elias Barrett and others, on both sides of the road leading to Nashville, to contain forty acres, to be taken from the tract where Thursby Griffin now resides, for the following purposes, to wit: That said trustee and his survivors are required to hold in trust for the benefit of Nancy Hunt, during the term of her natural life, and after the death of said Nancy to convey the same to the lawful heirs of Isaac T. Hunt; then to the lawful heirs of Thursby Griffin, wife of Benjamin Griffin. In witness whereof I have hereunto set my hand and seal the day and date above written. Isaac Sessums. [Seal.] Witness: John H. Sharp." The second deed was as follows: "This indenture, made and entered into the second day of July, 1867, between Isaac Sessums, of the county of Nash and state of North Carolina, of the one part, and B. H. Sorsby, Sr., trustee, or his survivors, of the second part, witnesseth: That for and in consideration of the sum of one dollar to me in hand paid by said trustee, the receipt whereof is hereby fully acknowledged, have this day bargained, sold, and conveyed unto him, the said trustee, and his survivors, one certain tract or parcel of land lying and being in Nash county, containing 110 acres, more or less, adjoining the lands of Jordan Brewer, the heirs of Henderson Ellen and others, and known as the place where Thomas Hunt formerly resided, for the following purpose, to wit: That is to

say, that the said trustee, or his survivors, shall hold in trust the above tract of land for the benefit of Isaac T. Hunt, during his natural life, and in the event of the said Isaac T. Hunt not leaving lawful issue I hereby empower the said trustee to make * * * of the above deeded premises to the heirs of Thursby Griffin, wife of Benjamin Griffin; but, in case of lawful issue of Isaac T. Hunt, then and in that case the said trustee is hereby empowered to make title to the heir of the said Isaac T. Hunt. And also in further consideration of one dollar in hand paid to me by said trustee I have bargained, sold, and conveyed to him one mouse-colored mule for the purposes above stated in regard to the disposition of the land," etc. "In witness whereof I have hereunto set my hand and seal," etc. "Isaac Sessums. [Seal.] Witness," etc. (3) That in the year 1876 George N. Lewis, sheriff of Nash county, sold said land for taxes due thereon for years 1874, 1875, and 1876, and conveyed same to one John Killibrew, reciting sale for taxes and that owner had failed to redeem, etc. (4) That on the 31st day of January, 1884, said John J. Killibrew conveyed said land by quitclaim deed for valuable consideration to one Isaac Proctor. This deed contained a note saying that the land formerly belonged to Isaac Hunt and was sold by G. N. Lewis for default in payment of taxes on April 3, 1876. (5) That Isaac T. Hunt, referred to in the deeds of Isaac Sessums, died on the 14th day of February, 1903, and plaintiffs are his children and heirs at law, and were born after the year 1884. This suit was instituted by the plaintiffs on the 18th day of August, 1903. (6) That prior to 25 years ago B. H. Sorsby, named as trustee in both deeds from Sessums, died, and no other trustee has been appointed by the court or agreed upon by the parties as to the trusts raised in said deeds. (7) That defendants are the widow and heirs at law of the said Isaac T. Proctor, grantee in the deed from Killibrew; that he died intestate in November, 1894, and defendants and those under whom they claim have been in the exclusive possession of said tract of land, under and ever since the date of the deed from J. A. Killibrew, dated January 1, 1884, claiming it as their own, and exercising the right of ownership over it, etc. On the facts set out in the case agreed the judge below was of opinion that plaintiffs could not recover, gave judgment to that effect, and plaintiffs excepted and appealed.

B. H. Bunn and F. S. Spruill, for appellants. Battle & Cooley, for appellees.

HOKE, J. (after stating the facts). The two deeds from Isaac Sessums to the trustees were evidently executed with the design and purpose of conveying the entire tract of 150 acres. The case agreed in effect so states. The second deed, however, is sufficiently definite and comprehensive under certain circumstances to embrace the entire tract of land "known as the place where Thomas Hunt formerly resided," giving also the county and adjoining lands. And if, as defendants contend, the first deed, which was made in the effort to cut off 40 acres from the land, is void, because too vague and indefinite in the description to pass any land, then the second would pass the entire tract. The court is of opinion that the position of defendant in regard to the first deed from Isaac Sessums set out in the case agreed is well taken, and the same is void, because too vague and indefinite to pass any land. It purports to cut off 40 acres from the main body of the land, and does not in any way indicate the shape or give any data by which the divisional line can be located. Robeson v. Lewis, 64 N. C. 737; Perry v. Scott, 109 N. C. 379, 380, 14 S. E. 294. The deed is therefore void, and the rights of the parties depend on the true construction of the second deed and the other facts set out in the case agreed.

On this second deed the defendant contends: First, that as same bears date prior to act of 1879 (Code 1883, § 1280) the word "heirs" is absolutely necessary to convey a fee; that, said word not being in the deed in connection with the trustee's estate, he only took a life estate; that this life estate terminated by his death 25 years ago, and at his death the land reverted to the grantor or his heirs. It is true that prior to the act of 1879 the word "heirs" was generally held necessary to the creation of a fee-simple estate in deeds conveying the legal title. It was not so in devises, nor in equitable estates, where it was generally held that an estate of inheritance would pass without the word "heirs," if such was the clear intent of the parties. Holmes v. Holmes, 86 N. C. 205–207. A series of decisions have also established the proposition that, whenever the word "heirs" appeared in an instrument as qualifying the interest of the grantee and indicative of his estate, whether in the premises, the habendum, or the warranty, same would be transposed and inserted in that portion of the deed which would cause same to operate as a conveyance of fee-simple interest, when such was the purpose of the grantors. And in Vickers v. Leigh, 104 N. C. 248, 10 S. E. 308, it was decided that in a deed conveying the legal estate, although the word "heirs" did not appear, the deed would be held to convey an estate of inheritance, if the same on its face contained conclusive intrinsic evidence that a fee-simple estate was intended to pass, and that the word "heirs" was omitted from the instrument by ignorance, inadvertence, or mistake. This case has since been uniformly upheld and acted on by this court where the evidence of

intent to convey a fee simple was of this character, and appeared so clearly from the face of the instrument that the court could see that the words of inheritance were omitted by mistake. The decisions since this opinion was rendered which are apparently to the contrary are cases where the evidence of the mistake could not be drawn exclusively from the instrument itself, but required the aid of facts dehors the instrument and the interposition of the equitable powers of the court on allegations of mistake duly made. This case of Vickers v. Leigh is cited and affirmed in Fulbright v. Yoder, 113 N. C. 456, 18 S. E. 713; Moore v. Quince, 109 N. C. 89, 13 S. E. 872; Helms v. Austin, 116 N. C. 751, 21 S. E. 556. In Helms v. Austin the position is taken as accepted doctrine, and in Moore v. Quince, supra, was applied to the estate of the trustee as in the case we are now considering. In the deed before us we are of opinion that it was the clear intent of the grantor to pass a fee-simple interest in both the legal and equitable estates, the two uniting when the exigency of the trust had terminated. Another principle may be properly invoked to uphold the estate of the trustee. In Am. & Eng. Enc. (2d Ed.) vol. 28, p. 923, it is said: "If there is an axiom of the law, it must be regarded as axiomatic in the construction of active trusts that the trustee will take precisely that quantum of legal estate which is necessary to the discharge of the declared powers and duties of the trust. Thus the trustee will take by implication of law a fee in the estate when the duties of the trust require it, although the conveyance is in terms of life estate or fails to use the word 'heirs.'" In the same volume, at page 924, it is also said: "The estate of trustee will, nevertheless, not extend beyond the term required by the exigencies of the trust; the unnecessary portions of the estate becoming executed by the statute of uses." The authorities clearly show this to be a correct statement of the doctrine. North v. Philbrook, 34 Me. 532; 1 Lewin on Trustees, pp. 213, 214. "If land," said Lord Hardwicke, "be devised to a man without the word 'heirs,' and a trust be declared which can be satisfied in no otherwise but by the trustee taking an inheritance, it has been construed that a fee passes. Thus a trust to sell, even on a contingency, confers a fee simple as indispensably necessary to the execution of the trust." And it is familiar doctrine that a trust shall not fail for the want of a trustee. Moore v. Quince, supra. These deeds from Isaac Sessums were evidently executed as a scheme for the settlement of the property in which the present plaintiffs, as children of Isaac T. Hunt, were the principal and ultimate beneficiaries of the grantor's bounty. The general purposes of the deed, the terms in which the estate is declared, and the general context conclusively show that it was the intent of the grantor to pass the absolute ownership of the property, and that the trustee is given an estate commensurate with the exigencies of the trust.

The defendant further contends that under the rule in Shelley's Case Isaac T. Hunt took an estate in fee simple under the deed from Isaac Sessums; the deduction being that, he being the owner of the land in fee, the sheriff's deed for taxes would convey a like estate to J. L. Killebrew, the purchaser of the tax title under whom defendants claim. But the rule in Shelley's Case does not apply to the deed we are here construing. A very clear statement of the rule and certain recognized exceptions to it will be found in the case of Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762, as follows: "In Shelley's Case, 1 Coke, 104, the rule was laid down on the authority of a number of cases from the Year Books to be 'that when the ancestor, by any gift or conveyance, taketh an estate of freehold and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs, in fee or in tail, "the heirs" are words of limitation of the estate, and not words of purchase. * * *' Chancellor Kent, however, adopts the following definition of the rule by Mr. Preston as being more full and accurate: 'When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate.' 1 Preston on Estates, 263. In cases, therefore, where the word 'heirs' or 'heirs of the body' are used, they will be construed to limit or define the estate intended to be conveyed, and will not be treated as words of purchase, and no supposed intention on the part of the testator or grantor, arising from the estate being conveyed, in the first instance, for life, will be permitted to control their operation as words of limitation. In all such cases the estate becomes immediately executed in the ancestor, who becomes seised of an estate of inheritance. By force of the unbending construction given to these terms, it imputed to the grantor or testator, in legal contemplation, an intention to use the terms in their legal sense and to give them their legal effect, though it should defeat even the real intention to the contrary. In other words, they are regarded as conclusive evidence of the intent of the testator. There are, however, well-recognized exceptions to this rule, two of which we will advert to at present in general terms: In the first place, whenever the testator or grantor annexes words of explanation to

the word 'heirs,' indicating that he meant to use the term in a qualified sense, as a mere descriptio personarum or particular description of certain individuals, and that they, and not the ancestor, were to be the points of termini from which the succession to the estate was to emanate or take its start, then in all such cases, where the word 'heir' is thus explained or restricted, it is to be treated as a term of purchase, and not of limitation. For example, the expressions 'heirs now living,' 'children,' 'issue,' etc., are words of limitation or purchase as will best accord with the manifest intention of him who employs them. Under this qualification of the rule the intention prevails against the strict construction. The second exception to which we will advert is that, where the estate limited to the ancestor is an equitable or trust estate, the two estates, under the rule in Shelley's Case, will not coalesce in the ancestor; and the result would be the same if the estate for life was a legal estate, and that limited to the heirs an equitable estate. Horne v. Lyeth, 4 Har. & J. 432."

The deed before us is within the first exception so clearly stated. In the terms of this deed descriptive of the estate, "the said trustee or his survivors shall hold in trust the above tract of land for the benefit of the said Isaac T. Hunt during his natural life, * * * and in the event of Isaac T. Hunt not leaving lawful issue I hereby empower the said trustee to convey to the heirs of Thursby Griffin; but in case of lawful issue of Isaac T. Hunt then, in that case, the trustee is hereby empowered to make title to the heir of Isaac T. Hunt." The words "heir of Isaac T. Hunt" are clearly not intended to denote the whole line of heirs to take in succession as said heirs, "from generation to generation," in the language of Preston's statement of the rule, but are simply only a designatio personæ, meaning lawful child or children of Isaac Hunt who may be living at his death. Said Hunt having died leaving lawful children, who are the plaintiffs, we hold the proper construction of the deed as to the interest conveyed to be that the trustee hold in trust for Isaac T. Hunt for his life, that after his death the trustee shall convey the land to the lawful children of Isaac T. Hunt, and, the exigencies of the trust having terminated on the death of Isaac T. Hunt leaving lawful children, the statute will execute the unnecessary portion of the estate. The sale and conveyance, therefore, of the land by the sheriff for default in payment of taxes on the part of Isaac T. Hunt, the land having evidently been listed as the land of Isaac T. Hunt, did not operate to convey the interest of his children, who take in remainder as purchasers. Tucker v. Tucker, 108 N. C. 236, 13 S. E. 5, citing In re Macay, 84 N. C. [illegible] This sale was under the statutes of [illegible]nd 1875, which speak throughout of the sale of delinquent's interest, the one who had listed the property and failed to pay. And, moreover, in the revenue law for that year (Laws 1874–75, p. 228, c. 184, § 29, subsec. 3) is the provision: "And it is expressly declared that the lands of a minor, lunatic or a person non compos mentis shall in no case be taken to be sold for taxes." It may be well to note that this sale for nonpayment of taxes took place under the provisions of the act of 1874–75. Under the act of 1887 and the revenue acts since that time, so far as we have examined, the state has adopted a different and more stringent method of enforcing the collection of taxes. When the taxes are due and the requirements of the statute otherwise complied with, a sale now conveys the property, and not simply the interest of the delinquent. The statute protects the interests of minors and remaindermen by making specific provision as to their rights to redeem. We have here only construed the revenue laws of 1874–75; these being the statutes governing the rights of the parties in the present case.

The defendants further contend that, if the tax deed does not convey to them the rights of the plaintiffs, it is good as color of title, and the defendants and those under whom they claim having occupied the land since the date of this deed in 1884, asserting ownership, they are protected by the statute of limitation. This position cannot avail the defendants. In the first place, while the tax deed does not operate to convey the interest of the plaintiffs, it does convey the interest of Isaac T. Hunt, the life tenant. The very definition of color of title is a paper writing (usually a deed) which professes and appears to pass the title, but fails to do so. In Words & Phrases Judicially Defined, vol. 2, p. 1264, it is said to be "that which in appearance is title, but which in reality is no title," citing many decisions. And for the same reason the possession of the defendants was not adverse. The tax deed under which they occupied the land passed to them the interest of the life tenant. Adverse possession which will ripen a defective title must be of a character to subject the occupant to action. If the trustee or these plaintiffs had sued during the life of Isaac T. Hunt, their action would have failed, because the defendants under their tax deed held the interest of the life tenant in the property. Their occupation, then, was neither adverse nor under color of title till the death of the life tenant, which occurred only a short time before the institution of the present suit. And herein lies the distinction between this case and King v. Rhew, 108 N. C. 698, 13 S. E. 174, 23 Am. St. Rep. 76, cited by defendants. In King v. Rhew the estate was conveyed to a trustee in trust for the sole and separate use of Charlotte King (feme covert) during her natural life, and after her death to be equally divided between any children she may leave her sur-

viving, etc. Isaac King and wife in August, 1869, undertook to convey the estate, and by mesne conveyances the land passed to the defendant, who occupied and claimed to own the same under his deeds till 1889, when suit was brought. Charlotte King died on September 20, 1889, and the plaintiffs, her only surviving children, instituted the action to recover the land. The deed by which Charlotte King and her husband endeavored to convey the land was void, and passed no estate or interest of Charlotte King, the life tenant. The court held that the estate of the trustee was barred, and for that reason the children, the cestuis que trust, were also barred. That was because, the deed of the life tenant being void, the attempted occupation under it was from the beginning hostile to the title of the trustee, subjecting the occupant to an action by him from the date of the deed. In our case the tax title passed the interest of the life tenant, and the trustee, as stated, could not have successfully maintained his action till the life estate terminated.

Our conclusion on the whole matter is that the deed from Isaac T. Sessums passed the entire estate in the land; the trustee holding for the benefit of Isaac T. Hunt during his life, and then in trust to convey the same in fee to his lawful children, who have a present right to recover the property. There was error in the judgment of the court below, and on the case agreed judgment will be entered for the plaintiffs.

Reversed.

(139 N. C. 65)

VANDIFORD et ux. v. HUMPHREY et ux.

(Supreme Court of North Carolina. Sept. 19, 1905.)

1. HUSBAND AND WIFE — ABANDONMENT BY HUSBAND—CONTRACTS OF WIFE.

An abandonment by a husband of his wife, within Code, § 1832, authorizing a woman abandoned by her husband to contract and bind her separate property, is shown by proof that the husband voluntarily left his wife, with the intention of forsaking her and never returning, but not necessarily leaving the state; and, when a husband has thus abandoned his wife, she may make contracts binding her separate estate, without waiting for a time sufficient to obtain a divorce on the ground of abandonment.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 369.]

2. SAME—EVIDENCE—SUFFICIENCY.

On the issue whether a husband had abandoned his wife, within Code, § 1832, authorizing a wife abandoned by her husband to make contracts binding her separate property, evidence *held* to justify a finding of abandonment.

Appeal from Superior Court, Pitt County; Webb, Judge.

Action by Jackson Vandiford and wife against J. C. Humphrey and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

F. C. Harding and Jarvis & Blow, for appellants. L. I. Moore, for appellees.

CONNOR, J. This action is prosecuted by plaintiffs, Jackson Vandiford and wife, for the cancellation of a deed executed by the feme plaintiff to defendants conveying a tract of land, being her separate estate. The validity of the deed is attacked for that (1) the feme plaintiff was a married woman at the date of its execution; (2) the execution was obtained by fraud and undue influence; (3) the feme plaintiff was of unsound mind and incapable of executing a valid conveyance. The defendants admitted the coverture, but alleged that at the date of the execution of the deed the male plaintiff had abandoned the feme plaintiff. They denied the other allegations of the complaint. Appropriate issues were submitted to the jury in respect to the several allegations. Under instructions, to which there are no exceptions, the jury found for the defendants upon the last two issues. The plaintiffs requested his honor to charge the jury that there was no evidence to sustain the defendants' averment of abandonment, and to the refusal to do so excepted. His honor instructed the jury upon the first issue as follows: "Abandonment means forsaking, deserting. An eminent law writer says abandonment means the voluntary leaving of the person to whom one is bound by special relation, as wife, husband, child; deserting. The court charges the jury that frequent, protracted absence of the husband, and the practice of the wife of transacting business, nothing else appearing, would not mean abandonment. If you find from the greater weight of the evidence that Jackson Vandiford, at the time of the execution of the deed in question by his wife, did voluntarily leave his wife, desert her, prior to the time of the execution of the deed, with the intention of forsaking her entirely and never to return, why then you ought to answer the first issue, 'Yes'; but, if you find that Jackson Vandiford had not abandoned his wife, deserted her, at the time of the execution of the deed in question, as alleged by the defendants, then you will answer the first issue, 'No.' If you find that she refused to let her husband live with her, threatened that, if he stayed with her, he did so at his own risk, as testified to by him, if you believe that, and, if you further find that this was the cause of his leaving his wife, and that he left her with the intention to return as soon as she would permit him, then this would not be abandonment, and you would answer the first issue, 'No.'" To this instruction plaintiffs excepted. The jury found for the defendants, and, upon the verdict judgment being rendered, plaintiffs appealed.

The undisputed facts show a most fertile field for domestic discord. The feme plaintiff was a widow, with five children by her first husband, and owned a small tract of land. The male plaintiff was over 70 years of age. Frequent quarrels were had, followed by separations lasting several months, etc. We have examined with care the testimony bearing up-

on the first issue. It is true that, as usual, after reconciliation and changed conditions, the husband and wife deny that there was any other trouble than a slight disturbance incident to domestic life. There is a vast amount of contradictory and conflicting evidence in regard to the declarations of both parties. The jury were invited to a very thorough investigation of the home life of the families involved in this controversy. The contention of the plaintiffs that there was no evidence to sustain the charge of abandonment is very largely dependent upon the correctness of their view of the legal definition of the term as used in the statute. Code, § 1832. If, as contended by the learned counsel, the power of the wife to deal with her property as a free trader arises only when her husband has left the jurisdiction of the court with no intention to return, is correct, then, of course, his honor's ruling is erroneous. He concedes that this court has held, in Hall v. Walker, 118 N. C. 377, 24 S. E. 6, that the statute is constitutional. He insists that, as in that case, to constitute abandonment, the husband must have left his wife with no intention of returning to her, and departed from the state. Our attention is called to a well-considered case decided by the Supreme Court of Maine, which seems to sustain this view. Ayer v. Warren, 47 Me. 217. It is also insisted that the power of the wife to contract in regard to her separate property as a free trader is to be tested by her right to maintain an action for divorce for like cause. This, we think, a safe test; but counsel further insist that, until the time has elapsed entitling her to bring the action, she should not be permitted to make contracts. This construction, we think, would to a very great extent destroy the beneficent purpose of the statute. The law requires that six months shall elapse after the injury complained of has been committed to enable the parties to become reconciled; but it cannot be contemplated that during this time a wife who has been abandoned by her husband shall either starve or become a charge upon the charity of her friends. If she has a separate estate, she should be allowed to resort to it by making contracts for the purpose of supplying the necessaries of life. The two statutes are based upon distinct reasons. The wife may and should wait six months after abandonment before rushing into court for a divorce; but she may not and should not be required to starve or go without support for that time, waiting the return of her recreant husband. We cannot reach the conclusion that the statute requires the departure of the husband from the state to enable the wife to use her property for her support.

We think that his honor correctly instructed the jury as to the law. While the testimony is conflicting, we are of the opinion that there was evidence fit to be submitted to the jury. It would serve no good purpose to set it out at any length, but we note the following: Amos Stocks testified that: "He [the husband] was all the time abusing her because she would not give him a life estate in the land. He left, and said he was not coming back any more. He carried his things, and his tools, buggy and harness, bed and bedding." Jesse Stocks testified that Vandiford said "that he had left her for good this time." There was other testimony to the same effect. The feme plaintiff, after her husband left her, went to live with the defendant Humphrey, who had married her daughter, and it would seem, and the jury so found, of her own free will executed the deed by which she charged upon the land a support for herself and the payment of $400 at her death to her other children. The contract seems to have been fair in its terms and freely made by her. The amount to be paid is approximately the value of the land. All suggestions to the contrary have been passed upon by the jury.

We have, after a careful consideration, found no error in the ruling of his honor. The judgment must be affirmed.

Affirmed.

(139 N. C. 198)

STONE & CO. v. CLYDE S. S. CO.

(Supreme Court of North Carolina. Oct. 8, 1905.)

1. CARRIERS — TERMINATION OF LIABILITY — WAREHOUSEMEN.

Where freight had been landed from defendant's vessel at destination on its platform or wharf, and the consignees were notified of its arrival, paid the freight, and removed part of the goods, the carrier's responsibility was terminated, and any obligation that remained with reference to goods not removed was that of a warehouseman or wharfinger.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 426.]

2. SAME—NEGLIGENCE.

A carrier was not guilty of actionable negligence in permitting goods to be injured by the elements after arrival and pending removal by the consignees, where the latter had been notified of the arrival of the goods, had paid the freight, and had permitted a portion of the goods to remain on the carrier's uninclosed platform or shed, according to custom.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 426.]

Appeal from Superior Court, New Hanover County; O. H. Allen, Judge.

Action by Stone & Co. against the Clyde Steamship Company. From a judgment in favor of defendant on appeal from a justice of the peace, plaintiffs appeal. Affirmed.

This was an appeal from a court of a justice of the peace, heard in the superior court on the following case agreed: "(1) The plaintiffs are a partnership doing business in Wilmington, and the defendant is a corporation operating a line of steamships for the purpose of carrying freight and passengers between New York and Wilmington and other points. (2) At the termination of its line in Wilmington the defendant owns and con-

trols a wharf or platform upon which goods are unloaded from its vessels. The said platform is not inclosed, but is covered by a tin shed or roof, under which said goods are piled on being unloaded. The said platform is open at all times and on a level with the ground, and upon it consignees of freight are accustomed to go and do go with drays and other vehicles for the removal of freight. The defendant makes no charge to shippers or consignees of freight for the use of said platform or wharf, except as follows: The vessel from New York arrives on Tuesday of each week on its regular schedule, and is unloaded on Tuesday, and if consignees allow goods to remain on platform longer than the next Monday a charge is made for the same; but no such charge was made in this case. It is the custom of the customers of the defendant in Wilmington to remove the same from said wharf at their earliest convenience, the defendant having no other means of storing the same, and this is known by the shippers and receivers of freight. (3) On January 24, 1904, the Hargrave Biscuit Company of Baltimore shipped to the plaintiffs, at Wilmington, N. C., over the defendant's line, certain boxes of crackers, to be delivered to the said plaintiffs at Wilmington, N. C., and the said defendant received the same for transportation and issued its bill of lading therefor. (4) The said goods arrived in Wilmington on defendant's vessel on the morning of Tuesday, February 9, 1904, and were delivered from said vessel upon the said wharf or platform in said city on the same day, and defendant immediately notified plaintiffs of such arrival. On Wednesday, February 10, 1904, the plaintiffs paid the freight due upon said goods and removed a part of the same from said platform or wharf to their own place of business. On the night of the 10th, after said freight had been paid, a wind and snow storm occurred in Wilmington, and blew snow and rain under the said shed and upon the said goods, by reason of which the said goods were damaged to the amount of $29.55 before the plaintiffs had completed the moving of the same to their own place of business. It is agreed that this case may be submitted to the court on the foregoing statement of facts, and that the court may render a judgment thereon as it may find the law to be." There was judgment for defendant, and plaintiffs excepted and appealed.

Louis Goodman, for appellants. Rountree & Carr, for appellee.

HOKE, J. On the foregoing facts, and according to our decisions, defendant's responsibility as common carrier had terminated (Hilliard v. Railroad, 51 N. C. 343), and any obligation which remained was that of warehouseman or wharfinger. The standard of conduct in such case is that of ordinary care; and, applying such standard to the facts before us, we are of opinion that there has been no negligence on the part of the defendant which amounts to an actionable wrong. The goods were placed on the defendant's wharf according to local usage, known to defendant's customers, and presumably acquiesced in by the plaintiffs, as they paid the freight and commenced the removal of the goods without any protest as to their placing. While it is true that neither usage nor custom, as a general rule, will sanction or excuse an act which the law condemns as negligent, it is pertinent evidence on the question whether there has been negligence in a given case. Morehead v. Brown, 51 N. C. 367. Furthermore, the plaintiffs had been promptly notified of the arrival of the goods, and, so far as appears, had been given ample time and opportunity to remove them. On the facts disclosed in the case agreed, the authorities are against the plaintiffs' right to recover. Chalk v. R. Co., 85 N. C. 423; Holtzclaw v. Duff, 27 Mo. 392.

No error.

(139 N. C. 131)

DARDEN et al. v. TIMBERLAKE et al.

(Supreme Court of North Carolina. Oct. 8, 1905.)

1. DEEDS—CONSTRUCTION—GRANTEES.
Where a deed conveyed certain land to W. and wife and their heirs, including the children of the wife by a former husband, the wife's children, so designated, living at the time of the execution of the deed, were sufficiently designated to take as grantees.

2. SAME—"HEIRS"—SURPLUSAGE.
Where a deed was executed to W. and wife "and their heirs," the words quoted should be rejected as surplusage; a conveyance to the heirs of a living person being void.

3. SAME — TENANTS IN COMMON — ESTATE BY ENTIRETY—SHARES.
Where land was conveyed to a husband and wife and their heirs, including the children of the wife by a former husband, of whom there were three, the grantees took as tenants in common; the husband and wife taking an estate by the entirety, with the right of survivorship and descent to the heirs of the survivor, in one-fourth of the property, and the three children of the wife taking one-fourth each.

Appeal from Superior Court, Wilson County; W. R. Allen, Judge.

Action by Charles F. Darden and others against Nelson Timberlake and others. From a judgment in favor of plaintiffs for less than the relief demanded, both parties appeal. Affirmed.

Connor & Connor, for plaintiffs. F. A. Woodard and Pou & Finch, for defendants.

Plaintiffs' Appeal.

BROWN, J. Plaintiffs and defendants claim under a deed by "R. J. Taylor and wife, of the first part, and Saml. Williams and wife, Annie, and their heirs, including the former children of the said Annie by another husband, of the second part." Annie died leaving Sam surviving. They had no

children of their marriage. Plaintiffs are Annie's children by the former husband. Defendants are Sam's heirs at law. His honor held that Sam, Annie, and the three plaintiffs took as tenants in common, and that each took one-fifth, and that Sam acquired Annie's fifth by survivorship, and that upon Sam's death his undivided two-fifths descended to the defendants.

1. The plaintiffs took as grantees under the deed. They were living at the time of its execution, and were the children of a named person. The designation is sufficiently certain to enable them to take as grantees. In Helms v. Austin the grantees were "Sarah Staton, his wife, and her heirs, named on the back of this deed, of the other part." On the back were indorsed the names of the children. In another deed, referred to in the same case, the grantees are "Sarah Staton and her children." 116 N. C. 751, 21 S. E. 556. The deeds were held to be valid conveyances, and created a tenancy in common between the grantees, including the children. See, also, King v. Stokes, 125 N. C. 514, 34 S. E. 641; Hampton v. Wheeler, 99 N. C. 222, 6 S. E. 236; 9 Am. & Eng. Enc. p. 132, note 9. The words "and their heirs," contained in the deed under consideration, are to be rejected as surplusage. A conveyance to the heirs of a living person is void, for "nemo est hæres viventis." Broom's Legal Maxims, 522. A deed purports to convey in præsenti, and the grantees cannot be ascertained until the death of the person named. 9 Am. & Eng. Enc. p. 132, note 9. But it is otherwise where the word "children" is used. Eliminating the words "and their heirs," Sam, Annie, and the latter's children (these plaintiffs) by a former husband are the grantees in this deed. In our opinion his honor was correct in holding that those grantees took as tenants in common.

2. His honor held that Sam and Annie took one-fifth each. In this there was error. Sam and Annie took by entireties, and not in severalty. They were neither joint tenants nor tenants in common with each other. They were considered one person in law, and could not take by moieties. They were both seised of an entirety. Upon this proposition the learned counsel for plaintiff, in an unusually helpful and well-prepared brief, cites us to Lord Coke, who says: "Also, if a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety, and the third person shall have as much as the husband and wife, viz., the other moiety, etc. And the cause is, for that the husband and wife are but one person in law. * * * In the same manner it is where an estate is made to the husband and wife, and to two other men, in this case the husband and wife hath but the third part, and the other men the other two parts." Coke on Littleton, § 187b; Freeman on Co-Tenancy, p. 129. See, also, 2 Kent's Com. *p. 132; 2 Blk. Com. c. 12, and notes to Cooley's Edition; Bruce v. Nicholson, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562; Johnson v. Edwards, 109 N. C. 466, 14 S. E. 91, 26 Am. St. Rep. 580. It is useless to multiply authorities. It is elementary learning that husband and wife are seised by entireties, per tout et non per my, and upon such seisin the right of survivorship depends. In this connection we are not inadvertent to the dictum of Mr. Justice Merrimon in Hampton v. Wheeler, supra. The contest in that case was not as to whether Alfred Hampton and his wife took by entireties, with the incident of survivorship, but as to whether the husband and wife and their children were tenants in common. Hampton and wife had conveyed the land in fee. Their children were claiming as tenants in common with the grantees of their parents, and the real question decided was as to the effect of the statute of limitations. There being seven children, the learned justice was evidently in error in dividing the land into nine parts. Under all the authorities, Hampton and wife took one-eighth in entirety, in stead of two-ninths. It was an evident inadvertence upon the part of that able and usually accurate judge. It is a case of "Homer nodding," which sometimes happens to the best of judges.

It follows, therefore, that Sam and Annie were together seised of one-fourth, and the three plaintiffs of one-fourth each. Sam acquired the one-fourth by right of survivorship, which at his death descended to the defendant. The cause is remanded to the superior court of Wilson county, with instructions to enter a decree in accordance with this opinion.

Error.

Defendants' Appeal.

The defendants claim the whole of the land, contending that the plaintiffs took nothing under the deed, but that Sam and Annie Williams took the whole of the land in fee, and that Sam acquired the whole by survivorship. No authority is cited in the defendant appellants' brief to sustain this contention, presented upon their appeal, and we have been unable to find any. The question presented by this appeal is decided adversely to the defendants by our opinion in the plaintiffs' appeal. The cause is remanded, to be proceeded with in accordance with that opinion. In holding that Sam and Annie Williams did not take the whole of the land under the deed from Taylor and wife, his honor committed no error. The defendants, having lost both appeals, are taxed with the costs of both.

No error.

(139 N. C. 547)

STATE v. DAVIS.

(Supreme Court of North Carolina. Sept. 19, 1905.)

EAVESDROPPING—INDICTMENT.

An indictment for eavesdropping, alleging that defendant willfully approached the dwelling of S. in the nighttime, peeping in the window, turning the blinds, eavesdropping the conversation, and looking in the rooms, to the great terror and disturbance of the family, etc., was fatally defective for failure to charge that such acts were habitual and that defendant had repeated the conversation heard.

Appeal from Superior Court, Pitt County; Webb, Judge.

Jordan Davis was indicted for eavesdropping, and from a judgment quashing the indictment the state appeals. Affirmed.

The defendant was indicted under the following bill: "The jurors for the state upon their oaths present that Jordan Davis, late of the county of Pitt and state of North Carolina, on the 15th day of April, 1905, at and in said county and state, being a person of evil mind and disposition, willfully and unlawfully did approach the dwelling house of one L. H. Smith, then and there in the actual possession of one Eva Smith, his wife, in the nighttime, peeping in the window, turning the blinds, and eavesdropping the conversation, and looking into the rooms, to the great terror and disturbance of the family, to the annoyance and inconvenience of the inhabitants of said house, to the evil example of all others in like cases offending, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state."

The Attorney General, for the State. Skinner & Whedbee, for appellee.

HOKE, J. There is no error. Eavesdropping is a criminal offense at common law, defined as follows: "Eavesdroppers are such as listen under the walls or windows or eaves of houses to hearken after discourse and thereupon proclaim slanderous and mischievous tales." 4 Blk. 168. Mr. Wharton, in his work on Criminal Law, says of the offense that, "in order to be indictable at common law, it should be habitual, and combine the lurking about dwelling houses and other places where persons meet for private discourse, secretly listening to what is said, and then tattling it abroad." The indictment before us is defective, in that it fails to charge that the conduct described was habitual, or facts from which such habit could be inferred, and also fails to allege that it was repeated in the hearing of divers persons. Mr. Bishop, in his new Criminal Law, describes the offense as a common nuisance in hanging about the dwelling house of another, hearing tattle, and repeating it, to the disquiet of the neighborhood. This author, in his new Criminal Procedure, suggests the form of a bill in terms as follows: "That A., late of, etc., and on each and every day thence continually until the day of the finding of this indictment, was and is a common eavesdropper, and there continually, and on each and all of the days and times, did listen about the houses and under the windows and eaves of the houses of the people there dwelling, hearing tattle, and repeating it in the hearing of all persons, to the common nuisance, etc., and against the peace, etc." In commenting on the proof required for conviction, he says it may be desirable, and is, perhaps, legally necessary, to prove at least three instances of offending, from which, and from the more general evidence, the jury will infer the habit of eavesdropping, wherein probably is the gist of the offense.

There is no error.

(139 N. C. 297)

WALLACE v. McPHERSON et al.

(Supreme Court of North Carolina. Oct. 17, 1905.)

ABATEMENT AND REVIVAL—DEATH OF PARTY—PENALTIES—ACTIONS TO RECOVER.

Code, § 188, provides that no action shall abate by the death of a party if the cause of action survive, and in case of death, except in suits for penalties, the court, on motion at any time within a year, may allow the action to be continued by or against decedent's representative, etc. *Held* that, where a register of deeds died pending an action to recover a penalty against him and his bondsman for issuing a marriage license in violation of Code, §§ 1814–1816, the court had no jurisdiction to continue the cause, either against his personal representative or surety, whether plaintiff was entitled to bring a new action, as provided by sections 1490, 1491 or not.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, § 286.]

Appeal from Superior Court, Cumberland County; Ferguson, Judge.

Action by the state, on relation of J. M. Wallace, against J. A. McPherson and another, to recover a penalty for issuing a marriage license in violation of Code, §§ 1814–1816. During the pendency of the action defendant McPherson died, and at the next succeeding term, his death being suggested, the court adjudged that the action abate, from which order plaintiff appeals. Affirmed.

T. H. Sutton, for appellant. Rose & Rose, for appellee.

CONNOR, J. The only question presented by this appeal is whether, by virtue of section 188 of the Code, the action, being for a penalty, abates. The language of the section is plain: "No action shall abate by the death, marriage or other disability of a party, or by transfer of any interest therein, if the cause of action continue or survive. In case of death, except in suits for penalties, and for damages merely vindictive, * * * the court on motion at any time within one year * * * may allow the action

to be continued by or against his representative," etc. If this section stood alone, there would be no question in respect to its construction. The court has no power in actions for penalties to make the personal representative of a deceased defendant a party, and in this condition of the record the action must abate. Such was the rule under common-law procedure and Rev. Code, c. 1, § 1, which prevailed prior to the adoption of the Code. Mason v. Ballew, 35 N. C. 483; Fite v. Lander, 52 N. C. 247.

The plaintiff insists that by virtue of sections 1490, 1491, the right of action survives, and that, notwithstanding the language of section 188, the court should have made the administrator a party defendant. There does appear to be some conflict in the two sections. However this may be, the language of section 188 is conclusive upon the power of the court to make the personal representative a party. Whatever may be the right of the plaintiff to bring a new action under the provisions of sections 1490, 1491, the present action must abate by the express language of section 188. This disposes of the right to prosecute this action against the surety. Fite v. Lander, supra.

The judgment must be affirmed.

(139 N. C. 79)

DAYVIS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Sept. 26, 1905.)

1. TELEGRAPH COMPANIES—FAILURE TO DELIVER TELEGRAM — NEGLIGENCE — MENTAL ANGUISH.

The addressee of a telegram, in case of a wrongful failure to deliver, may recover for mental anguish, independent of any bodily or substantial pecuniary injury, where the message is for his benefit or concerns his domestic or social interests.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 69, 70.]

2. SAME—NOTICE—EVIDENCE.

Where, in an action for failure to deliver a telegram, plaintiff's wife testified that, on her missing a certain train on which she was expected to arrive by her husband, she wrote out a message to him and informed the operator that she and her two children, who were ill, had missed their train, and that her husband was to meet her and would be worried unless he got the message, etc., such evidence sufficiently showed notice to the telegraph company that, if the message was not delivered and the husband was thereby left in ignorance of the whereabouts and condition of his wife and children, it might result in actionable suffering and mental anguish.

3. SAME—SUFFERING WIFE AND CHILDREN.

In an action by a husband to recover damages for mental anguish as to the whereabouts and condition of his wife and children, resulting from a telegraph company's failure to deliver a message, no recovery could be had for the actual privation and suffering of the wife and her children.

4. SAME—CURING ERROR.

In an action by a husband for mental anguish caused by defendant's failure to deliver a telegram, an instruction that the jury should not consider any suffering or anxiety which the wife or children sustained, or the plaintiff's anxiety because they were ill at the time and had no money with them, cured the erroneous admission of evidence concerning their privations, though the court also charged that such instructions were based on the idea of the suffering of the wife and the children, and that the jury was limited to a consideration of the husband and his sufferings and mental anxiety.

Brown and Connor, JJ., dissenting.

Appeal from Superior Court, Beaufort County; Long, Judge.

Action by J. L. Dayvis against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

There was testimony to the effect that on the morning of June 26, 1904, plaintiff's wife left Durham, N. C., to go to Washington, N. C., to which place her husband had recently moved his residence; that in the regular course of travel Mrs. Dayvis would have reached Washington on the afternoon of the 26th, at about 6 o'clock; that she and two children who accompanied her were all sick, and she had written to the plaintiff, her husband, on Friday before leaving Durham on Sunday; that the plaintiff had sent his wife enough money to defray her expenses from Durham to Washington, via Selma and Rocky Mount; that at Rocky Mount, by misdirection of a railroad station employé, she and her children were put on the train going to Weldon, where they arrived about 5 p. m. and were unable to go on to Washington till the afternoon of the following day, June 27th; that the plaintiff, who was expecting his wife and children on the afternoon train on June 26th, had gone up on the morning train to meet them and had boarded the returning train in the afternoon, expecting to meet them at a station called Pactolus; that he inquired for them and could get no information; that he looked through the train and found their trunk checked through from Durham to Washington; that immediately on arriving at Washington he went to his hotel and inquired for a telegram, and none had been received; that he then went to the telegraph office and it was closed; that this was about 6:30; that the train had arrived on time at about 6:20; that he endeavored to get a telephone communication with his wife and children, but failed, and could hear nothing from them until their arrival on the train of the afternoon of the 27th, as stated; that he was aware they were sick and had only money enough to pay their way to Washington, and he suffered great distress and mental anguish by reason of his uncertainty as to their whereabouts, etc.; that the plaintiff had been a resident in Washington about one month, was at the Hotel Pamlico, and had received telegraphic messages at that place during his stay. Mrs. Dayvis testified: That, when she arrived at Weldon with her children at 5 p. m. June 26th, she went to the office of defendant company and wrote a

message to her husband on one of its blanks as follows: "J. L. Dayvis, Washington, N. C. Got left. Be there at 7:30 o'clock tomorrow. [Signed] D." She delivered it to the operator. She stated that she told the operator that she had been thrown over in Weldon, had two children with her who were sick, her husband was to meet her, and would be worried unless he got the message, and told him to be sure to get it off right away, and he said he would; that she came back in an hour and a half, and asked the operator if he had sent the message, and he said he got it off all right; that the message was never received by the plaintiff. The operator testified that the message was given him by Mrs. Dayvis at 5:12 in the afternoon of the 26th, and he sent it on not long after; that, not being able to tell, when he read the message, whether it was signed "D." or "W.," he carried the same to the hotel where she was, and asked about it, and was told the letter was "D."; that she did not tell him who J. L. Dayvis was, nor what her name was, nor that she and her children were sick, nor that her husband would meet her and be worried if he did not receive the message; that all she said was that she had got on the wrong train at Rocky Mount, and she asked the witness to get the message off promptly; that she came back about 6 o'clock, or later, and asked if the message had been sent and heard from; that he replied, "Sent but not heard from." Under the charge of the court there was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

F. H. Busbee & Son, Small & McLean, and Murray Allen, for appellant. J. D. Grimes and W. B. Rodman, for appellee.

HOKE, J. (after stating the case). At the close of the plaintiff's testimony, and again at the close of the entire testimony, there was a motion to nonsuit by the defendant, and exception duly taken. The decisions of this court have established the principle that the addressee of a telegram, where there has been a wrongful failure to deliver or negligent error in transmitting the message, may under certain circumstances recover compensatory damages for mental anguish, where the message is for his benefit or concerns his domestic or social interests; and this, independent of any bodily or substantial pecuniary injury. Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep 883; Sherrill v. Telegraph Co., 109 N. C. 527, 14 S. E. 94; Kennon v. Telegraph Co., 123 N. C. 232, 35 S. E. 468; Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864. If mental anguish is shown to exist, it is not required for a recovery that the claimant should be a very near relative. Bright's Case, 132 N. C. 317, 43 S. E. 841; Hunter's Case, 135 N. C. 458, 47 S. E. 745. Nor is it necessary that the telegram should contain a message concerning sickness or death. Green's Case, 136 N. C. 489, 506, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955. It is necessary, however, that the grievance complained of should amount to a high degree of mental suffering, within the natural and correct definition of mental anguish, and not consist simply of annoyance or disappointment and regret. Hancock's Case, 137 N. C. 497, 49 S. E. 952. The decisions further hold that, before a recovery can be had on that account, the defendant company must be notified that mental anguish will naturally and reasonably follow as a result of its misconduct, either from the character and contents of the message itself, or from facts within its knowledge or brought to its attention at the time of accepting the message for transmission, or certainly in time to have enabled it to avoid the consequence complained of by due care and diligence. Kennon's Case, supra; Williams' Case, 136 N. C. 87, 48 S. E. 559; Green's Case, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955; Cranford's Case, 138 N. C. 162, 50 S. E. 585. The judge told the jury that such notice must be brought home to the defendant, and under his charge the jury have necessarily decided that the plaintiff's version as to what took place, at the time the telegram was handed to the defendant's agent, was the true one.

Applying these principles to the facts of the case before us, the plaintiff has made out a cause of action. The testimony of Mrs. Dayvis on that point was as follows: "When I got to Rocky Mount I went to Weldon. I got to Rocky Mount about 2 p. m. I got to Weldon about 5 p. m., registered at the hotel, went to the telegraph office [identifies the message written out], gave it to the operator, told him I had been thrown over in Weldon, had two children with me, they were sick, my husband was to meet me, and would be worried unless he got the message. I told him to be sure and get it off right away, and he said he would. (The defendant in apt time objected to all the conversation with the defendant's agent. Objection overruled, and defendant excepted.) I came back in an hour and a half, and asked the agent if he had heard anything from the message, and he said he had not yet; and I asked him if he had sent it off, and he said he got it off all right." The court is of opinion that here was ample testimony to notify the defendant that, if the message was not delivered and the husband was thereby left in ignorance of the whereabouts and condition of his wife and children, it would be to him a matter of grave concern, and might well result in actionable suffering and mental anguish. There was no error in overruling the defendant's motion to nonsuit.

In some of the cases on the subject of mental anguish, there is a strong intimation that the action should be in tort, as involving a breach of public duty, and there is high

authority to the effect that only in this character of action can a suit be sustained by the addressee of a message. In awarding the damages to be recovered, however, where the right to damage has been established, the decisions of this court have thus far uniformly applied the law governing cases for breach of contract, and this course seems very generally to have obtained. 27 Am. & Eng. Enc. (2d Ed.) 1059; Thompson on Law Elec. § 386. In the examination of Mrs. Dayvis, witness for plaintiff, she was asked by the plaintiff's counsel if she and her children had anything to eat in Weldon, the day they were there, and the witness replied: "Only a few cakes, and a couple of coca colas." The witness was then asked why, and she replied, "Because they had no money." This evidence was admitted over the objection by defendant, and the defendant excepted. This is an action by Mr. Dayvis to recover damage for mental anguish, by reason of his just alarm from being left uninformed as to the placing and condition of his wife and children. The actual privation and suffering of Mrs. Dayvis and her children are not pertinent to the inquiry. The testimony, if competent at all, could only have been so held as corroborative evidence, and under the circumstances of the case the court inclines to the opinion that the admission of the testimony would be reversible error, but for the fact that, in the charge, the court entirely withdrew it from the consideration of the jury. In response to prayers for instruction preferred by the defendant's counsel, the judge instructed the jury as follows: "I have been requested by counsel for defendant to instruct you that you should not consider any suffering or anxiety which the plaintiff's wife or children suffered by reason of taking the wrong car to reach Rocky Mount and having to stop at Weldon, or being ill during the time, or having no money with them. I give you that instruction. The defendant also asked me to instruct you that the jury should not consider any evidence with reference to the plaintiff's anxiety, caused by the mental or physical suffering of his wife or children, due to the fact that they were unwell and without means to support them. The court gives you that instruction." The defendant concedes that this part of the charge would amount to a withdrawal of the objectionable testimony if it stood alone, but contends that it was in effect again submitted by reason of the following addition to the charge: "You will note that these last two instructions relate to recovery based upon the idea of the suffering of the wife or of the children, or of their anxiety and trouble that they may have had at Weldon. You will understand that this action is not brought by the wife nor by the children. It is brought by the husband, and therefore you are limited in this case to a consideration of the husband and his suffering and mental anxiety by reason of these circumstances." The court does not think that these concluding words of the judge should receive the interpretation and effect insisted on by the defendant. The judge had just, in express terms and in response to a special request, told the jury that neither the privations of Mrs. Dayvis at Weldon nor her husband's mental anxiety by reason of such suffering should be considered by them, and when he added, "only the mental anxiety of the husband by reason of these circumstances," by fair interpretation, we think this could only mean such circumstances as under his charge should be held pertinent, and no doubt the jury so understood it.

The court is referred by the defendant to Sparkman's Case, 130 N. C. 447, 41 S. E. 881, as authority for the position that no recovery at all can be had in the case now being considered. In that case, J. B. Sparkman at Durham, N. C., at 2:10 o'clock p. m., March 11, 1904, received a message from one S. Johnston, Little Rock, Ark., that his brother, E. Sparkman, had died at Little Rock, Ark., on the day before. About two hours later J. B. Sparkman sent or left a message with the company addressed to S. Johnston, Little Rock, Ark., as follows: "Shall we look for him? What are you going to do? [Signed] J. B. Sparkman." The message was never delivered to Johnston, and, on action brought for mental anguish, judgment was given for the defendant. There is no doubt that this case is well decided, and for the reason given by the court that there was nothing in the language of the telegram, nor in anything brought to the attention of the company, leading it to believe that mental anguish would result by reason of the failure to deliver the message. "Surely," said the court, "the distance between Durham and Little Rock, in connection with the brother's death the day before the telegram was delivered to the defendant, would preclude any idea that there was a desire or purpose on the part of the plaintiff to go to Little Rock to attend the funeral services." As a matter of fact, the case does not even disclose whether Johnston would have replied to the message if it had been received by him. The opinion, however, goes on to say that "the rule is well settled in Akard's Case (Tex. Civ. App.) 44 S. W. 538, and we adopt it. It is that a telegraph company is not to be held liable in compensatory damages for its failure to forward and deliver a message intended to relieve mental anxiety in the mind of the sender." Akard's Case refers for authority to Rowell's Case, 75 Tex. 26, 12 S. W. 534, and of this authority the opinion in Sparkman's Case further says that "Rowell's Case seems to be a leading case. The headnote is 'Anxiety caused by the failure of a telegraph company to deliver a message conveying information of the improved condition of a sick relative furnishes

no ground for recovery against the company for its negligence.'" Rowell's Case was one where the plaintiff, J. H. Rowell, had received a message saying that his wife's mother "was worse, dangerously sick." He sent a message of inquiry: "How is mother? If no better, Josie comes to-night. Answer at my expense." A reply was forwarded to him: "Mother some better. Doctor says not dangerous." The last message the company failed to deliver, and, on action brought, the court held, as stated, that the plaintiff could not recover. In the opinion the court declares as follows: "We are of opinion that the demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion on the mind of the injured party is probably the result of a breach of contract in most cases, but the cases are rare in which such emotion can be held an element of damage resulting from the breach. For injury to the feelings in such case the courts cannot give redress. Any other rule would result in intolerable litigation. We regard this case as differing in principle from that of Stuart v. Tel. Co., 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623, in which damage for mental suffering has been allowed." This is the length and strength of the opinion in Rowell's Case. It would seem to be an arbitrary limitation on the doctrine we are considering, not consistent with former decisions in the same jurisdiction, and the reasoning is far from satisfactory.

If a breach of contract, involving also a breach of public duty, by reason of which a telegraph company fails to relieve an oppressive and harrowing anxiety about the serious illness of a dear relative or the result of a dangerous and threatening surgical operation, cannot be made the subject-matter of recovery in actions of this character, the doctrine should be abandoned. It is not a correct premise to characterize such a grief or anxiety as "some kind of unpleasant emotion in the mind of an injured party, incident to a breach of contract in most cases." Nor is the conclusion convincing: "For injury to feelings in such cases the courts can give no redress. Any other rule would result in intolerable litigation." The limitation laid down in Rowell's Case has been criticised by a recent writer, and held to be inconsistent with other decisions on this subject. 3 Sutherland, Dam. § 975. And like comment is made in Connelly v. Telegraph Co., 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919. The court does not think the principle laid down in Rowell's Case is a sound one, and the opinion in Sparkman's Case, in so far as it adopts such principle, is not approved. There is some question if Sparkman's Case applies to the one we are now considering in any way. This message was sent to prevent anxiety in the plaintiff's mind, and, but for the defendant's default, would have filled its mission, except, perhaps, for an hour and a half while the plaintiff was up the road in the expectation of meeting his wife.

There is no reversible error, and the judgment is affirmed.

BROWN, J. (dissenting). I am unable to agree with my Brethren in the disposition made of this case. I am of opinion, first, that the motion to nonsuit should have been allowed, and, second, that there was error committed and a new trial should be awarded.

1. The facts taken in any light do not show a case where a recovery for mental anguish should be allowed. The right to recover damages for mental anguish, not growing out of physical injury, is the settled law of this state, although the wisdom of permitting such recovery is denied by some of the ablest courts in the country. No one has ever contended that the damages are punitive in character. They are purely compensatory and are allowed for acute mental suffering. Anguish is defined to be "intense pain of body or mind," and is derived from anguis, a snake, referring to the writhing or twisting of the animal body. Hancock's Case, 137 N. C. 501, 49 S. E. 952. We find no case where such damages are allowed for mere disappointment. This view of what constitutes that degree of mental suffering for which actual or compensatory damages may be had is indorsed by this court in Hancock's Case and also in Hunter's Case, 135 N. C. 459, 47 S. E. 745. The opinion in Hunter's Case was written by Justice Douglas, who cannot be said to have unduly favored the telegraph companies. The facts in this case, with which the defendant is connected, disclose nothing that should cause any feeling at all approximating anguish in the mind of a man of ordinary courage and self possession. Doubtless the chief anxiety of the plaintiff arose from the fact that he had been guilty of such gross negligence as to supply his wife with only money enough to purchase a ticket from Durham to Washington, with nothing to buy bread with in case of an accident. When the plaintiff discovered at Pactolus that his wife and children were not on the train, common experience should have taught him that they had missed connection, and that there were no reasonable grounds for serious apprehension. Knowing that his wife was penniless, he naturally became alarmed. But that was his own fault. Had he supplied her with funds there would have been no occasion for great anxiety, much less anguish. There is nothing on the face of the message to put the defendant on notice that mental anguish might ensue if it was not promptly delivered, and what Mrs. Dayvis said to the operator at Weldon was not sufficient for that purpose. The "solemn

issues of life and death" were not involved, nor serious illness, nor any of the usual circumstances disclosed, which indicated that great mental suffering might be caused by delay in its delivery. Mrs. Dayvis testified that she took the wrong train at Rocky Mount and went on to Weldon, and there filed the telegram set out in the record. She states: "I told the operator I had been thrown over at Weldon, had two children with me. They were sick. My husband was to meet me and would be worried unless he got the message." There is nothing here to put any one on notice that what this court has defined mental anguish to be would probably result from a failure to deliver the message. The conclusion of Mrs. Dayvis that her husband would be worried is immaterial. Worry is not sufficient to justify a recovery. From the message and disclosure of Mrs. Dayvis, the defendant could draw only natural and reasonable inferences, which inferences would be that an ordinarily robust husband with ordinary self-control is waiting for his wife and children, and if he fails to meet them, he will take a common sense view of the matter and conclude that they are delayed somewhere enroute, as is often the case. The company cannot foresee the result of its negligence due to facts not brought to its attention. It was not disclosed to the company, nor is it shown that the company was aware of the fact, that Dayvis knew his children were sick or that his wife was without money; and these facts are stated by the plaintiff to be the real ground of his suffering. On cross-examination he said he knew his wife would be uncomfortable; that he did not want his children suffering, because he knew they were sick; that he was worried because they did not come, and because they did not have money enough to pay their expenses. Of these causes of his suffering, only one was brought to the attention of the company, that is because his wife and children did not come. Could the company reasonably assume that this alone would likely cause him mental anguish? If not, then his suffering could not have been in the contemplation of the parties, and the plaintiff should have been nonsuited. On redirect examination, the plaintiff testified that his anxiety, because he feared his wife and children might be inconvenienced and uncomfortable, was the chief cause, and in fact the only cause of his suffering. It has often been held that distress, because of the discomfort of another, cannot be held the basis of an action for mental anguish. Tel. Co. v. Stratemeier (Ind. App.) 32 N. E. 871; Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772. Any misapprehension suffered by the plaintiff as to the meaning of the failure of his wife and children to arrive when expected, though resulting in mental anguish, cannot be made the basis of a recovery of damages. Bowers v. Tel. Co., 135 N. C. 504, 47 S. E. 597; McAllen v. Tel. Co., 70 Tex. 243, 7 S. W. 715.

2. There has been great trouble in ascertaining the ground on which telegraph companies may be held liable to the addressee of a telegram not a party to the contract. Different views are advanced by courts and law writers, but this court seems to have adopted the contract theory. That being so, there must be some reasonable measure by which damages can be awarded. Doubtless having this in view, this court, in Sparkman's Case, adopted the rule of the Texas Supreme Court, and held that: "A telegraph company is not to be held liable in compensatory damages for its failure to forward or deliver a message intended to relieve mental anxiety then existing in the mind of the sender." In Rowell's Case, 75 Tex. 26, 12 S. W. 534, the rule is applied to the sendee. It is impossible for a jury to measure in damages the extent to which the sendee may be injured by failure to relieve existing anxiety, for which the company cannot be held liable. The jury cannot well discriminate and distinguish between the anguish existing and that which might have been relieved. In this case, the plaintiff was already, as claimed, suffering anguish. He ascertained at Pactolus that his wife and children were not on the train. He could not get a telegram until he reached Washington. Had he received the telegram, what would he have learned? Only where they were. He would still have suffered all the distressing anxiety growing out of the knowledge that his family were in a strange town, sick and penniless owing to his own improvidence. How can a jury under such circumstances measure the mental anguish for which the defendant may be liable, and distinguish it from the existing, as well as continuing, anxiety for which the defendant is not liable? The Texas court is advanced in its views on these questions, and, having adopted its rule in Sparkman's Case, I see no reason to overrule it.

3. It is admitted that the court erred in admitting improper testimony. I do not think the court below corrected its error. A careful reading of the attempted correction contained in the charge satisfies me that the jurors were permitted still to consider the mental anguish suffered by the plaintiff, growing out of a knowledge of his family's sick and penniless condition. This was well calculated to prejudice the defendant, and doubtless increased the damages, which seem to be more than ample compensation for such anxiety as a reasonably self-contained man should have suffered under the circumstances of this case, omitting those conditions for which the defendant is admittedly not responsible.

CONNOR, J. (dissenting). I concur in the dissent of Mr. Justice BROWN. I prefer

to rest my dissent upon the last ground assigned in his opinion. It is conceded that there was reversible error in the admission of testimony in regard to Mrs Dayvis' condition, etc., while in Weldon, which entitles the defendant to a new trial; but for the instruction of his honor, I do not think that the incompetent testimony which was prejudicial to the defendant was withdrawn. I concede that, if incompetent testimony is withdrawn, the error in its admission is cured, just as if competent testimony is excluded if its admission could in no point of view have affected the verdict, the error is harmless. State v. White, 138 N. C. 704, 51 S. E. 44. With all deference, I do not think that his honor withdrew or intended to withdraw the objectionable testimony. He expressly instructs the jury that they are limited to a consideration of the sufferings and mental anxiety of the husband "under these circumstances," concluding with the words "and therefore my instructions limit you to such recovery, as the husband should recover, and not as to the wife." I do not think the testimony was competent for any purpose. It was prejudicial on the issue directed to the amount of damages to be awarded. The defendant company was not responsible for the failure of Mrs. Dayvis to reach Washington on the 26th day of June, or of her remaining in Weldon. The misdirection of some person connected with the railroad was the cause of her misfortune. The plaintiff's state of mind was caused by his failure to meet his wife on the cars at Pactolus. The breach of duty by the defendant did not cause this anxiety. The purpose of the wife in sending the telegram was to relieve this state of mind on the part of the husband. By reason of the failure to deliver the telegram the state of mind continued, the mental anxiety was not relieved. A. strikes B. a blow causing pain. C., a physician, is called in, and undertakes to relieve the pain. He negligently fails to perform his contract; he is liable in damages, not for the origin of pain, but for the negligent failure to relieve it. I concur with the opinion of Mr. Justice Hoke that the principle laid down in Rowell's and Akard's Cases, and approved in Sparkman's Case is not sound. I am unable to see why a breach of assumed duty to perform an act, the purpose of which is to relieve mental anguish, does not confer a right of action upon the same principle that a similar breach of duty causes mental anguish. I wish to emphasize the necessity on the part of judges to use extreme caution in defining to juries the range within which they are permitted to move in assessing damages in this class of cases. In all cases, the original or primal cause of the suffering must be distinguished from the suffering caused by the breach of duty by the defendant. How far, in practice, it is possible for juries to do so must cause anxious consideration to courts. The entire subject is so fraught with obscurity and difficulty that one may well hesitate to enter upon its consideration. I note, as an indication of the progress being made, that mental anxiety is substituted for mental anguish. This case, like many others, shows gross and inexcusable negligence for which the law should give both redress and impose punishment.

(139 N. C. 75)

DIXON v. JONES.

(Supreme Court of North Carolina. Sept. 19, 1905.)

DEEDS—CONSTRUCTION—DESCRIPTION.

A deed, which calls for "a point opposite the canal which is the dividing line between Mrs. R.'s homestead and the tract hereby conveyed to [grantee], thence the course of said canal, and with said homestead line of Mrs. R. to" a creek named, covers no part of the homestead of Mrs. R.; and the covenants of warranty in the deed cannot be made the basis of an action for eviction from the homestead conveyed to the grantee by a subsequent deed.

Appeal from Superior Court, Greene County; Councill, Judge.

Action by R. D. S. Dixon against J. O. W. Jones to recover damages for breach of covenants of warranty contained in two deeds executed by defendant to plaintiff. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

Geo. M. Lindsay and L. V. Morrill, for appellant. L. I. Moore and F. A. Woodard, for appellee.

BROWN, J. The material facts, condensed from the record and case on appeal, briefly stated, are as follows: (1) On August 31, 1886, the defendant executed and delivered to the plaintiff a deed with the usual covenants of seisin, quiet enjoyment, and general warranty, by which, for the consideration of $2,500, paid by plaintiff, he conveyed to plaintiff a tract of land in Greene county described as follows: "Adjoining the lands of W. H. Edwards, Annie S. Rawls, and others, bounded as follows, viz.: Beginning at Fool's Bridge, on the north side of Contentnea creek, and runs with the Goldsboro road to a point opposite the canal, which is the dividing line between Mrs. A. S. Rawls' dower or homestead and the tract hereby conveyed to the said Dixon; then the course of said canal, and with said dower or homestead line of Mrs. Annie S. Rawls to Contentnea creek; then up the various courses of said creek to the beginning—containing 225 acres, more or less. (2) On January 1, 1895, the defendant executed and delivered to the plaintiff, R. D. S. Dixon, and his wife, Frances Dixon, a deed with the usual covenants of seisin, quiet enjoyment, and general warranty, by which, for the consideration of $500 paid by plaintiff, he conveyed to plaintiff and plaintiff's wife a tract of

land in Greene county, described in said deed as follows: "Adjoining the lands of John Harvey, O. F. Worrell, R. D. S. Dixon, and the Cobb heirs and others, bounded as follows: Situated on the south side of the Goldsboro and Greeville road, and in the north fork of Fort Run and Contentnea creek, and lying on the east side of the Snow Hill and Wilson road, and bounded on the west by the same, and on the south by the Fort Run, and known as lands conveyed by the dower or life estate of Mrs. Annie S. Rawls, as by reference to record of same will more fully appear, containing by estimation 222½ acres, more or less; the same being the tract or parcel of land conveyed by Marcellus Edwards to Dr. Swift." At December term, 1902, W. C. Swift and others recovered final judgment against the plaintiff, Dixon, for all of the land covered by the above deeds which had been allotted to Annie S. Rawls as her homestead. Swift v. Dixon, 131 N. C. 42, 42 S. E. 458.

In his complaint the plaintiff practically sets out two causes of action—one for the breach of the covenants contained in the deed of 1886, and another for the breach of the covenants in the deed of 1895. The plaintiff contends that the lands, from which he has been evicted, embrace all the lands described in both deeds, except about 75 acres, which he claims are not worth over $500. His honor gave judgment for the plaintiff, upon the second cause of action for breach of the covenants in the deed of 1895, for all that the plaintiff under the evidence was entitled to recover for breach of those covenants, and held that the plaintiff was estopped to sue on the covenant contained in the deed of 1886. To this last ruling relating to the deed of 1886, the plaintiff excepted. In the view we take of this appeal, it is unnecessary to discuss the question of estoppel so fully argued by counsel. We are of opinion that the deed of 1886 does not purport to convey any part of the land included in the judgment in Swift v. Dixon, and from which land only the plaintiff has been legally evicted. That judgment embraces none of the Rawls land, except the homestead of Annie S. Rawls, which in the language of the opinion "had been laid off and located by metes and bounds before the sale by the commissioner." The deed of August 31, 1886, calls for "a point opposite the canal which is the dividing line between Mrs. Annie S. Rawls' homestead and the tract hereby conveyed to the said Dixon, thence the course of said canal, and with said homestead line of Mrs. Rawls to Contentnea creek." It is perfectly apparent that the deed of 1886 covers no part of the homestead, and, as the warranty can extend no further than the land described in the deed containing the warranty, we are at a loss to understand the foundation of the plaintiff's contention. The opinion in Swift v. Dixon, supra, takes the same view we do. In referring to this deed of 1886, Furches, C. J., says: "Which deed only conveyed that part of the tract outside the homestead boundary. But after the death of Mrs. Rawls the defendant [meaning Dixon] bought and took a deed from Jones for that part of the land covered by the homestead." This last reference is evidently to the deed of 1895. This latter deed does cover the homestead, and nothing more; and, as the plaintiff has been evicted from that, he was entitled to recover damages under the covenants contained in that deed. His honor properly adjudicated such damages and gave judgment against the defendant therefor. He held that the plaintiff was entitled to recover nothing on account of the deed of 1886, which ruling we affirm, although upon other grounds than those which seem to have influenced the court below, the correctness of which it is not necessary for us to pass upon.

Affirmed.

CONNOR, J., did not sit on the hearing of this appeal.

(139 N. C. 196)

YARBOROUGH et al. v. HUGHES et al.

(Supreme Court of North Carolina. Oct. 3, 1905.)

1. MORTGAGES—CONSTRUCTION—RIGHT TO REDEEM—RIGHT TO FORECLOSE.

A grantor in a deed of trust to secure a debt and a third person entered into an agreement whereby the third person agreed to purchase the land at the trustee's sale and sell the same to the grantor for the amount of the purchase money with a reasonable advance as a profit. After the sale the parties entered into a new agreement, which fixed the amount the grantor was to pay on redeeming the land. The agreement provided for payment of the amount in installments, with a clause of forfeiture and a power of sale on default. *Held*, that the agreements gave the grantor the right to redeem the land by complying with provisions therein, and the third person the right to foreclose by sale on default, provided the price was reasonable and there was no fraud.

2. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

It is not reversible error to refuse a requested instruction subsequently given by the court.

3. MORTGAGES—SALE—SETTING ASIDE.

Evidence, in a suit to set aside a sale under a power given in a contract on the ground that the attorney who bid in the land at the sale acted as attorney for the person having the power to sell and the purchaser, examined, and *held* to show that the attorney only represented the purchaser.

4. USURY—WHAT CONSTITUTES.

A grantor in a deed of trust and a third person entered into a contract whereby the third person agreed to purchase at the trustee's sale and convey the premises to the grantor at a reasonable advance. The third person purchased the land for $1,475. After the sale the grantor voluntarily agreed to pay $2,115 for a reconveyance. *Held*, that the transaction did not amount to usury in the absence of evidence showing an intent to evade the statute against usury.

5. MORTGAGES—SALE—SETTING ASIDE.

Where, in a suit to set aside a sale under a power in a contract on the ground that the holder of the power and the purchaser were jointly interested, there was evidence showing that they were jointly interested, and defendants failed to produce writings relating to the transaction or to explain away any inference drawn from such failure, the refusal to charge that such failure raised an inference against them was reversible error.

Appeal from Superior Court, Franklin County; Councill, Judge.

Action by A. L. Yarborough and others against W. T. Hughes and another. From a judgment for defendants, plaintiffs appeal. Reversed.

This action was brought to set aside a sale of land made by the defendant W. T Hughes under the power given in a contract between him and the plaintiffs, dated April 26, 1902; the other defendant, M. L. T. Davis, having purchased the land at the sale and received a deed therefor from his codefendant. Plaintiffs alleged that the defendants were jointly interested in the contract containing the power, although on its face it appears to have been made by them with W. T. Hughes alone, and that the sale under the power was in fact and in law conducted by W. T. Hughes through his attorney, and the land bid in by the same attorney in the name of Davis, but really for the use and benefit of Hughes, or for the joint benefit of Hughes and Davis, who were at the time copartners in trade. The facts necessary to be stated for an understanding of the case are these: Joseph Branch, an ancestor of the plaintiffs, other than the husbands of those who are married and the widow of Branch, was at his death the owner of the land, and after his death his heirs, to whom it had descended (or some of them, who had received a deed from J. M. Allen, purchaser at the administrator's sale, under a prior agreement with him), conveyed it to F. S. Spruill, as trustee, to secure certain debts of Jos. Branch, and perhaps some other debts, with power of sale in case of default. Mr. Spruill sold the land in accordance with the terms of the deed of trust, and W. T. Hughes became the purchaser at the price of $1,475. Plaintiffs allege that before this sale Hughes had agreed to buy the land in for them, and that the transaction should be treated either as a loan of the amount of the purchase money or as a purchase by him for them, with the right to redeem or buy it back on paying the amount of the bid and interest; but a written contract, dated March 22, 1902, was put in evidence, the substance of which was that Hughes agreed to buy the land for himself, with a stipulation that he would sell it to the plaintiffs for the amount of the purchase money paid by him "with a reasonable advance thereon" as a profit to himself, the total sum to be divided into three equal installments, one of which was to be paid each year for the next three years as rent, and it was further agreed that, when the three installments were paid in full, Hughes should convey the land to the plaintiff. There was a stipulation in the contract for a lien on the crops, and a clause of forfeiture and a power of sale if default was made in the payment of any one of the installments of rent or purchase money. It was further provided that the full agreement should be reduced to writing after the sale by Mr. Spruill, as trustee, which was then advertised for April 7, 1902. There was also in evidence a written agreement purporting to be the one provided for in the paper writing just mentioned. It contained substantially the same stipulations, except that it fixed the amount of the purchase money at $2,115, to be divided into three equal installments and paid as above provided. There were other terms not necessary to be mentioned. This contract was duly acknowledged by all of the parties before the clerk. Plaintiffs alleged that they had made certain payments on the debt to Hughes, reducing the amount of it to $1,185.08. They having defaulted in the payment of the installments according to the contract, Hughes advertised and sold the land under the power, and it was purchased by his codefendant, Davis. Issues were submitted to the jury, and the answers thereto were as follows: "(1) Hughes paid Spruill, trustee, for the land, $1,475. (2) Plaintiffs paid to Hughes in 1902, over and above supplies furnished to them by him, $516.85. (3) The annual rental value of the land is $225. (4) The value of the wood cut and removed by defendants, $10. (5) The land brought, at the sale by Hughes under the power, December 22, 1902, $1,692. (6) Defendants were not mutually interested in the purchase of the land at the sale of April 7, 1902, by F. S. Spruill. (7) Defendants were not mutually interested in the purchase of the land at the sale of December 22, 1902. And, reversing the order of the last two issues: (8) Davis was represented by Mr. Ruffin as attorney at the sale of December 22, 1902. (9) The said attorney did not represent Hughes at that sale. Judgment was entered for the defendants upon this verdict, and the plaintiffs excepted and appealed.

W. M. Person and T. T. Hicks, for appellants. F. S. Spruill, for appellees.

WALKER, J. (after stating the case). We may assume, for the sake of the argument, if not for all purposes, that the written agreement between the plaintiffs and Hughes, dated April 26, 1902, is a contract to sell or to make title upon payment of the purchase money and compliance with the other stipulations, notwithstanding that it has some of the usual terms of a lease expressed in it. Puffer v. Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682; Clark v. Hill, 117 N. C. 11, 23 S. E. 91, 53 Am. St. Rep. 574; Mfg. Co. v. Gray, 121 N. C. 168, 28 S. E. 257; Hervey v. Locomotive Works, 93 U. S. 664.

23 L. Ed. 1003. The plaintiffs, therefore, had the right, or after default the equity, to redeem the premises by paying the purchase money and in other respects complying with the agreement, and the defendant Hughes had the right to foreclose by sale when there was any default. The contention of the plaintiffs thus far may be admitted, and the case was really tried on the plaintiffs' theory. They have therefore substantially had the full benefit of the principle involved in their second prayer. The plaintiffs' allegation that Hughes bought upon the promise that he would convey to them on payment of the amount of his bid and interest is not sustained. There was no issue upon this allegation, and, indeed, it seems to have been abandoned, or at least waived for the present. They further claim that the contract of April 26, 1902, was onerous, oppressive, and therefore inequitable, and that the court should not enforce it. There was no issue asked or submitted which presented this contention. By the agreement of March 22, 1905, Hughes was to buy at the approaching sale and convey to plaintiffs upon payment of his outlay and a reasonable advance thereon, which it was agreed should be the purchase price, to be paid in three equal installments. We do not see why he did not have the right to make this contract with the plaintiffs, or how it was onerous or unconscionable for him to do so. They had no money, and requested him to bid in the land, as he had money for the purpose. He was to buy for himself—so says the contract—and to sell to them for a reasonable profit on the transaction. There is no suggestion that he stood in any position of trust or confidential relation to them at the time, or that there was undue influence used or any fraud practiced to obtain the contracts. Defendants agreed in the preliminary contract to pay a fair and reasonable amount over and above his bid, and by the contract executed in April they virtually affirmed that the amount fixed was reasonable. Nothing else appearing, we are unable to hold that the plaintiffs have any equity to cancel or to reform the contract, or to pay a less sum than it calls for. They asked for no issue as to the reasonableness of the price charged by Hughes, and we must conclude that this matter was fairly and finally adjusted by the parties in April in accordance with their previous understanding as evidenced by the agreement made in March. If the price was reasonable, and there was no fraud or other vitiating element, the contract must stand both in law and in equity. The first, third, and sixth prayers of the plaintiffs were therefore properly refused.

Upon the sixth and seventh issues the plaintiffs requested the court to charge the jury that they might consider the manner of keeping the accounts by defendants; it appearing that certain items paid by plaintiffs on the debt were entered on the books in the name of W. T. Hughes & Co., and that a receipt for rent was given to David Perry, one of the plaintiffs, in the name of the firm, and the supplies entered as furnished by the firm, which was composed of W. T. Hughes and M. L. T. Davis. This instruction, it appears, was not given in response to plaintiffs' prayer; but by referring to the charge we find that it was afterwards given by the court and the contentions of the parties and the evidence bearing thereon fully explained to the jury. There was, therefore, no reversible error in refusing to give that part of the instruction embraced by the seventh prayer of plaintiffs which related to this matter.

Before considering the remaining portion of this prayer we will dispose of two other exceptions, as it is more convenient to treat of them in this order.

In the fourth prayer the plaintiffs requested the court to instruct the jury that the testimony of the attorney, if believed, constituted him in law, at the time of the sale of December 22, 1902, the attorney of Hughes and Davis, and for that reason the sale was void and passed no title. The testimony was to the effect that Hughes told his attorney that there would be a default, and that, if there was, he would sell the land. The attorney then advised him that he could not buy at his own sale, as Hughes had intimated that the land might not bring the amount of the debt, and he would have to bid it in. Hughes then suggested the names of several parties who would bid, and he was told by his attorney that he could not buy directly or indirectly, and that it must be some one not interested in the sale. Hughes then said Mr Davis had money for investment, and that he would suggest to him not to let the land be sold at less than its value. The attorney then said that he could not represent him at all, but that he must go there and make the sale himself, and added that, if he was expected to represent Mr. Davis, he could not conduct the sale, as he could not, being attorney for Hughes, make a bid for anybody else. He then prepared the advertisement of sale as a courtesy to Hughes, and after that became the attorney of Davis, having received a letter from the latter requesting that he act for him at this sale, limiting his bid to $1,700, and promising to remit the cash should he become the purchaser. It is not necessary to recite the other testimony on this point. It will suffice to add that the witness further testified in substance that he had completely severed his connection with Hughes as his attorney, and represented Davis alone at the sale. The jury accepted this version of the transaction, as they found that the witness did not act for Hughes at the sale, but solely for Davis. There being evidence to sustain the verdict, it must be an end of the matter. As we construe the evidence, the conduct of the

attorney was perfectly correct, both in law and in fact. When it appeared to him from what Hughes said that he expected him to represent him at the sale, he promptly advised him of the law on the subject, and of the impropriety of his acting in a dual capacity and representing opposing, if not conflicting, interests, and immediately divested himself of all obligation to Hughes as his attorney, and ceased to act for him. It was a question of fact, to be determined by the jury under the proper guidance of the court. The exceptions to the refusal of the court to give the instructions contained in the fourth and fifth prayers are therefore overruled.

After the verdict had been returned the plaintiffs requested the court to adjudge upon the verdict that the defendant Hughes had received from the plaintiffs $730.85 of unlawful and usurious interest, and that judgment be entered for double that amount. This prayer was properly refused by the court. The contract of March 22, 1902, expressly provided that Hughes should buy the land at the sale of April 7th and sell it to the plaintiffs upon the terms we have already set forth. He was to receive a reasonable advance on the amount of his bid, the total amount to be divided into three equal installments, to be paid as stipulated. Afterwards, on April 26, 1902, the plaintiffs freely, voluntarily, and solemnly agreed (without any serious allegation, and certainly no issue, as to fraud or undue influence in procuring the instrument, or other equitable element to vitiate the contract or to prevent its full operation) that they would pay $2,115 for the land, and there is evidence tending to show that they had proposed to pay Hughes $2,400 for the land; he replying to this proposal "that $2,100 and the costs was all he wanted." There is further evidence that they importuned him to buy and then sell to them, and that Hughes had at the time been offered $2,000 in cash for the land. The only question was whether the price fixed in the contract was a reasonable advance on the bid, and we do not well see how this question could be raised, as they had agreed in writing that it was and had promised to pay it. If there was no ground upon which to assail that agreement and have it reformed or set aside, it must be binding upon them, and no equity for either reforming or canceling the agreement has been established by the verdict. The profit realized by Hughes, even if excessive, would not amount to usury, unless it was a mere device to cover and conceal a usurious transaction. It is less difficult to decide what is usury, when there is a loan of money, than in a case like this one. Interest is the premium allowed by law for the use of money, while usury is the taking of more for its use than the law allows. It is an illegal profit. 4 Blk. 156. How can we say on the face of this transaction that as matter of law it is usurious? If it was a reasonable advance, it surely cannot be illegal; for it was not excessive, and, even if exorbitant, it must have been resorted to as a mere cloak for usury. It would therefore depend upon the intent with which the increase was exacted. Referring to a state of facts much like those in this record, Tyler in his work on Usury (page 92) says: "The inquiry often arises whether the transaction was a real sale in the regular course of business, or a colorable sale with intent to disguise a loan and evade the statute against usury; but if the case is found to be a sale, and not a loan, the courts uniformly hold that usury cannot attach, and, indeed, a sale can in no case be prima facie evidence of usury, for it is valid unless it be a loan in disguise, and the burden of proof lies on the party claiming it to be usury, and it is necessary for him to show the circumstances which bring it within the statute." In cases like this the intent is the essential element of usury, and this is, of course, a question of fact, to be decided by the jury under proper instructions from the court. In this case the unlawful intent is not found.

We now come to the consideration of the exception to the refusal of the court to give the latter portion of the seventh prayer, which is as follows: "The jury may consider the fact that the writings, if any, by which the land was paid for at or after both sales, are presumably in possession of defendants and would throw light on the nature of the transaction, and as tending to show that such writings, if produced, would make against the defendants on said issues"—referring to the sixth and seventh. This exception has presented more difficulty than any other. The plaintiffs notified the defendants to produce the papers described in the prayer; but the notice was not served on Davis, and was served on Hughes late in the trial. If the correctness of the prayer depended upon the serving of notice, we might, perhaps, overrule the exception on account of the lateness of the time of service. But we do not think it does. The complaint itself was sufficient notice to the defendants of the importance of these writings as evidence to them. It is the failure to introduce testimony, oral or written, which should be valuable to a party, that raises the inference against him that, if introduced, it would be detrimental to his case. The relevancy and weight of such a fact as evidence is established by one phase of the maxim, "Omnia praesumuntur contra spoliatorem," which is said to rest upon logic, and the presumption it raises to be reinforced by our everyday experience that men do not as a rule withhold from a tribunal facts beneficial to themselves. It is therefore laid down in the books as a well-settled principle that where a party fails to introduce in evidence documents that are relevant to the matter in question and

within his control, and offers in lieu of their production secondary or other evidence of inferior value, there is a presumption, or at least an inference, that the evidence withheld, if forthcoming, would injure his case. The failure to produce on notice merely increases the strength of the presumption or inference, or adds weight to the oral evidence, if any, offered by the other side as to their contents. Some of the authorities say that the presumption does not constitute independent and substantive evidence of a fact; but we need not decide how this is. The same rule applies to the failure to call an available witness with peculiar knowledge of the fact to be established. The subject is fully and clearly treated in 16 Cyc. pp. 1059–1065. It has been applied in our courts to the case of a litigant in a civil action who fails to appear as a witness in his own behalf, and who is fixed with a knowledge of the facts. Goodman v. Sapp, 102 N. C. 477, 9 S. E. 483, and cases therein cited, which illustrate the application of this rule of evidence. In Attorney General v. Dean of Windsor, 22 Beav. 706, it is said that evidence is always to be taken most strongly against a person who keeps back a document. Broom in his Legal Maxims says (8th Am. Ed., p. 938): "If a man by his own tortious act withhold evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted; for, where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him." And again: "This rule is founded on a sort of presumption that there is something in the evidence withheld which makes against the party producing it." And he puts the case of the nonproduction of a deed or other written instrument. Broom's Legal Maxims, p. 940. See, also, 3 Elliott on Evidence, § 1967; 1 Greenleaf on Ev. (16th Ed.) § 37, note 1, and section 195c, note 1. The text-writer last cited says that the conduct of the party withholding the evidence is attributed to his supposed knowledge that the truth would have operated against him, and the nonproduction of the evidence is a significant fact for the consideration of the jury.

This court applied the rule in Black v. Wright, 31 N. C. 451, saying that it is classed among the strongest circumstantial proofs against a person that he omits to introduce evidence which should properly come from him. State v. Atkinson, 51 N. C. 67. Analogous cases are Hawkins v. Alston, 39 N. C. 147, and Satterwhite v. Hicks, 44 N. C. 109, 57 Am. Dec. 577. The court refused to apply the rule in Gudger v. Hensley, 82 N. C. 486 (affirmed in Scott v. Elkins, 83 N. C. 426), in regard to lists supposed to have been annexed to the Blount grant, but for the reason that the proof showed that they were inaccessible. Authorities applying the rule of presumption upon the ground that the document, if produced, would probably militate against the party who withholds it or could produce it, are Westervelt v. Mfg. Co. (Ind. App.) 69 N. E. 169; Darby v. Roberts (Tex. Civ. App.) 22 S. W. 529. It is also applied in Johnson v. Levy, 109 La. 1038, 34 South. 68, where the principle is stated to be that, when effective proofs are within the reach of a party and he fails to produce them, a presumption is raised that they would, if produced, make against him. This is very nearly the language of the prayer in this case. Usually the nonproduction of papers called for in a notice has no other legal effect than to allow the opposite party to prove their contents; but when a party, under the obligation to sustain his defense by proof, has possession of the best evidence and fails to produce it, but attempts to sustain it by inferior evidence, it authorizes the inference that he does not furnish the best, because it would injure instead of benefiting, his cause. Insurance Co. v. Evans, 9 Md. 1, 66 Am. Dec. 30. Strongly supporting the maxim in its general application will be found the cases of Clifton v. U. S., 4 How. 242, 11 L. Ed. 957; Runkle v. Burnham, 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694; Roe v. Harvey, 4 Burrows (opinion by Lord Mansfield) 2484.

There surely was evidence in this case for the jury upon the question whether Hughes and Davis were jointly interested in the land and in the purchase at the sales, and it was so considered at the trial by the court below, as will appear from the charge, in which his honor so lucidly stated the contentions of the respective parties and arrayed the evidence in support of them. The case was such as to call for a full disclosure by the defendants through the medium of the best attainable evidence. We think the instruction as to the nonproduction of the papers should have been given. It may be that the defendants will be able to show that after due and diligent search prosecuted in good faith they are unable to produce them, or they may in some other manner explain away any inference to be drawn from the failure to offer them in evidence. If there is a fair, frank, and satisfactory explanation the presumption may be laid out of the case, and the defendants will not be deprived of any right to which they are otherwise entitled. If, however, no satisfactory explanation is forthcoming, the maxim of the law will apply, and the jury must pass upon the case, aided by the presumption, giving to it such force and effect as they may think it should have under all of the facts and circumstances. The Pizarro, 15 Wheat. 228, 4 L. Ed. 226; State v. Phifer, 90 N. C. 721.

The court erred in not giving the said instruction, for which there must be a new trial; but it will be confined to the sixth and seventh issues, as we deem this a proper case for the exercise of our discretion to restrict

the scope of the new trial. The other issues are independent of these two and clearly severable from them. If the jury find for the plaintiffs upon the sixth and seventh issues, or, perhaps, upon either of them, further proceedings must be had to adjust and enforce the plaintiffs' equity. If the decision is the other way, and is errorless, it will put an end to the case.

New trial.

(139 N. C. 215)

WEEKS v. WILKINS et al.

(Supreme Court of North Carolina. Oct. 3, 1905.)

DEEDS—EFFECT—ESTOPPEL.

A deed of bargain and sale, purporting to convey a fee and containing a clause of warranty, is sufficient to estop an infant grantor, as to whom the deed was voidable when made, but which he failed to disaffirm on coming of age, from setting up as against the grantees an after-acquired title.

Appeal from Superior Court, Sampson County; O. H. Allen, Judge.

Action by Samson Weeks against J. T. Wilkins and others. From a judgment for plaintiff, defendants appeal. Reversed.

John D. Kerr, for appellants. F. R. Cooper, for appellee.

BROWN, J. This case was before the court at spring term, 1904, and is reported in 134 N. C., at page 517, 47 S. E. 24. The facts are very fully stated in the opinion of Mr. Justice Connor. It is a matter of surprise that the interesting question of estoppel, discussed upon this hearing, should not have been presented upon the former hearing. It is decisive of the case and bars a recovery by plaintiff of any part of the land conveyed in the deed from Esther Weeks and seven of her children on June 1, 1863, to Brittain A. Edwards. The deed was never signed or executed by Betsy Ann Raynor, the remaining child, nor was the privy examination of the three married women, Susan Williford, Phœbe Williford, and Mary J. Jones, ever taken. During 1899 all the children of Esther Weeks, including said married women, executed a deed to the plaintiff, Samson Weeks, for the same land. We are of opinion that the plaintiff is estopped from setting up the outstanding title thus acquired against the defendants, who claim under the deed to Brittain Edwards. The husbands of the married women did not sign this latter deed, and no privy examination was taken. The deed is void as to them, and is to be treated just as if neither of the femes covert had signed it. As to Samson Weeks, the deed has been adjudged in this cause to be a valid and binding conveyance; and it is sufficient in form to estop plaintiff from setting up against those claiming under it the outstanding title thus acquired.

An ordinary quitclaim or release deed, containing no covenant whatever, vests in the grantee only such title as the grantor was seised of at the time of the execution of the deed. If such grantor subsequently acquires an outstanding title, it does not inure to his grantee in the quitclaim deed. The deed of June 1, 1863, is not in form a quitclaim or release. It is a bargain and sale for the joint consideration of $1,000, and purports to convey to the grantee in fee a good and indefeasible title to the entire 208 acres therein described. It makes no mention of the individual interest of the grantors, but it is a joint conveyance of the entire body of land, in which each grantor undertakes to convey the entire land in fee to the grantee. The deed contains a clause of warranty wherein the grantors jointly, as well as severally, warrant and defend to the grantee, his heirs, etc., the "above-bargained land and premises from the lawful claims of any and all persons whatsoever." At the time Samson Weeks executed the deed of June 1, 1863, he was a minor; but this court has held that his deed was voidable, and not void, and that consequently his failure to disaffirm during the 36 years between June 1, 1863, and June 1, 1899, made the deed a valid and binding conveyance on his part. It may be possible that the minority of plaintiff, if pleaded, would bar a recovery in an action upon the contract of warranty for damages for an ouster; but, if that be true, it would not prevent the operation of the entire deed as an estoppel. A rebutter arises from a warranty. Estoppels arise in cases where there may be no warranty. While it might be that a personal recovery cannot be had upon this warranty, yet it is a part of the instrument, and may be considered as showing the real intent and purpose of the parties in respect to the land conveyed.

As between the parties to a deed of bargain and sale, the seisin is to be considered in law as passing, because the bargainor is estopped from showing that he was not seised of the title which the deed purports to convey, and, if he was actually seised of such estate, it was transferred by the statute of uses. As Judge Henderson tersely says, in Taylor v. Shufford, 11 N. C. 129, 15 Am. Dec. 512: "As between the parties, the bargain and sale shall pass what it purports to pass; as to strangers, what it actually does pass." This principle is founded in justice and reason. The grantee is necessarily influenced in making the purchase by the quality and extent of the estate which purports to be conveyed by the deed, and hence the grantor in good faith and fair dealing should thereafter be precluded from gainsaying it. Where the conveyance purports, as in this case, to pass a title in fee to the entire body of land, the grantor is estopped thereafter to say it does not. The consensus of all the authorities is to the effect that, where the deed bears upon its face evidence that the entire estate and title in the land was intended to be conveyed, and that the grantee expected to become vested with such estate as the deed purports to convey, then, although the deed may not contain

technical covenants of title, still the legal operation and effect of the deed is binding on the grantors and those claiming under them, and they will be estopped from denying that the grantee became seised of the estate the deed purports to vest in him. Van Rensselaer v. Kearney, 52 U. S. 323, 13 L. Ed. 703, is a leading case, in which Mr. Justice Nelson states the doctrine with great clearness and wealth of learning. Irvine v. Irvine, 76 U. S. 625, 19 L. Ed. 900. The true principle is that the estoppel works upon the estate which the deed purports to convey and binds an after-acquired title as between parties and privies. In cases where the deed contains a warranty, the grantee and those claiming under him will not be remitted to an action on the covenant for damages. "When one assumes by his deed to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title and turn his grantee over to a suit upon his covenant for redress." Smith v. Williams, 44 Mich. 240, 242, 6 N. W. 662; Case v. Green, 53 Mich. 615, 19 N. W. 554; Ryan v. U. S., 136 U. S. 88, 10 Sup. Ct. 913, 34 L. Ed. 447; Hassell v. Walker, 50 N. C. 270; Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655. From these and many other authorities it seems to be plain that upon this record the plaintiff is not entitled to recover.

The judgment of the superior court is reversed.

(139 N. C. 167)

SHERROD v. FARMERS' MUT. FIRE INS. ASS'N.

(Supreme Court of North Carolina. Sept. 26, 1905.)

1. INSURANCE—NONPAYMENT OF ASSESSMENTS —NOTICE.

Where an insurance company determines to cancel a risk for nonpayment of an assessment, the insured is entitled to reasonable notice.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 905.]

2. SAME—EVIDENCE.

If the insurer shows that notice of an assessment was mailed, properly addressed and stamped, the law presumes the addressee received it.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 92; vol. 28, Cent. Dig. Insurance, § 909.]

3. SAME.

Where a by-law of an insurance association provides that "any member failing to pay his assessment within 60 days from date of notice, which date shall be the day of mailing said notice, shall forfeit all rights, claims, and privileges in this association, and his policy shall by such failure be canceled without any further notice," the insured, in an action on the policy, may rebut the presumption of notice arising from defendant's proof that notice of an assessment was sent by mail, properly addressed and stamped.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 111.]

Appeal from Superior Court, Martin County; Councill, Judge.

Action by J. T. Sherrod against the Farmers' Mutual Fire Insurance Association to recover on a policy of fire insurance. From a verdict and judgment in favor of plaintiff, defendant appeals. Affirmed.

Harry W. Stubbs, for appellant. T. T. Thorne, for appellee.

BROWN, J. The only question presented is whether section 3, art. 4, of the by-laws of the defendant company is subject to rebuttal on the part of the plaintiff by showing nonreceipt of notice; the defendant having properly postpaid and addressed the same. The by-law is as follows: "Any member failing to pay his assessment within sixty days from date of notice, which date shall be the day of mailing said notice, shall forfeit all rights, claims, and privileges in this association, and his policy shall by such failure be canceled without any further notice." The defendant introduced evidence tending to prove that it was its custom to notify members of assessments in case of loss, by written notice dropped in the post office when an assessment had been called—the witness stating that he sent out about 200 notices at the time the plaintiff is alleged to have failed to pay his assessments, and that several of these notices came back through the dead letter office for misdirection in the address; that he could not say certainly that he ever mailed notice to the plaintiff, or that, if mailed, it might have been one of those misdirected; that he was only swearing by his "system," and he believed he sent the notice, because there was a check mark opposite the plaintiff's name on his books; that the plaintiff's name was still on his books, and the only thing to indicate that he was not in good standing in the defendant's company was the words "Not paid" opposite his name. The plaintiff testified in his own behalf that he had never received any notice from the company of any assessment against him.

The court instructed the jury that proof of the mailing of the notice, "properly addressed and postpaid, raised a presumption that the notice was received by the plaintiff; but that is only a presumption of fact and could be rebutted, and that it was for the jury to find whether such notice was in fact properly addressed and mailed. If so, then the presumption was that plaintiff received it, and unless he rebuts this presumption, by showing that he did not receive the notice, the plaintiff could not recover." The defendant excepted to this instruction. All contracts and by-laws of an incorporated society are made with reference to the general law, and they must conform to certain general requirements in respect to vested personal and property rights of members. 16

Am. & Eng. Enc. Law (1st Ed.) pp. 41, 42, and cases cited. Where an insurance company determines to cancel a risk, the insured is entitled to reasonable notice. Insurance Co. v. Brooks, 83 Md. 22, 34 Atl. 373. The instructions of the court to which the defendant excepts are correct, and are fully sustained by the authorities. If the insurer sends the notice by mail, properly addressed and stamped, the law presumes the addressee received it. The presumption may be rebutted, as appears to have been done in this case. Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395; Lawson on Presumptive Ev. 69; 19 Am. & Eng. Enc. Law (1st Ed.) pp. 80, 81, and cases cited.

Affirmed.

(139 N. C. 555)

STATE v. TELFAIR.

(Supreme Court of North Carolina. Sept. 26, 1905.)

APPEAL—FAILURE TO DOCKET—DISMISSAL.

That the case on appeal was not settled by the judge until too late to docket the case at the proper term is no excuse for failure to so docket it, it being appellant's duty to docket the record proper and ask for a writ of certiorari to perfect the transcript; and hence such an appeal will be dismissed under rule 16 (39 S. E. vi).

Appeal from Superior Court, Franklin County; Moore, Judge.

Eliza Telfair was convicted of crime, and appeals. Appeal dismissed.

W. M. Person, for appellant. The Attorney General, for the State.

PER CURIAM. This case, having been tried in October, 1904, should have been docketed here at last term. The defendant's excuse that the "case on appeal" was not settled by the judge till after it was too late to docket at last term in time for the call of the district to which it belongs is of no force. It was the duty of the appellant to docket the "record proper" in apt time, and, upon the call of the district, have asked for a writ of certiorari to perfect the transcript. Pittman v. Kimberly, 92 N. C. 562; Porter v. Railroad, 106 N. C. 478, 11 S. E. 515, and numerous other cases cited in Parker v. Railroad, 121 N. C. 504, 28 S. E. 347, where it is said, repeating Burrell v. Hughes, 120 N. C. 278, 26 S. E. 782, "There are some matters settled, and this is one of them"; Norwood v. Pratt, 124 N. C. 747, 32 S. E. 979, and cases cited; Worth v. Wilmington, 131 N. C. 533, 42 S. E. 964. The motion of the Attorney General to dismiss the appeal must be allowed. Rule 16 of this court (39 S. E. vi); State v. Deyton, 119 N. C. 880, 26 S. E. 159; Hinton v. Pritchard, 108 N. C. 412, 12 S. E. 838.

Appeal dismissed.

(139 N. C. 170)

KING v. HOBBS.

(Supreme Court of North Carolina. Oct. 3, 1905.)

REFORMATION OF INSTRUMENTS—BOND FOR DEED—MISTAKE.

Where plaintiff contracted to convey to defendant an indefeasible title to certain land, free from incumbrance except a conveyance of the short straw timber growing thereon to a certain lumber company, and defendant knew of the sale of such timber before the contract was made, and testified that he did not understand he was buying such timber, but the scrivener, in reducing the contract to writing, neglected to insert an exception of the timber so conveyed therein, plaintiff was entitled to have the contract reformed for mistake.

Appeal from Superior Court, Sampson County; O. H. Allen, Judge.

Action by S. J. King against T. A. Hobbs. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The plaintiff alleged that in 1892 he sold and conveyed to a lumber company the short straw timber growing on a tract of land situated in Sampson county, and the company owned the same under a registered deed, and that in 1902 he sold this tract of land to the defendant for $300, and executed to the defendant a bond to make title on payment of the purchase money. This bond contained a stipulation that, on payment of the purchase money, the plaintiff would make to the defendant a good, sure, and indefeasible estate of inheritance, free from any and all incumbrances whatever. The plaintiff further alleged that, in the sale of the land to the defendant, the short straw timber previously conveyed to the lumber company was excepted, and a stipulation to that effect was omitted from the contract by the mutual mistake of the parties, and demanded judgment that the instrument be corrected and for the full amount of the purchase money. The defendant denied that there was any mistake, and resisted recovery on the ground that the short straw timber had been previously conveyed, and further claimed damages for breach of covenant by way of counterclaim, in case recovery was had against him on the purchase price. The single issue submitted was as to the alleged mistake in the bond for title. Verdict and judgment for plaintiff for full amount of purchase money. Defendant excepted and appealed.

John D. Kerr, for appellant. F. R. Cooper, for appellee.

HOKE, J. (after stating the case). At the close of the testimony the defendant requested the judge to charge the jury "that there was no evidence to show that the clauses exempting from the bond for title the right and interest of the lumber company in the land in controversy were omitted from said bond by the mutual mistake of the parties." The prayer for instruction was refused, and the defendant excepted. This

exception raises the only point presented for our consideration. To correct an instrument of this character on the ground of mistake, the evidence must be strong, clear, and convincing, and our decisions have established the principle that, where there is any evidence to go to a jury on the question, they are to determine under proper instructions whether the evidence is of the character required. Lehew v. Hewett, 138 N. C. 6, 50 S. E. 459. Under the charge of his honor, the jury have found the issues as to the mistake against the defendant, and the court is of the opinion, not only that there was evidence sufficient to be submitted to the jury, but that it fully justifies the verdict which they rendered. Both the plaintiff and defendant testify that, before they went to the justice of the peace to have the instrument written, they had come to a definite contract of sale of the land, and that the timber previously sold and conveyed to the lumber company was excepted. King, the plaintiff, testified that he was to give the bond for just what he had; that Hobbs knew all about the sale of the short straw timber to the company, and talked about how it was to be measured; and that he sold Hobbs the land and the long straw timber, and Hobbs was to take the witness' place with the lumber company. Hobbs, the defendant, testified that "at the gin [the place where the trade was made] the plaintiff did tell me he had sold the short straw timber. I thought I was buying the land with the timber left out. When the bond was signed I thought I was buying all timber except 12 inches and upward. He told me he had sold that. I did not understand I was buying that. I knew there was a deed." The defendant also testified "that the clause in question was not left out by mistake and that nothing was said about excepting anything." A witness by the name of Bradshaw testified: "Hobbs, the defendant, told me he had bought the land, and all he disliked about it was that the timber on it was sold." The plaintiff and defendant then went to a justice of the peace to have their contract put in writing, and the justice, evidently by inadvertence or mistake —whether of himself or the parties makes no difference—omitted a material stipulation. In such case all the authorities are agreed that the instrument will be reformed so as to express the true intent and meaning of the parties.

This is not an instance of an essential mistake or misunderstanding of the agreement itself, nor where the written instrument is supposed to embody the first and only contract of the parties, but is a case of an error of expression, where the parties have come to a definite agreement beforehand, and, in the endeavor to put this agreement in writing, a mistake is made, so that the instrument as drawn does not in some material point express the contract it was intended to evidence. In 20 Am. & Eng. Enc. (2d Ed.) p. 823, it is said: "In mistakes of this kind the only inquiry is, does the instrument contain what the parties intended that it should, and understood that it did? Is it their agreement? And it is wholly immaterial whether the defect is a statutory or common-law requisite, or whether the parties failed to make the instrument in the form they intended, or misapprehended its legal effect." The authorities are numerous, and fully bear out this statement of the doctrine. Stamper v. Hawkins, 41 N. C. 7; Warehouse Co. v. Ozment, 132 N. C. 839, 44 S. E. 681; Rogers v. Atkinson, 1 Ga. 12; Stines v. Hays, 36 N. J. Eq. 364; Leitensdorfer v. Delphy, 15 Mo. 160, 55 Am. Dec. 137. In this last case, it is held that "equity will correct a mistake, either as to fact or law, made by a draftsman of a conveyance or other instrument, which does not fulfill, or which violates, the manifest intention of the parties to the agreement." In Stines v. Hays, supra, it is said: "Nor will the fact that the defendant denies that there is a mistake, and testifies that the deed was drawn according to the intention of the parties, prevent the court from granting the relief, if it is satisfied that the deed is not in accordance with the agreement, but ought to be so." And it has been held that the courts will correct an error of this kind, when the complainant himself drew the paper. Cassidy v. Metcalf, 66 Mo. 519. This case, in the principal facts, is very similar to the one before us, and it is there held that "a court of equity will order a contract to be reformed, so as to make it speak the actual agreement of the parties, when satisfied that by mistake in reducing it to writing property has been transferred which it was not the intention of either should be included in the contract; and this in a case where the complainant himself drew the paper. It is immaterial how the mistake happened, whether by a misunderstanding of the meaning of the words or through sheer carelessness."

There was no error in refusing the defendant's prayer for instruction, and the judgment of the court below is affirmed.

(72 S. C. 350)

TINSLEY v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. APPEAL—HARMLESS ERROR.
The admission of irrelevant evidence is not ground for reversal, unless it appears harmful.
[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4154.]

2. TELEGRAPHS—FAILURE TO DELIVER MESSAGE—EVIDENCE.
Where a telegram announcing a death and requesting a conveyance was not delivered, in an action against the telegraph company, plaintiff could show the amount of money the sender had on arrival at destination with which to procure other conveyance.

3. TRIAL—CHARGE ON FACTS.
Remarks made by the court during the examination in chief of defendant's witness, on objections to evidence, are not a charge on the facts.

4. TELEGRAPHS—DEFECT IN WIRES.
Where a defect in a telegraph wire was caused by the company's negligence, it is its duty to receive messages and transmit them with all reasonable dispatch.
[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 33.]

5. TRIAL—INSTRUCTIONS—EXCEPTIONS.
An exception, quoting a portion of the judge's charge and alleging that it was error, without specifying in what particular, is too general.
[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 689, 690.]

6. NEGLIGENCE—WILLFULNESS.
An inadvertent failure to observe due care indicates mere negligence, but a conscious failure to observe due care constitutes willfulness.
[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 1, 13.]

Appeal from Common Pleas Circuit Court of Laurens County; Watts, Judge.

Action by Clarence Tinsley against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ferguson & Featherstone and Evans & Finley, for appellant. Dial & Todd, for respondent.

JONES, J. This appeal is from the judgment on a verdict for $100, in an action for damages for mental anguish for alleged negligent and wanton failure to promptly deliver the following telegram: "Enoree, S. C., March 17, 1904. Richard Fuller, Mountville, S. C. My baby dead. Meet me with wagon at High Point. Bring Hugh Henderson. Clarence Tinsley." The message was received at the Enoree office about 9:30 a. m., and was transmitted from that office to Augusta at 1 o'clock p. m., and reached the Mountville office through another relay office at 3:25 p. m., and was not actually delivered until next day. Fuller did not live within the corporate limits of Mountville. He, however, some time later received notice of the message over the 'phone through another, and proceeded to make arrangements to go to High Point with a wagon, and arrived there about sundown. In the meantime the train bearing plaintiff, the corpse, and attendants reached High Point at 2:20 p. m. The weather was cold and windy. The remains reached plaintiff's mother's home, about six miles distant, some time after dark. The funeral was not had until next day.

1. The first exception alleges error in allowing plaintiff to testify as to how much money he had when he got to High Point, on the ground that the testimony is irrelevant. The irrelevancy of testimony is so largely left to the discretion of the trial judge that the judgment will not be disturbed, unless it clearly appears to have been harmful to appellant. Watts v. Railroad Co., 60 S. C. 70, 38 S. E. 240. We fail to see how the testimony could injure appellant, even if irrelevant. But it was not wholly irrelevant. It was designed to show the situation of plaintiff, with respect to means of procuring other transportation, produced by the failure to have transportation for the corpse on arrival of the train as a result of the nondelivery of the telegram.

2. The second exception assigns error in some remarks made by the court in presence of the jury while making a ruling as to the admissibility of testimony. Plaintiff having testified as to the exposure to the weather at High Point during the delay there, defendant's counsel was seeking to show that there were houses of other people near the station where he might have resorted. The court at first, regarding the testimony incompetent, remarked: "It was the duty of the telegraph company to deliver and promptly transmit the message. It was not his business to go off hunting up people's houses," etc. He immediately afterwards decided to permit the testimony to be brought out, and directed the appellant's counsel to go ahead. It is objected that the remark of the court was a charge upon the facts and prejudicial to appellant. The case of State v. Marchbanks, 61 S. C. 21, 39 S. E. 187, shows that such remark by the court during the progress of the trial is not a charge upon facts. The exception does not indicate wherein the remark was otherwise prejudicial.

3. The third exception alleges error in certain remarks made by the court during the examination in chief of defendant's witness. Defendant's counsel was endeavoring to show by his witness that defendant company transmitted the message as promptly as possible in view of the condition of the wires. One of the wires was down, and the circuit of the other wire was frequently interrupted from some unexplained cause, and this wire was at intervals being used by the train dispatcher and for railroad messages. Plaintiff's counsel objected to the witness stating anything unless he knew of his own knowledge, whereupon the court remarked that he did not think it made any difference how the message got there. If defendant received the message, it was its duty to get it there as

quickly as it could, no matter what wire it used. Appellant's counsel conducted the examination of the witness on that point. The exception to this remark is based upon the ground that it was calculated to prejudice the defendant and cut off one of its defenses, viz., that it had no wire which it could use for the purpose of transmitting the message, of which plaintiff had been informed. We think the court's remark could have no such meaning. The ruling as to the admissibility of the testimony was favorable to appellant, and the accompanying remark was not a charge upon facts. Furthermore, in the charge to the jury the issues raised by defendant were clearly stated.

4. The fourth exception is to the following charge to the jury: "I charge you as a matter of law that it was the duty of the Western Union Telegraph Company, the defendant here, to receive this message when it was tendered, when the party offered to pay reasonable charges exacted of him by the defendant company; that it was the duty of the defendant company to transmit that message from the point at which it was received to its destination. It was their duty to observe due care in properly transmitting and delivering that message. It was their duty to receive it and transmit it when the plaintiff paid them the charges they exacted, and it was their duty to exercise the same care and diligence that an ordinarily prudent person would be expected to exercise under similar circumstances." It is objected that the charge excluded from the jury the defense that the wires were in such condition that it was impossible to transmit the message, and that said message was received subject to indefinite delay, of all which plaintiff had notice. If the condition of the wire was due to an act of God, the law on that subject was explained to the jury, and they were instructed that the defendant was not liable if the failure to transmit promptly was due to such cause. If the condition of the wire was due to defendant's negligence, defendant was nevertheless bound to receive the message upon payment of charges, and transmit with all reasonable dispatch. The judge's charge only held defendant to the duty of exercising ordinary care under the circumstances.

5. The fifth exception quotes a portion of the judge's charge and alleges that it was error, without specifying wherein the error consisted, and is, therefore, too general; and the sixth exception also quotes a portion of the charge, and alleges that it was not in accordance with the law of this state as to punitive damages, without stating wherein it is contrary to law and is also too general. If, however, the object of these exceptions is to question the correctness of the judge's charge to the effect that "a conscious failure to observe due care is wantonness or willfulness," and so would justify punitive damages, they cannot be sustained in view of our decisions. Pickens v. Railroad Co., 54 S. C. 505, 32 S. E. 567; Watts v. Railroad Co., 60 S. C. 74, 38 S. E. 240; Myers v. Railroad, 64 S. C. 519, 42 S. E. 598; Butler v. Telegraph Co., 65 S. C. 516, 44 S. E. 91. An inadvertent failure to observe due care indicates mere negligence, but an advertent or conscious failure to observe due care passes beyond mere negligence into wantonness or willfulness.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(72 S. C. 387)

WATSON v. POLLITZER.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. APPEAL—AFFIRMANCE—CERTIFYING JUDGMENT.

Where a circuit court affirms a judgment of the probate court, that it does not certify the judgment to the probate court is not ground for its reversal by the Supreme Court.

2. SAME—RECORD.

On appeal to the circuit court from a judgment of the probate court, appellant must file a certified copy of the record.

Appeal from Common Pleas Circuit Court of Beaufort County; Townsend, Judge.

Proceedings for the removal of Peter Watson, as guardian of Isaiah and Florence Chaplin, and appointment of H. C. Pollitzer in his stead. From an order sustaining the judgment of the probate court, Watson appeals. Affirmed.

W. S. Tillinghast and Jno. S. Reynolds, for appellant. W. J. Thomas, for respondent.

JONES, J. Proceedings were instituted in the probate court of Beaufort county to remove Peter Watson as guardian of two minor children, for alleged misappropriation of funds of his wards. The probate judge made an order, dated November 7, 1904, removing said guardian and appointing H. C. Pollitzer in his stead, and requiring Watson to forthwith turn over to the court all funds of the wards in his hands. From this order Watson served notice and grounds of appeal to the circuit court on the probate judge, and on H. C. Pollitzer within 15 days, as required by section 57 of the Code of Civil Procedure of 1902. The original notice and grounds of appeal were filed with the clerk of the court of common pleas for Beaufort county on the 14th day of November, 1904. Nothing further was done by appellant, and no return or certified copy of the proceedings in the probate court was ever filed in the circuit court, as required by section 58 of the Code of Civil Procedure of 1902. At the ensuing term of the circuit court, Judge Townsend, on motion of the adverse party and on the production of attested copies of the said appeal, affirmed the proceedings of the probate court on the ground that appellant had neglected to enter his appeal. The appellant now alleges that the order of Judge Townsend was

erroneous (1) in not conforming to section 62 of the Code of Civil Procedure of 1902; (2) in holding that the statute required that a certified copy of the proceedings in the probate court should be filed in the circuit court in entering an appeal; and (3) in not allowing plaintiff to amend the return by having said certified copy filed.

1. It is not stated wherein the order fails to comply with section 62 of the Code. This section requires that the final judgment of the circuit court, on appeal from the probate court, shall be certified to the probate court by the circuit court. This may be done hereafter, and, if it be a fact that such has not already been done, it is not a ground for a reversal of the order.

2. The order of the circuit court was fully warranted, under sections 58, 60, and 61 of the Code of Civil Procedure of 1902, which are as follows:

"Sec. 58. The person appealing shall procure and file in the circuit court to which such appeal is taken a certified copy of the record of proceedings appealed from, and of the grounds of the appeal filed in the probate court, together with the proper evidence that notice has been given to the adverse party according to law."

"Sec. 60. When such certified copy shall have been filed in the circuit court, such court shall proceed to the trial and determination of the question, according to the rules of law. * * *

"Sec. 61. If the person appealing from the proceedings of the probate court, as provided in this title, shall neglect to enter his appeal, the circuit court, to which such appeal shall be taken, on motion, and producing attested copies of such appeal by the adverse party, shall affirm the proceedings appealed from, and may allow costs against the appellant."

3. The third ground cannot be sustained, because there is nothing in the record to show that any application was ever made to the circuit court to allow an amendment to the return. It is well settled that a statement of fact which appears only in the exception cannot be considered by this court.

The judgment of the circuit court is affirmed.

(72 S. C. 355)

BURNS v. GODDARD.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. BILLS AND NOTES—ACTION—EVIDENCE.
Where an action on a note was in the name of the payee against the maker alone, that there was an indorsement on the note in the name of the payee was immaterial.

2. EVIDENCE—SIMILAR TRANSACTIONS.
In an action on a note by the payee against the maker, a question asked plaintiff as to whether his agreement with defendant was different from the usual agreement in similar cases was properly excluded.

3. SALE—DELIVERY—INSTRUCTIONS.
In an action on a note given for the price of a machine which did not arrive until after the maturity of the note, an instruction that delivery to the carrier, in the absence of any agreement as to place of delivery, is delivery to the purchaser, but that the jury should consider, not only the place of the contract, but all of the circumstances, in determining whether the property was to be delivered at the home of the buyer, or only to the carrier, was proper.

4. TRIAL—INSTRUCTIONS—BURDEN OF PROOF.
An instruction that, when a party sets up an affirmative defense, the burden is on him to prove it, is not objectionable, in that the jury could infer that the burden of proof meant only the duty of making a prima facie case, whereas his defense should be established by a preponderance of evidence.

5. EVIDENCE—PAROL.
Where a written contract as to a machine was a lease under seal and a note not under seal, failure to deliver the machine at a specified time and place for a specified purpose under an oral agreement may be proved by parol, on issue of failure of consideration of the note.

6. APPEAL—HARMLESS ERROR.
An instruction not based on the evidence is not ground for reversal, when no prejudice is shown.

Appeal from Common Pleas Circuit Court of Greenville County; Townsend, Judge.

Action by S. A. Burns against J. W. Goddard. Judgment for defendant, and plaintiff appeals. Affirmed.

B. F. Martin, for appellant. McCullough & McSwain, for respondent.

JONES, J. In this case the payee sues the maker upon a promissory note for $175, dated December 19, 1902, and due April 1, 1903. The answer alleged as defenses a total failure of consideration and that the note was obtained by false and fraudulent representations. The note in question was part of a transaction between the parties, in which Burns executed to Goddard an instrument granting the exclusive right to use and sublease to others the right to use the Shannon Axle Cutter from December 19, 1902, to April 4, 1906, in the county of Greenville, S. C., and as a part of said transaction Burns agreed to deliver to Goddard at Greenville, S. C., one of said machines within two or three weeks from December 19, 1902. There was testimony that it was understood that Burns would canvass Greenville county between the making and maturity of the note for the purpose of subleasing rights to use said machine as a means of paying the note, and in order to make such canvass it was necessary for Goddard to have such a machine for exhibition. The machine did not arrive in Greenville until after the maturity of the note, when Burns declined to receive it and also refused to pay the note. The jury rendered a verdict for the defendant, and the plaintiff appeals from judgment thereon.

1. The fifth and sixth exceptions relate to the rulings of the court as to the admissibility of testimony. The plaintiff was asked the question, "What is that indorsement, 'S.

A. Burns,' on the back of the note?" which the court excluded as irrelevant. This ruling was correct. The action was in the name of the payee against the maker alone, and the indorsement was no part of plaintiff's case. It is argued, however, that it was admissible in anticipation of the issue of fraud raised by defendant's answer, and that it was a circumstance against the charge of fraud that, notwithstanding the note had been actually negotiated before maturity, so that the indorsee could have recovered as an innocent purchaser, yet Burns took up the note himself and made the fight to recover thereon. The court ruled in substance that such a circumstance had no probative value to show the motives or acts of plaintiff at the time of the transaction with defendant. In 14 Ency. of Law, 196, it is stated that the "conduct of a party charged with fraud, either before, at the time of, or after the transaction alleged to have been fraudulent, may be shown for the purpose of rebutting a presumption of fraud arising from the evidence, if it has any legitimate tendency in this direction." The testimony in question would have no legitimate tendency to rebut any presumption of fraud, if there was any arising from the testimony, because it was the duty of the plaintiff, on account of his liability as an indorser, to take up the note upon refusal of the maker to pay, whether the original transaction was fraudulent or not.

2. The court also excluded the answer of plaintiff to the question: "Was your agreement with Mr. Goddard in any way different from the usual agreement in those cases?" The witness answered, "Not at all," which was stricken out as irrelevant. The ruling was not improper nor harmful. The question was as to the specific agreement between plaintiff and defendant, and it would have been too discursive to inquire as to the terms of agreements made by plaintiff with others.

3, 4. The fourth exception complains of the charge to the jury in relation to the question as to where the machine was to be delivered. The plaintiff requested the court to charge: "In the absence of any stipulation or agreement as to the place of delivery, the sale is complete upon delivery to a common carrier for transportation to the buyer. Delivery to the common carrier in such a case is delivery to the buyer, in contemplation of law." The court charged this as a good general proposition, but instructed the jury that every case depends upon its own circumstances, and he further charged in these words: "For instance, I write to New York to send me a hat by express. As soon as it is delivered to the express company that is a delivery to me. It is my hat. Suppose I am here and a man sells me a hat, and I say, 'Send it by express,' and so on, that would be a matter for the jury to say whether he was bound to deliver it at my place or not. The question would be whether he led me to believe he would deliver it at my place or not. The question in every case for the jury is, what was the understanding between the parties? Now, the agreement may be expressed or implied by word or action. The jury has to take into consideration all of the circumstances, the place where the parties were and all about it, and come to their conclusion as to whether or not there was an entire absence of a stipulation or agreement." It is objected that this is a charge upon the facts in making specific reference to the place of the contract, and that the illustration was misleading. We think the charge is not liable to the criticism made. The jury was instructed not only to consider the place of the contract, but all of the circumstances, in determining whether there was an entire absence of evidence as to the place of delivery. The illustration construed with the context does not single out the place of the contract as a circumstance tending to show the place of delivery.

5. The third exception alleges error in failing to charge upon plaintiff's oral request as to the degree of proof by which defendant must establish his affirmative defense. The plaintiff made the following oral request to charge: "There were two affirmative defenses—failure of consideration and the charge of fraud. I request your honor to explain to the jury that the burden of proof is upon the defendant to satisfy the jury of these by the preponderance of the evidence." The court, responding to the request, said: "When a party sets up an affirmative defense that he is released from any obligation, he must prove it. The burden is on him to prove it." It is objected that this was error, because the jury could infer that "burden of proof" meant only the duty of making a prima facie case, whereas defendant's affirmative defenses should be established by the preponderance of the evidence, and because the jury, under the instruction, might have found against the plaintiff on these matters, if they had been equally balanced as to them. The rule of court requires that requests to charge should be presented in writing; but as neither counsel nor the circuit court raised any objection to the consideration of the request on that ground, we will not. The occasion does not call for any consideration of the fine distinctions made with reference to the expressions, "burden of proof," and "prove the issue by the preponderance of the evidence." The court clearly used the expression "burden of proof," not in the sense of adducing some evidence of the issue, but in the sense of proving the same by the preponderance of the evidence, and therefore he charged substantially as requested by the plaintiff. This is further made evident by reference to another portion of his charge with respect to defenses of defendant.

6. The second exception alleges error in charging the jury as to the defense of total

failure of consideration set up in the answer, the ground of objection being that there was no evidence on the subject. One extract from the charge will suffice to show the purport of the charge, as follows: "If the jury find that plaintiff was to furnish the machine or appliance within a specified time, and if such machine was such an essential part of the consideration furnished to the defendant as to render the patent right valueless, in the absence of such a machine, and if the said machine was not delivered within the time specified, then there would be a failure of consideration for the note given by the defendant, and the verdict should be for the defendant." We think there was some evidence to which the charge was applicable. The note sued on was not under seal, and there was some evidence tending to show that the contract was made on plaintiff's representation that the machine would be delivered at Greenville, S. C., within two or three weeks from December 19, 1902; that the understanding between the parties was that defendant would canvass the county during the months of January, February, and March, 1902, and sell enough shop rights to meet the note at maturity; that the possession of the machine for exhibition and illustration was essential in selling such rights; and that the machine was not delivered until after the maturity of the note. The promissory note, the lease of the county right, and the oral agreement as to the delivery of the machine, were all parts of one transaction, and the presence of a seal on the lease would not operate to prevent defendant from showing a total failure of consideration as to the promissory note in question.

7. The first and remaining exception assigns error in the charge with respect to allegations of fraud in answer, on the ground that there was no evidence of fraud. It cannot be said that there was evidence of actual fraud on the part of the plaintiff or of any false representation, or existing or past fact, calculated to mislead the defendant; but if there was no evidence whatever of fraud, the charge of the court did not prejudice the plaintiff. The language of the court was used in reference to the issues raised by the pleadings, and the court instructed the jury that the fraud alleged must be proven. As a general proposition it is true that no instructions should be given to a jury which are not based upon some theory deducible from the evidence, but it is also true that to justify a reversal of the judgment of the circuit court it must appear that appellant was probably prejudiced by the action of the court. Whatever may be the view elsewhere, our cases support the view that an instruction upon an issue as to which there is no evidence whatever, or of mistake in stating issues, is not reversible error, unless the attention of the court is called to the matter. Vann v. Howle, 44 S. C. 546, 22 S. E. 735; Crosswell v. Association, 51 S. C. 469, 29 S. E. 236; State v. Still, 68 S. C. 38, 46 S. E. 524, 102 Am. St. Rep. 657. There are other more appropriate methods of raising the question as to the absence of evidence, as by motion for nonsuit in proper cases, by request for an instruction that there is no evidence upon stated issues, or by motion for a new trial on that ground. Moreover, the appellant has no ground for complaint, as his counsel requested the court to explain to the jury that the burden of proof is upon the defendant to satisfy the jury of his defenses—failure of consideration and fraud—by the preponderance of the evidence, which instruction the court gave at his instance.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(72 S. C. 381)

GLOVER v. CHARLESTON & S. RY. CO. et al.

(Supreme Court of South Carolina. Oct. 7, 1905.)

EMINENT DOMAIN — COMPENSATION — RIGHTS OF LANDOWNER.

Rev. St. 1893, c. 51, art. 2, §§ 1743–1755, relating to recovery of compensation for a right of way, do not apply to a right of way against remaindermen after the death of life tenant, on refusal of the railroad company to make compensation, denying any right to recover the same, where the landowners have not consented to the entry of the railroad company; but the remedy is by action.

Appeal from Common Pleas Circuit Court of Charleston County; Klugh, Judge.

Action by Eleanor L. Glover against the Charleston & Savannah Railway Company and others. From an order overruling demurrer to the complaint, defendant railway company appeals. Affirmed.

Mordecai & Gadsden, for appellant. Howell & Gruber, Young & Young, and Jas. F. Izlar, for respondent.

WOODS, J. The complaint is to recover compensation for the use of land held by the defendant Charleston & Savannah Railway Company as a right of way. The railway company demurred to the complaint "on the ground that the same does not state facts sufficient to constitute a cause of action, inasmuch as the remedy provided by article 2, c. 51, §§ 1743 to 1755, Rev. St. 1893, for obtaining compensation for right of way, is exclusive." The appeal is from an order overruling the demurrer.

The complaint expressly alleges (1) that the plaintiff and the defendants, except the railway company, are the owners of the land, claiming under the will of Joseph Glover after the life estate devised to Francis Y. Glover; (2) that the railway company entered and constructed its road during the lifetime of Francis Y. Glover, the life tenant, "long before the rights of the plaintiff and her co-tenants accrued, and long before many

of them were in esse, some of the parties now in interest being at the time when their rights accrued, and now, minors under the age of 21 years"; (3) that the defendant railway company denies the right to compensation; and (4) that neither the plaintiff nor any of the defendants who are in common interest with her "have actually or presumptively consented to or permitted the entry of the said Charleston & Savannah Railway Company, nor any one or more of its predecessors in title, upon the said premises or any part thereof, for the purpose of constructing said railroad or railway thereon, or for any purpose whatsoever." It has been decided in many cases that the condemnation statute provides no method for determining the right of compensation where it is disputed, and that the right must be adjudicated in an action of this kind. Railway Co. v. Riddlehuber, 38 S. C. 308, 17 S. E. 24; Cureton v. Railroad Co., 59 S. C. 371, 37 S. E. 914; Glover v. Remley, 62 S. C. 52, 39 S. E. 780; Railway Co. v. Reynolds, 69 S. C. 481, 48 S. E. 476. Under these authorities the statutory proceedings are not applicable here, for the further reason that the complaint alleges those who claim the land as owners have not actually or presumptively consented to or permitted the entry by the corporation for construction. Under the allegations of the complaint ownership of the land included, not only the life estate of Francis Y. Glover, but the remainder claimed by the plaintiff and the defendants in common interest with her. Permission or consent by the life tenant could not affect the interest of the remaindermen. Cureton v. Railroad Co., supra; Railway Co. v. Reynolds, supra.

The judgment of this court is that the judgment of the circuit court be affirmed.

(72 S. C. 346)

WOFFORD v. CLINTON COTTON MILLS.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. MASTER AND SERVANT—INJURY TO SERVANT—KNOWLEDGE OF DANGER.

A servant cannot recover for injuries received in the use of an appliance, the danger of which he knew.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574–600.]

2. EVIDENCE—EXPERT TESTIMONY.

An expert operative, who testifies as to his knowledge of certain machinery, can state what a person would have to do to get his hands caught in the machine in a certain manner.

3. NEGLIGENCE.

Negligence is the want of due care.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 1.]

Appeal from Common Pleas Circuit Court of Laurens County; Ellis G. Graydon, Judge.

Action by J. M. Wofford against the Clinton Cotton Mills. Judgment for plaintiff. Defendant appeals. Reversed.

F. P. McGowan and W. R. Richey, for appellant. Simpson & Cooper, for respondent.

WOODS, J. The plaintiff, an employé of the defendant cotton mill, recovered a verdict of $200 for the loss of his hand while attending a speeder frame in the mill. The important question is whether the motion for nonsuit, which was refused by the circuit court, should have been granted, on the ground that the plaintiff assumed the risk of the character of the machine and of the work in which he was engaged when the accident occurred. The case rested on these facts. The plaintiff was required to clean the floor under the machine with a cloth, and in performing this duty his hand was caught and crushed by the cogwheel that ran the speeder. The speeder was "a late improved machine," made by the Providence Machine Company. The cogs were covered on top, but the cover did not extend to the floor; and hence the cogs under the machine, which were about 15 inches above the floor, were not protected. It was possible, and would have been safer, to cover the cogs at the bottom as well as the top, and similar machines in two other mills mentioned by the witnesses had the cogs so protected. The plaintiff had never been told of the danger of his employment, and he testified: "I thought it was cased up sufficiently to keep from getting caught. * * * I knew it [the casing] didn't come to the floor, but I didn't think it was dangerous to run my hand under there." The plaintiff, who was 25 years old and has been working in the mill two years, saw the machine put up, and every Saturday after the mill stopped it was his duty and habit to take off the cover and clean the cogs. As a man of ordinary intelligence—and ordinary intelligence must be imputed to him in the absence of proof of disability—he was, therefore, necessarily familiar with the structure of the machine, and could not have failed to know that in using a cloth with his hand to clean a floor 15 inches below a revolving cogwheel there was peril of having his hand caught and injured. The case is therefore one where the servant complaining of injury had knowledge, not only of the nature of the appliance, but the danger to which its use subjected him.

1. It is not the duty of the servant to ascertain whether the machinery is reasonably safe, but when it affirmatively appears he did actually know of the features of the machine which he alleged constituted defects, and knew also the danger which grew out of them and assumed the risk, he cannot recover. Whether the servant assumed the risk, as has been often decided, is ordinarily a question to be determined by the jury under all the circumstances of the case. Bussey v. Railway Co., 52 S. C. 438, 30 S. E. 477; Lasure v. Graniteville Mfg. Co., 18 S. C. 275; Farley v. Veneer Co., 51 S. C. 222, 28 S. E. 198. He is not chargeable with inspection or exercise of care in discovering defects; that being the master's duty. Wood v. Victor Mfg.

Co., 66 S. C. 487, 45 S. E. 81. Even where he has knowledge of the defect and the danger, it is for the jury to say whether he is chargeable with the risk, if he continues in the employment in order to meet an extraordinary emergency due to defective appliances furnished by the master, as in Barksdale v. Railway Co., 66 S. C., 208, 44 S. E. 743, or the servant continues the work relying upon the master's assurance of safety, his knowledge being presumably superior, as in Mew v. Railway Co., 55 S. C. 100, 32 S. E. 828, and Keys v. Winnsboro Granite Co., 72 S. C. 97, 51 S. E. 549, or works under the coercion of legal penalties. 1 Labatt on Master & Servant, § 289, subd. "d." None of these grounds of excuse appear in this case, nor is there any evidence of disability or lack of experience or ordinary intelligence. The risk was obvious, and could not fail to be comprehended by a person of meager, not to say ordinary, understanding. The evidence admits of no other conclusion than that the plaintiff not only knew the nature of the machine, but fully comprehended the danger of putting his hand under the moving cogs to clean the floor. This being so, it follows the nonsuit should have been granted. Hooper v. Railroad Co., 21 S. C. 547, 53 Am. Rep. 691; Mew v. Railway Co., 55 S. C. 101, 32 S. E. 828; Owings v. Moneynick Oil Mill Co., 55 S. C. 483, 33 S. E. 511; Martin v. Royster Guano Co., 72 S. C. 237, 51 S. E. 680; Biggers v. Catawba Power Co., 72 S. C. 264, 51 S. E. 882; 1 Labatt on Master & Servant, §§ 263, 264, 279b. It does not appear that any objection was made to the plaintiff giving his opinion that the gearing where he was hurt could have been guarded. Therefore the first exception cannot be considered.

The testimony of the witness Eugene Davis that cleaning the floor under the machine while it was running was not dangerous, if the person was careful, was not excluded or stricken out. There is, therefore, no ground for the second exception.

Objection was made to the question asked the witness Moore, "Was this or not a safe machine?" and the question was excluded as leading. Subsequently the witness gave his opinion as to whether the machine was dangerous, and the defendant, therefore, suffered no prejudice. The witness D. T. Godfrey gave his opinion as follows: "It is the safest machine I ever saw. No possible chance for a man to get hurt, unless he is willful and careless." This statement was not stricken out, and there is therefore no ground for saying the defendant did not have the benefit of the opinion of this witness.

2. The same remarks apply to the evidence of J. B. Wright, who testified, if a person exercised care he could have cleaned off the zinc under the machine without getting hurt. It is true the court stopped the witness at this point, but this evidence was not stricken out, and was therefore before the jury. We think, however, there was error in refusing to allow the defendant to ask J. B. Wright what a person would have to do in order to get his hands caught in the cogs while the covering was on. The witness, who was an experienced operative, had described the machine and had given the facts upon which his answer to the question might well have been founded. The question was therefore competent. Chemical Company v. Kirven, 57 S. C. 449, 35 S. E. 445. The circuit judge distinctly charged that the master is not required to furnish the safest and best appliances, but only those that are reasonably safe and suitable for the work in which the servant is engaged, and there is not the slightest ground for the exception that the language used "left the impression upon the minds of the jury that the defendant was required to be the insurer of the safety of its employé."

3. The definition of negligence as the want of due care is not only elementary, but is approved in the case of Carter v. Railroad Co., 19 S. C. 24, 45 Am. Rep. 754, and the exception as to this definition is overruled.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause be remanded for a new trial.

(72 S. C. 343)

TRAPP v. SOUTHERN RY.
BROOKS v. SAME.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. CARRIERS — CARRYING PASSENGER BEYOND STATION—PUNITIVE DAMAGES.

Where a passenger buys a ticket to his station, and under direction of the station agent gets on a train which does not stop there, and his station is passed before the conductor comes to take up the ticket, and he offers to take him on and return him to his station on the next train, but at his request the conductor stops the train several miles beyond his station and he walks back, he cannot recover punitive damages.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1083.]

2. SAME—EVIDENCE.

Where, in an action by a passenger for being carried beyond his station, defendant shows that he boarded the wrong train, plaintiff may show that he was directed by the station agent to board the train.

Appeal from Common Pleas Circuit Court of Fairfield County; Watts, Judge.

Actions by Edgar Trapp against the Southern Railway and by E. Trapp Brooks against the same defendant. Judgments for plaintiffs, and defendant appeals. Reversed.

B. L. Abney and C. P. Sanders, for appellant. Buchanan E. Hanahan, for respondents.

JONES, J. These actions, depending upon substantially the same facts, were tried together in the circuit court, and resulted in a judgment for $400 in favor of each plaintiff. The complaints claim damages for both negligence and willfulness in carrying plain-

tiffs beyond their station while aboard defendant's train as passengers. It appears that on October 29, 1903, during the fair in Columbia, plaintiffs purchased tickets at Columbia for Bookman's a station on defendant's railroad between Columbia and Alston, and boarded an excursion train not scheduled to stop at Bookman's. One of the plaintiffs, in reply, was permitted to state that a railroad man, in uniform, directed him to get on "that train that was back in on that track." Under this direction plaintiffs boarded said excursion train. Defendant company also ran another train, which left Columbia station on the same track, scheduled to run a few minutes behind the excursion train, and to stop at Bookman's. Whether or not this second train, or any part of it, was "back in on that track" when plaintiffs got aboard, does not clearly appear. There was evidence, however, that, while plaintiffs were on board, servants of the defendant went through the train a few minutes before starting, and gave notice that said train would not make any stop before reaching Alston. The train, consisting of a baggage car and four coaches, was crowded with passengers; some standing in the aisles. The conductor began collecting fares and tickets at the front end of the train, and before he reached the place where plaintiffs were, in the rear end of the last or next to the last coach, the train was passing, or had passed, Bookman's. Seeing this, one of the plaintiffs tried to pull the cord and called to the conductor, who was then in the front end of the coach occupied by plaintiffs. On reaching plaintiffs to receive their tickets, the conductor for the first time ascertained that plaintiffs were on board for Bookman's, and told them they were on the wrong train, that said train did not stop at Bookman's, and offered to take them to Alston, the next station, and return them to Bookman's on next train. Plaintiffs objected to being taken to Alston and requested that the train be stopped. The conductor then pulled the bell cord and tried to stop the train, and, as the train did not slow down, he went out on the platform and signaled with lantern to stop. It was then dark. The train came to a stop some 400 or 500 yards beyond Littleton, a flag station 2 or 3 miles from Bookman's. The plaintiffs alighted at a spot across Little river from Littleton. Plaintiffs were subjected to no rudeness or indignity. They walked back to Bookman's, crossing the trestle over Little river with some apprehension of danger, but sustaining no physical injury and no loss, except the time and effort required to walk back to Bookman's, which was accomplished in about three-quarters of an hour.

1. The vital question presented by the appeal is whether there was any evidence whatever of willfulness, so as to justify punitive damages. This question is presented in various forms—by exception to refusal to nonsuit the cause of action based upon willfulness, exception to refusal to charge that there was no evidence of willfulness, and to the refusal of a new trial on that ground. We have carefully examined the testimony to this end, and are of the opinion that there was no evidence whatever of any reckless or wanton conduct on the part of defendant, and that the exceptions based upon this contention should be sustained.

The remaining exceptions were to rulings as to the admissibility of testimony. It is contended under the first, second, and third exceptions that the court allowed the plaintiff Edgar Trapp to give his opinion as to the amount of damages he sustained. As a matter of fact the court held that the witness must state facts, not his opinion, and the witness really expressed no opinion as to the amount of damages.

2. The sixth exception alleges error in permitting Edgar Trapp to be examined, in reply, as to how he happened to get upon said train. The testimony was in reply to the testimony offered by defendant that plaintiffs had wrongfully boarded a train not scheduled to stop at Bookman's. It was competent for plaintiffs to show in reply, if they could, that the agent of the defendant, while acting within the scope of his agency, had directed them to take that train.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(139 N. C. 397)

PROPST v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Oct. 31, 1905.)

1. STATUTES—CONSTRUCTION—LEGISLATIVE INTENTION.

In construing a statute, the legislative intention should be ascertained from the words of the statute, if possible, and such intention, when so ascertained, must govern.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 259.]

2. SAME—PROVISOS.

While, as a general rule, a proviso is not permitted to enlarge the meaning of the enactment to which it is appended, so as itself to operate as a substantive enactment, but is confined by construction to the subject-matter of the section of which it is a part, yet, if the context requires it, the proviso may be construed as extending to and qualifying other sections, or even as being tantamount to an independent provision.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 310.]

3. VENUE—ACTIONS AGAINST RAILROADS.

Acts 1905, p. 398, c. 367, amending Code, § 192, provides for the trial of actions in the county where plaintiffs or defendants reside, and, if defendants are nonresidents, then in the county in which plaintiffs reside, and, if none of the parties are residents, then in the county designated in the summons and complaint, "provided that in all actions against railroad companies" the action shall be tried either in the county where the cause of action arose, or in an adjoining county, or in the county where plaintiff resided when the cause of action arose, etc. Section 194 provides that actions against foreign corporations may be

brought in the county in which the cause of action arose, or in which the corporation usually does business, or in which it has property, or in which plaintiff usually resides. *Held*, that an action against a railroad, whether resident or foreign, is to be tried in the county where the cause of action arose, or in an adjoining county, or in the county where plaintiff resided, in accordance with section 192 as amended, and section 194 will be construed to apply only to foreign corporations other than railroads.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 46–50.]

4. STATUTES — CONSTRUCTION — INDEPENDENT PROVISIONS.

Separate sections of the Code should be so construed, if possible, as to reconcile them and effectuate each.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 282, 283, 312.]

Appeal from Superior Court, Guilford County; Peebles, Judge.

Action by J. L. Propst against the Southern Railway Company. From an order changing the place of trial, plaintiff appeals. Affirmed.

John A. Barringer and J. T. Morehead, for appellant. King & Kimball and A. B. Andrews, Jr., for appellee.

WALKER, J. This action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, a nonresident corporation, was brought by the plaintiff in the superior court of Guilford county. The defendant moved that the place of trial be changed to Rowan county, where it was found, as a fact, the plaintiff resided and the cause of action arose. The court ordered the case to be removed for trial to said county, under chapter 367, p. 398, Acts 1905, amending section 192 of the Code. That section provides for the trial of actions in the county where the plaintiffs or the defendants or any of them reside, and, if none of the defendants resides in the state, then in the county in which the plaintiffs or any of them reside, and, if none of the parties resides in the state, then in the county designated by the plaintiff in the summons and complaint, subject, however, to the power of the court to change the place of trial as provided by law. The section was amended by Acts 1905, p. 398, c. 367, as follows: "Provided that in all actions against railroads, the action shall be tried either in the county where the cause of action arose or in the county where the plaintiff resided at the time the cause of action arose, or in some other county adjoining the county in which the cause of action arose, subject however to the power of the court to change the place of trial in the cases provided by the statute."

The plaintiff's counsel contended that the proviso enacted in 1905 applies only to corporations residing in the state, and that, as the defendant is a nonresident corporation, it does not come within either the words or the intent of the proviso, and consequently actions against it must be brought and tried in accordance with the provisions of section 194 of the Code relating to suits against nonresident or foreign corporations, which section requires such actions to be brought in the county in which the cause of action arose, or in which the corporation has property or usually does business, or in which the plaintiff resides. We do not think this is the proper construction of the proviso, and it seems to us that, if it should be so interpreted, the clearly expressed intention of the Legislature would be defeated. It is our duty, in construing a statute, to ascertain from its words, if possible, the meaning which the Legislature intended it should have, and, when the intention is thus ascertained, it must always govern. The general office of a proviso is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, and usually it is not permitted to enlarge the meaning of the enactment to which it is appended, so as itself to operate as a substantive enactment. It relates generally to what immediately precedes it, and is confined by construction to the subject-matter of the section of which it is a part. These rules are, however, not absolute, and after all, if the context requires it, the proviso may be construed as extending to and qualifying other sections, or even as being tantamount to an independent provision; the main object being to enforce the will of the Legislature as it is manifested by the entire enactment. 26 Am. & Eng. Enc. (2d Ed.) 678, 679. The intention of the lawmaker, if plainly expressed, must have the force of law, though it may be in the form of a proviso; the intention expressed being paramount to form. 2 Lewis' Sutherland on Stat. Const. (2d Ed.) p. 673, § 352 (223); Bank v. Manufacturing Co., 96 N. C. 298, 3 S. E. 363; Railroad v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377. In Bank v. Manufacturing Co., supra, this court says: "While it is a general rule in the construction of statutes to consider a proviso as a limitation upon the general words preceding and [as] excepting and taking out something therefrom, the rule is not absolute, and the meaning of the proviso must generally be ascertained from the language used in it." That case affords a striking illustration of the principle, and seems to be a direct authority for the position that the proviso of 1905 may operate independently, if the intention to give it that effect is sufficiently indicated, which we will now consider.

Giving to the language of the act of 1905 its ordinary meaning, we are unable to avoid the conclusion that the purpose was to extend its provisions to all railroads, both domestic and foreign. The words are broad and comprehensive. They embrace "all actions against railroads," and this

means nothing less than that, wherever a railroad is defendant, it shall be entitled to the benefit of the act without regard to its residence; and this is so because there is nothing to restrict the meaning to resident railroads. The very fact that the proviso was added to section 192 is additional evidence, if any is required, of the intent of the Legislature. That section provides for the place of bringing and trying actions against both resident and nonresident defendants, and it was meet and proper, therefore, that a proviso, if intended to apply to both classes of corporations, resident and nonresident, should be annexed to that section, and not to section 194, which applies only to nonresident or foreign corporations. We think, also, that the spirit of the law shows the correctness of our conclusion. It is a wise provision which requires an action of this kind to be tried in the county where the cause of action arose or where the plaintiff resides, instead of being in its nature purely transitory, so that it can be brought and tried in any county where it has property or transacts business, though it may be far distant from the place where the cause of action arose, and where, perhaps, all the parties and witnesses reside. It saves cost and expenses, and subserves the convenience of those interested, without imposing any hardship on the plaintiff. While not exactly so, the proviso is to some extent in accordance with the spirit of the ancient law, which required, even in transitory actions, not the venue to be laid, but the trial to be had, in the vicinage or neighborhood where the injury is alleged to have been done. 3 Blk. Com. 294. But it is useless to argue the matter any further, as the language of the proviso is plain and explicit, and we must declare the law to be as it is clearly written in the statute. We have no doubt whatever that the Legislature intended to place the two classes of corporations on the same footing in respect to the venue or place of trial. If this case were not within the letter of the statute, as we think it is, it is surely within the intention, and whatever is within the intention is as much within the statute as if it were within the letter.

Our decision does not have the effect to repeal or annul section 194, as suggested by the plaintiff's counsel. The two sections, under our construction of the proviso of 1905, can well stand together and each have full operation within its own appointed sphere. Section 192 will apply to all classes of plaintiffs and defendants, as it did at the time the proviso was adopted, and the latter will apply to railroad corporations generally; while section 194 will be confined to corporations, other than railway companies, which have been chartered by any other state, government, or country. In this way the two sections may easily be reconciled and each be permitted to operate, and when effect can thus be given to both enactments it is enjoined upon us by an elementary canon of construction to adopt the meaning which will produce this result.

We can see no reason why the ruling of the court was not correct.

No error.

(139 N. C. 390)

BRAY & FRANKLIN v. VIRGINIA FIRE & MARINE INS. CO.

(Supreme Court of North Carolina. Oct. 31, 1905.)

1. INSURANCE—CONSTRUCTION OF POLICIES—AMBIGUOUS PHRASES.

A clause in an insurance policy which is ambiguously worded, or the interpretation of which is in doubt, should be construed so as to effectuate the intention of the parties, if ascertainable; but any doubt should be resolved in favor of the insured.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 292, 295.]

2. SAME—FIRE POLICIES—IRON SAFE CLAUSE.

An "iron safe clause" in an insurance policy required insured to make an inventory "within 30 days after the date of the policy," unless such inventory had been taken within the 12 calendar months preceding such date, and further required him to keep a set of books representing a complete record of business transacted "from the date of the inventory." *Held*, that insured was not required to keep a set of books until after the taking of the inventory, for which purpose 30 days was allowed, so that the failure to keep such books did not defeat a recovery on the policy, where the loss occurred within 30 days from the date of the policy and no inventory had been taken.

Appeal from Superior Court, Person County; Ward, Judge.

Action by A. J. Bray and another, doing business under the firm name of Bray & Franklin, against the Virginia Fire & Marine Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Watson, Buxton & Watson, for appellant. Kitchin & Carlton, for appellees.

WALKER, J. This action was brought by the plaintiffs to recover the amount of a policy of insurance for $500 issued to them on the 19th day of December, 1904, and by which the defendant agreed to insure their stock of merchandise from loss by fire. The only defense pleaded was that the plaintiffs had not observed and kept the provisions of what is know in such policies as the "iron safe clause," in that they had not taken an inventory or kept books as therein directed. The clause in this policy is in the usual form, and requires of the assured (1) that he shall take a complete itemized inventory of his stock on hand at least once in each calendar year, and one shall be made within 30 days after the date of the policy, unless such an inventory has already been taken within the 12 calendar months next preceding said date, the policy to become null and void if the inventory is not taken, and the unearned premium to be returned on demand;

(2) that he shall keep a set of books, which must clearly and plainly present a complete record of business transacted, including purchases, sales, and shipments for cash and credit, from the date of the inventory as provided in the first section of the clause, and during the continuance of the policy; (3) that he shall keep such books and inventory securely locked in a fireproof safe at night, and at all times when his building is not actually open for business, or, failing in this, in some place not exposed to a fire which would destroy the building. In the event of failure to produce such set of books and the inventory for the inspection of the company, the policy to become void, and such failure to be a perpetual bar to any recovery thereon. We have reproduced the material portions of the clause, as the decision of the case must turn upon its true construction. The counsel for the defendant in an able argument and well-prepared brief maintained that the clause in question is a valid one, as containing a promissory warranty which, if not complied with, will defeat a recovery upon the policy, and a large majority of the courts, it seems, have so held; but we do not deem it necessary to enter upon a discussion of the proposition, or to undertake to decide the same, as the validity of the clause was not seriously contested by counsel for the plaintiffs, who presented his case with unusual force and clearness, and distinctly placed the plaintiffs' right to recover upon the ground that by a fair interpretation of the clause, when considered in connection with the facts of the case, they had not in any particular violated its provisions. We will therefore assume, for the sake of the argument and without deciding the question, that the clause is valid as a whole and in each and every part, and proceed to examine the case upon that hypothesis.

The clause first provides for the making of an inventory within 30 days after the date of the policy. It appears in this case that none had been made prior to that time. The fire occurred on January 11, 1905, just 23 days after the policy was issued by the defendant, so that the full time allowed to the plaintiffs for preparing the inventory had not expired by 7 days. So far there was not much, if any, dispute between counsel as to the proper construction of the clause. They did differ widely as to the true intent and meaning of the second section. Counsel for defendant contended that the books are required by that section to be opened and kept from the date of the policy, while counsel for plaintiffs insist that by the explicit terms in which the provision is couched they are required to be opened and kept only "from the date of the inventory, as provided for in the first section of the clause," and as by the first section the assured have the full period of 30 days after the date of the policy to make the inventory, it logically follows that they must have a like period within which to comply with the provision as to keeping a set of books, unless the inventory is sooner taken. It seems to us perfectly clear that in this contention the plaintiffs' counsel must be right. If the requirement that books shall be kept is to be effective only from the date of the inventory, and it is expressly so stated in the contract of insurance, the plaintiffs could not be in default, as to this provision, until either the inventory was actually taken or until the time for taking it had expired; for, until the happening of the first event, namely, the completion of the inventory, the time had not arrived when they were required to open a set of books, and until the expiration of 30 days from the date of the policy it could not be determined when the inventory would be taken, if at all, and consequently the provision as to keeping books was not in force. The most that can be said in behalf of the defendant is that, during the 30 days succeeding the date of the policy, the duty of keeping books was, so to speak, in a state of abeyance or suspension, awaiting the happening of the event upon which it depended. It may well be asked, how could the plaintiffs keep books, showing the transactions in their store from the date of the inventory, until such an inventory had been taken? If the clause in question is ambiguously worded, so that there is any uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention if it can be ascertained, although it may have been imperfectly or obscurely expressed. Grabbs v. Insurance Co., 125 N. C. 389, 34 S. E. 503. This is the rule to be adopted for our guidance in all such cases, and one reason at least for it is that the company has had the time and opportunity, with a view to its own interests, to make clear its meaning by selecting with care and precision language fit to convey it, and if it has failed to do so the consequences of its failure should not even be shared by the assured, so as to deprive him of the benefit of the contract as one of indemnity for his loss. But we entertain no doubt as to what the parties meant, and the conclusion we have reached is fully sustained by the well-considered opinion of the court in Insurance Co. v. Waugh, 60 Neb. 348, 83 N. W. 81, wherein it is said: "Under any ordinary and fair rule of construction, the assured was not required to keep books of account until the inventory had been taken, and 30 days were given in which to perform that act. The fire occurred within less time. There existed no legal obligation on the assured to preserve books of account in a fireproof safe, or other place secure from fire in said build-

ing, until the expiration of the time in which an inventory was to be taken." This language was used with reference to a policy having the same phraseology as the one in this case. In another case the same court, construing a policy which required an inventory to be taken at least once a year, and after fully discussing the question raised, said: "The time, therefore, for taking an inventory of the stock of goods insured did not expire until a year after the policy was written, and, as the loss occurred in less time, no default in this condition, or any condition dependent thereon, is shown or can rightfully be claimed." Insurance Co. v. Jeary, 60 Neb. 338, 83 N. W. 78.

This is the pivotal and decisive question in the case, and, as our opinion upon it is against the defendant, it follows that the plaintiffs were entitled to recover the amount of the policy, and there was consequently no error in the charge of the court to the jury that, if they found the fact to be in accordance with the plaintiffs' evidence, they should return a verdict upon the issue in their favor.

No error.

(139 N. C. 212)

DONLAN v. AMERICAN BONDING & TRUST CO.

(Supreme Court of North Carolina. Oct. 3, 1905.)

1. CONTRACTS—ORDERS OF CONTRACTOR—ACCEPTANCE — LIABILITY ON CONTRACTOR'S BOND.

Where plaintiff accepted drafts drawn by a contractor for labor and material to an amount beyond the amount due the contractor, for which excess plaintiff was not otherwise liable, as provided by Code, § 1802, he was not entitled to recover such excess against the contractor's surety.

2. SAME—ABANDONMENT OF WORK—COMPLETION BY OWNER.

Where a building contractor abandoned the contract, and his surety directed the owner to complete the buildings, the surety was liable for the reasonable value of the owner's services in supervising the work of completion.

3. SAME—PREFERENCE.

Where, on the abandonment of a building contract by the contractor, plaintiff completed the work, he was not entitled to a preference for the reasonable value of his services in supervising such completion as against the claims of laborers and materialmen.

4. SAME—ATTORNEY'S FEES.

Where a building contractor abandoned his contract, and the same was completed by the owner, the latter was not entitled to claim an attorney's fee as against the contractor's surety.

5. SAME—RENTS.

A building contractor having failed to complete the buildings within the time specified, the owner was entitled to recover of the contractor's surety for loss of rents which he would have received if the buildings had been completed in time.

Appeal from Superior Court, New Hanover County; O. H. Allen, Judge.

Action by Timothy Donlan against the American Bonding & Trust Company. From a judgment in favor of plaintiff for less than the relief demanded, both parties appeal. Reversed on plaintiff's appeal.

E. K. Bryan, for plaintiff. Iredell Meares, for defendant.

CLARK, C. J. The defendant, as surety to one Vollers, who had contracted to build three houses for the plaintiff by September 15, 1899, covenanted to pay all damages which should accrue by failure of said Vollers to comply in all respects with his said contract. On September 20, 1899, the plaintiff notified the defendant that the work was not completed, and later notified the defendant that it might complete the work as it was entitled to do under its bond. It did not choose to do so, but told the plaintiff to complete the houses, which he did at a cost of $460.25, by the referee's report. At that time Vollers was indebted for labor and material on the houses in the sum of $874.04, for which the plaintiff had accepted drafts from Vollers, and has since paid. Vollers owed, besides, other amounts for labor and material, of which the plaintiff had then no notification. After deducting $460.25, cost of completing the houses, from the $1,120, which was the balance due Vollers, had he completed the work, there was only $659.75 to be applied on the $874.04; but the difference cannot be charged to the defendant, as it was the plaintiff's misfortune or officiousness that he accepted drafts for more than enough to absorb the sum which would be due the contractor. Code, § 1802.

It was admitted that $100 was the reasonable worth of the plaintiff's services in supervising the completion of the houses, and the judge properly allowed it, but erred in holding it to be a proper charge in favor of the plaintiff only against the contractor. On the contrary, it was damages chargeable against the surety; for it was reasonably in contemplation of the surety that there would be such supervision required, if the contractor should abandon the work. No compensation to the contractor for his services could be allowed in preference to the claims of labor and material to be satisfied out of the money due by the plaintiff, and, of course, no allowance to one doing the supervision in lieu of the defaulting contractor would have such preference as against them. It was not a preferred charge against the $1,120 in the plaintiff's hands, which he must or could deduct before paying for labor and material. The $75 for lawyer fee was properly disallowed. The plaintiff was not bound for the indebtedness for material and labor beyond the balance due the contractor (Code, § 1802), and in accepting and paying beyond that sum he was in his own wrong, and cannot ask that the surety make him whole.

On the other hand, the judge finds as a fact that the plaintiff sustained as damages $298.33 for loss of rents which he should have received, had the contractor completed

the houses by the time specified in the contract. This damage directly flows from the breach of the builder's contract, and is within the terms of the defendant's contract of suretyship. The judge properly gave the plaintiff judgment for that sum, but his judgment must be corrected by adding thereto the above sum of $100 for supervision of the work.

In the plaintiff's appeal there is error. In the defendant's appeal there is no error.

(139 N. C. 190)

OUTLAW v. GARNER.

(Supreme Court of North Carolina. Oct. 3, 1905.)

1. PAYMENT—LEGACIES—EVIDENCE—SUFFICIENCY.

On the issue whether a legacy had been paid to a legatee in a will bequeathing $500 to the legatee and providing that on her death childless the gift should go to a third person, it was shown that the will bequeathed $3,300 in pecuniary legacies, and devised realty, and provided for the distribution of the residue. An inventory and account of sales filed by the executors in 1861, the year of testator's death, showed $13,000, and the report of commissioners showed that in 1863 there was in the hands of executors $14,000 due the legatees, and receipts from two other legatees in 1868, acknowledging receipt of a smaller amount than their legacies "in full," were shown. *Held*, that there was no evidence of payment of the $500 to the legatee sufficient to charge her estate, on her death in 1903 without leaving children, in favor of the third person.

2. SAME—PRESUMPTIONS.

The presumption of payment of a legacy, arising from lapse of time, arises only between the executor and legatee, and to create a liability on the part of the legatee over to a remainderman there must be proof that the legatee received the legacy.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, § 176.]

Appeal from Superior Court, Duplin County; Councill, Judge.

Action by J. B. Outlaw, administrator of Axey Simmons, deceased, against Joel J. Garner, administrator of Rachel Garner, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Grady & Graham, for appellant. H. B. Parker, Jr., and Thad Jones, for appellee.

CLARK, C. J. Nathan Garner, who died in January, 1861, bequeathed, among other legacies, to his daughter Rachel a negro girl and "$500 in money, to her and her heirs, forever. If the said Rachel Garner should die leaving no child or children, my will and desire is, further, that Axey Simmons to have said negro and the $500, to her heirs, forever." Rachel died a widow and intestate in November, 1903, leaving no child. Axey Simmons died intestate in February, 1887, and the plaintiff qualified as her administrator January 13, 1904. This action was brought to recover the $500, alleging that the legacy had been paid to Rachel Garner. This is denied by the answer.

The plaintiff, to sustain the burden of this allegation, relies upon the following evidence: (1) The will, which bequeathed $3,300 in pecuniary legacies, and made specific devises of certain realty, and required the residue to be sold and proceeds divided between his four sons; (2) the inventory and account sales, filed by the executors January and February, 1861, showing nearly $13,000 total; (3) report of commissioner, showing that on September 9, 1863, there was in the hands of said executors nearly $14,000 (including interest) due the legatees, none of whom had then been paid; (4) receipts from two legatees (out of the ten) in April and October, 1868, acknowledging receipt of a much smaller amount than their respective legacies, "in full of all due from said executor." The court properly held that there was no evidence of payment of said $500 legacy to Rachel to charge her estate in favor of the plaintiff. Had there been any presumption of payment, it would have arisen at the end of two years, when by the statute (Rev. Code, c. 46, § 24) the executor was required to pay over; and this was rebutted by the plaintiff's evidence that the legacies were still unpaid in September, 1863, and the only evidence of subsequent payment was that of much smaller sums than their legacies "in full payment" to two other legatees in 1868. This was surely no evidence of a payment in full, or any payment at all, to Rachel. The inference, if any, indeed, would be to the contrary.

But, aside from that, the presumption of payment from the lapse of time arises only between the executor and legatee, between debtor and creditor. It is a protection to discharge a liability. It cannot arise to create a liability to a third person on the part of the person who should have received the legacy. To create any liability on the part of the legatee over to the remainderman, there must be proof that the legatee received the sum. When A. owes B., the lapse of time may raise a presumption of payment for the protection of A., who may have lost his receipt or have satisfied B. otherwise than by payment; but it never creates a liability on B.'s part to a third person by reason of such presumed payment. Like the statute of limitations, presumption of payment "is a shield, never a sword." This is clearly stated by Mr. Justice Burwell in Cox v. Brower, 114 N. C. 422, 19 S. E. 365, that the presumption of payment of a legacy is in favor of the party to be charged (not against him) "for the sake of repose and to discourage stale claims." The presumption against official misconduct, also, is a presumption in favor of the officer, and cannot be invoked for the purpose of putting another officer in default. 22 Am. & Eng. Enc. (2d Ed.) 1270; Weimer v. Bunbury, 30 Mich. 201; Houghton

County v. Rees, 34 Mich. 481. The fact that a debtor could and ought to have paid is not proof or presumption in favor of one seeking to charge the creditor. The party relying upon such payment as a cause of action must prove it.

In nonsuiting the plaintiff, there was no error.

(139 N. C. 179)

PORTER v. ARMSTRONG et al.

(Supreme Court of North Carolina. Oct. 3, 1905.)

1. EMINENT DOMAIN — TAKING FOR PRIVATE USE—DRAINS.

Code, c. 30, and amendments thereto, providing for the drainage of lands, are not unconstitutional as authorizing the taking of land for a private purpose.

2. DRAINS—MISCONDUCT OF COMMISSIONERS—SETTING ASIDE REPORT—REVIEW.

Where, in proceedings for the drainage of land, the court found that two of the commissioners appointed pursuant to Code, c. 30, and amendments thereto, were guilty of gross indiscretion while hearing the cause, an order setting aside the report of the commissioners, because it did not comply with the statute, will not be disturbed on appeal, whether the report conformed to the statute or not.

3. SAME—APPOINTMENT OF NEW COMMISSIONERS—AUTHORITY OF COURT TO INSTRUCT.

The court, on setting aside the report of the commissioners in proceedings under Code, c. 30, and amendments thereto, for the drainage of land, and directing the appointment of new commissioners, should not instruct the new commissioners as to their duties; the statute authorizing the proceedings containing directions to the commissioners, and the question of the conformity of their report thereto being reviewable on their report coming in for confirmation.

Appeal from Superior Court, Pender County; O. H. Allen, Judge.

Proceedings by E. Porter against T. J. Armstrong and others for the drainage of lands. From an order setting aside the report of the commissioners, plaintiff appeals. Modified.

Stevens, Beasley & Weeks and Shepherd & Shepherd, for appellant. E. K. Bryan and J. T. Bland, for appellee.

BROWN, J. It is contended by the defendants that these proceedings should be quashed, as the acts under which they are instituted are violative of the federal Constitution, as well as our own, inasmuch as the land of the defendants is to be taken for a mere private purpose. The constitutionality of our drainage laws has been settled as far as repeated decisions of this court can settle it. Norfleet v. Cromwell, 70 N. C. 638, 16 Am. Rep. 787; Brown v. Keener, 74 N. C. 714; Pool v. Trexler, 76 N. C. 297.

The judge below set aside the report "being of the opinion that the report of the commissioners filed herein does not comply with the statute in such case made and provided." His honor further finds as a fact in his order that two of the commissioners "have been guilty of gross indiscretion while hearing this cause," and ordered that they be relieved from any further duties. This latter finding is sufficient to justify setting aside the order in his honor's discretion. Although such is not the reason given for setting aside the report, yet, in the face of such a finding by a judge of the superior court, we would not feel justified in reversing his order, whether the report conformed to the statute or not. It is best, in the interests of justice, that the clerk proceed to carry the order into effect by appointing other commissioners.

That portion of his honor's order wherein he undertakes to instruct the new commissioners as to their duties should be set aside. Those instructions may or may not be correct. If incorrect, and they should be followed by the commissioners to be appointed, their report would have to be set aside. Code, c. 30, and the amendments thereto, are the charts which should guide the commissioners, and their decisions, findings, and report should conform thereto. Upon the coming in of their report, its correctness may be reviewed.

Let the cause be remanded to the superior court of Pender county, to be proceeded with in accordance with this opinion. Let the costs of appeal be taxed equally against the plaintiffs and defendants.

Modified and affirmed.

WALKER, J., concurs in result.

(139 N. C. 196)

PEACOCK v. BARNES et al.

(Supreme Court of North Carolina. Oct. 3, 1905.)

EXECUTORS AND ADMINISTRATORS—SALES OF LAND—MISTAKE AS TO QUANTITY—RECOVERY OF EXCESS IN PRICE.

Where land ordered sold for payment of a decedent's debts was sold by a commissioner at a certain price per acre, and the purchaser, under representations by the commissioner that the tract contained a certain number of acres, paid for 96 acres more than the tract actually contained, the purchaser was entitled to recover the excess paid from the distributees of the estate.

Appeal from Superior Court, Wilson County; Councill, Judge.

Action by J. W. Peacock against Ida Barnes and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Connor & Connor, for appellant. F. A. Woodard and Pou & Finch, for appellees.

CLARK, C. J. Certain lands of Harris Winstead, deceased, were sold to make assets to pay debts by a commissioner appointed by the court in that proceeding. The net proceeds were applied to the discharge of sundry mortgages upon the land, and the surplus was divided between his heirs at law—two daughters—and was invested in real estate. Other real estate of said Win-

stead was duly partitioned between his said daughters and devisees. At the sale of the land by the commissioner aforesaid to make assets, lot No. 5 was purchased by the plaintiff at the price of $11.10 per acre; the commissioner representing that said lot contained 416 acres, and bids being asked for said land at so much per acre. The plaintiff, Peacock, paid for said tract the sum of $4,617.60, being the price, calculating 416 acres at $11.10 per acre. Subsequently he ascertained that the tract in truth contained only 320 acres, making a deficiency of 96 acres, by reason of which, at $11.10 per acre, he had overpaid $1,065.60. For the recovery of this sum, with interest thereon, this action is brought, and plaintiff asks that he be subrogated to the rights of the creditors whose debts were discharged to the extent of said $1,065.60, and that the land bought with the surplus of the proceeds from said sale and the other realty of said Winstead in the hands of his devisees be sold by a commissioner, that he may be reimbursed the aforesaid sum overpaid by him in the purchase of lot No. 5.

The defendants demur on the ground that no cause of action was stated, because the complaint does not aver that the number of acres was falsely or fraudulently misrepresented by the defendants or the commissioner, nor that either of them knew that the number of acres in lot No. 5 (whose boundaries were correctly given in the complaint in the proceedings to sell the land) was intentionally stated incorrectly in the complaint, nor that there was an intent to deceive, nor is it averred that Peacock exercised due care to ascertain the number of acres before making such purchase and payment, nor is it alleged that any of the defendants were in possession of any information as to the number of acres which was not communicated to the plaintiff.

The demurrer was properly overruled. This is not an action for breach of warranty, nor for fraud and deceit in the sale of land by the commissioner. In such action the complaint would be fatally defective for failure to make the averments whose lack is pointed out by the demurrer. It is also true that there is no implied warranty in the sale of real estate, when made otherwise than by judicial decree, either as to quantity, title, or incumbrance (Barden v. Stickney, 130 N. C. 62, 40 S. E. 842), and that the cases in which the courts have relieved the purchaser at a judicial sale by reason of a defect of title or shortage have been usually instances in which such matters have been called to the attention of the court, prior to confirmation and payment and while the sale was under the control of the court. Here, if the purchaser is shown to have been negligent or guilty of laches in not sooner ascertaining the shortage, or in failing to act promptly upon ascertaining such fact, he would have no standing in a court of equity. But upon the plaintiff's averments, admitted by the demurrer, the purchaser relied upon the representations of the commissioner appointed by the court. The bid made and accepted was $11.10 per acre. That fact both sides understood. That was the essence of the contract of sale. It was a mutual mistake, so far as appears, that, in calculating the amount of the bid, the purchaser was charged and paid for 96 acres more than he had purchased. It is still in the power of the court to correct the error, and the defendants will suffer no prejudice therefrom. When the case goes back, it will be open to the defendants to deny the shortage, or set up laches of the plaintiff, or any other defense they may be advised. We do no more than to hold that a cause of action is set up by the complaint, in seeking to correct an overpayment by reason of an error in calculating the amount due for land bought at a judicial sale, at which the land was put up and sold by the acre, when there is no laches shown or averred as to the purchaser, and no change of condition or other cause by reason of which correction of the error by the court would work a prejudice to those for whose interest the land was sold.

No error.

CONNOR, J., did not sit on the hearing of this appeal.

(139 N. C. 135)

BUNN v. BRASWELL et al.

(Supreme Court of North Carolina. Sept. 26, 1905.)

1. JUDGMENT — CONSENT — EFFECT AS CONTRACT.

A consent judgment is a contract of the parties, made a matter of record by the court at their request, and must be construed as any other contract.

2. MORTGAGES — CONSENT JUDGMENT — CONSTRUCTION—RELATION OF MORTGAGOR AND MORTGAGEE.

A consent judgment, declaring that defendant "has an equity to redeem" land on the payment to plaintiff of a specified sum, and in case of the failure to pay the same within the time limited "defendant shall stand debarred absolutely" of all equity in the premises, establishes the relation of mortgagor and mortgagee between the parties.

3. SAME.

The words "defendant shall stand absolutely debarred" of all equity in the land, as used in the judgment, do not amount to a strict foreclosure, and defendant has the right to redeem.

4. SAME — ACTION BY MORTGAGEE — LIMITATIONS.

Code, § 152, subsec. 3, bars an action to foreclose a mortgage after 10 years from the forfeiture, or after 10 years after the last payment on the debt. A consent judgment established the relation of mortgagor and mortgagee between the parties. The party standing as mortgagor took and continued in the possession of the premises for over 10 years thereafter. *Held*, that plaintiff, as mortgagee, could neither have a writ of possession, nor maintain ejectment, unless he showed a payment on the debt, preventing the operation of the statute.

Appeal from Superior Court, Nash County; W. R. Allen, Judge.

Action by one Bunn against one Braswell and others, consolidated with a proceeding by motion of plaintiff for an execution on a prior judgment. Judgments for plaintiff in the action and on the motion, and defendants appeal. Reversed.

At the October term, 1888, of the superior court of Nash county, N. W. Boddie recovered judgment by default against Exum Braswell, adjudging him to be the owner and entitled to the possession of the tract of land in controversy. At the spring term, 1889, upon a motion to set the judgment aside, it was by consent adjudged "that said judgment is so far modified as to declare that the defendant has an equity to redeem the land described in the complaint, upon the payment to the plaintiff of $600 and interest from date and the cost of this action on or before the 1st day of October next, and, if this payment is made in full on or before that day the plaintiff will convey the said premises to the defendant; but, in case of his failure to make such payment within the time limited, the defendant shall stand absolutely debarred and foreclosed of and from any and all equity or other estate or interest in the premises. The former judgment, however, remains in full force, so far as it declares that the plaintiff is the owner and entitled to the possession of said land, and, if necessary, the clerk will issue a writ of possession." Exum Braswell remained in possession until his death, when the defendant, who succeeded to such possession and rights as he had, continued therein until the institution of the action and other proceedings set forth in the transcript. Upon the death of N. W. Boddie, his rights in respect to said land vested in the plaintiff. On the 14th day of April, 1900, a civil action was instituted in the superior court, by Mrs. L. C. Boddie, who then represented the title of N. W. Boddie, deceased, against Exum Braswell. In the complaint filed therein the plaintiff avers ownership in herself, and wrongful possession by defendant. At the spring term, 1900, judgment by default was entered. At the spring term, 1901, the heirs at law of Braswell were permitted to come in and make themselves parties defendant, the judgment was set aside, and defendants allowed to file answer. They answered, averring that the judgment of spring term, 1889, in the original action, was a final settlement of the rights of the parties, and that the terms thereof were complied with by Exum Braswell, by paying the sum therein adjudged to be due N. W. Boddie. They also pleaded the 10-year statute as a bar to the action. On the 20th day of November, 1901, upon application of the plaintiff, the clerk of the superior court of said county made an order directing that a writ of assistance issue upon the judgment of spring term, 1889. Pursuant thereto such writ was issued to the sheriff of said county, commanding him to eject the defendants from said land and put the plaintiffs in possession thereof. The defendants thereupon made a motion before the said clerk to withdraw said writ, for that more than 10 years had elapsed since the rendition of said judgment, that no execution had issued thereon, that no notice had been given of the motion for the issuance of said writ, and that the judgment was barred by the statute of limitations. The plaintiffs, respondents to said motion, filed answer to the affidavit upon which the motion was made, admitting the matters of record and denying that the possession of the defendants or their ancestor was or had been adverse to the plaintiffs. The said answer set forth "that the relation established by the judgment [of spring term, 1889] between the plaintiff and defendant was that of mortgagor and mortgagee, with the mortgagor in possession and clothed with the right to redeem under said decree of strict foreclosure," and that the heirs of Exum Braswell took subject to the rights of N. W. Boddie. The clerk withdrew the writ, and plaintiffs appealed to the judge. The original action and appeal coming on for hearing by consent, the two records were consolidated and heard at the May term of Nash superior court, where judgment was rendered for plaintiffs, to which defendants excepted and appealed. No evidence of payment of the $600 was introduced.

Austin & Grantham, for appellants. F. S. Spruill, for appellee.

CONNOR, J. (after stating the facts). There is nothing in the complaint filed in the action of fall term, 1888, to indicate the source or quality of the title of N. W. Boddie. The judgment of spring term, 1889, being by consent, is to be construed as any other contract of the parties. It constitutes the terms of an agreement of the parties, made a matter of record by the court at their request. Gaston, J., in Wilcox v. Wilcox, 36 N. C. 36, says that a consent judgment "is the decree of the parties." Dillard, J., in Edney v. Edney, 81 N. C. 1, says: "A decree by consent is the decree of the parties put on file with the sanction and permission of the court, and in such decrees the parties, acting for themselves, may provide as to them seems best concerning the subject-matter of the litigation." Vaughan v. Gooch, 92 N. C. 524. The judgment is therefore to be construed in the same way as if the parties had entered into the contract by writing duly signed and delivered.

The plaintiff, in her answer to the motion to withdraw the execution, contended that the relation established between the parties by the judgment was that of mortgagor and mortgagee; the defendant being the mortgagor in possession. The defendants in this court make the same contention, while the plaintiff here insists that the judgment

established the relation of vendor and vendee; the vendee being in possession. The learned counsel calls our attention to the provision that the plaintiff is declared to be the owner of the land, and, upon payment of the amount fixed, is directed to convey it to the defendant. This, he insists, excludes the idea that the defendant was the owner, and the plaintiff the mortgagor. There is certainly much force in this view. On the other hand, the defendant's counsel, in their well-considered brief and excellent oral argument, contend that the declaration that the defendant "has an equity to redeem the land" shows clearly that the relation of mortgagor and mortgagee, at that time and theretofore, existed between the parties, and not that he was by the judgment given such equity; that the judgment was a recognition of the existence thereof. They further insist that the term "equity to redeem" is well defined and applicable to no other relation than that of mortgagor and mortgagee. From this position counsel contend that, notwithstanding the provision in the judgment that, upon failure to pay the amount fixed by October 1, 1889, the defendant shall be forever debarred and foreclosed of any equity, etc., in said lands, the relation continued to exist, and that after default the possession of the defendant continued to be that of mortgagor and not tenant, and that at the end of 10 years the plaintiff was barred by subsection 3, § 152, of the Code. This defense is not based upon the idea that the possession of Braswell was adverse to the plaintiff. It is conceded that the authorities cited by plaintiff, in her answer to the motion to withdraw the execution, sustain the position that the possession of the mortgagor is not adverse to the mortgagee. Parker v. Banks, 79 N. C. 480. The plaintiff contends that, after default, the defendant was the tenant of the plaintiff at sufferance, and that until by some unequivocal act on his part the character of his tenure could not be changed. We do not think that in any aspect of the case the question of adverse possession arises. It has been found difficult to define satisfactorily the tenure of the mortgagor in possession. Rodman, J., in Jones v. Hill, 64 N. C. 198, said: "If a mortgagor remains in possession after the forfeiture of the property, he remains only by permission of the mortgagee. In such case the mortgagor has sometimes been called a tenant at will or sufferance, and sometimes a trespasser; but he is properly neither. His position cannot be more accurately defined than by calling him a mortgagor in possession, "but he may be ejected at any time by the mortgagee without notice.

Do the terms of the judgment of spring term, 1889, establish the relation of mortgagor and mortgagee? In discussing the character of an instrument involving the same question, Ruffin, C. J., said: "The case is not free from doubt upon the first point. The character of the conveyance is to be determined by the intention of the parties, and if that, however ascertained, was that it should operate as a security, the court so regards it and the debtor will be entitled to redeem." Gillis v. Martin, 17 N. C. 472, 25 Am. Dec. 729. In Wilson v. Weston, 57 N. C. 349, the deed provided: "The said Wilson shall have the privilege of redeeming * * * by paying the said Weston * * * the said sum of $35 on or before the expiration of six months." Ruffin, J., said: "There may be in some cases much difficulty in distinguishing between a mortgage and a conditional sale; but there are very decisive evidences of the true character of this transaction. The deed of itself imports prima facie a security, and not a sale, by the proviso for the privilege of redeeming the negroes, which, between these parties, is equivalent to a technical condition on which an equity of redemption would arise, as denoting the intent of the parties." Mason v. Hearne, 45 N. C. 88; Robinson v. Willoughby, 65 N. C. 520, Rodman, J., saying: "If a transaction be a mortgage in substance, the most solemn engagement to the contrary, made at the time, cannot deprive the debtor of his right to redeem; such a case being on grounds of equity an exception to the maxim, 'Modus et conventio vincunt legem.'" It is to be regretted that, for the purpose of aiding us in construing the terms of the contract or agreement of the parties as embodied in the consent judgment, we have no evidence or information in regard to the status of the title prior to the judgment of fall term, 1888. The defendants, in their affidavit made before the clerk, say that Exum Braswell, their ancestor, owned and had possession of the land since 1883. Whether Mr. Boddie ever owned the land, or how he acquired a right to it, or to have $600 paid him as a condition upon which he was to convey it to Braswell, does not appear. The term "right to redeem" is appropriate to express the right, interest, or estate of a mortgagor, and not a vendee. When we speak of the interest of one in, or right to, real estate as an "equity of redemption," which is synonymous with "right to redeem," we understand that reference is made to the status of a mortgagor, not a vendee. We are also impressed with the expression that the defendant "has a right to redeem." The language clearly conveys the idea that some such relation in respect to the land then existed between the parties. The judgment of fall term, 1888, is not inconsistent with the suggestion that the plaintiff's title was not absolute, but subject to the right to redeem. The judgment of fall term, 1888, and the consent judgment, when read together, as they should be to ascertain the intention of the parties, is consistent with the contention of the defendant. Watkins v. Williams, 123 N. C. 170, 31 S. E. 388. The

mortgagee is the owner, and in an action for that purpose entitled to the possession of the mortgaged estate. Upon a careful consideration of the terms of the consent judgment, in the light of the authorities, we are of the opinion that the relation of mortgagor and mortgagee was recognized, or at least established.

The plaintiff insists that, conceding this to be true, the judgment expressly declares that upon failure to pay the debt on or before October 1, 1889, the defendant shall be barred and foreclosed of his right or equity to redeem; that by this provision in the judgment there was a strict foreclosure; that after the day fixed the default of the defendant deprived him of any and all interest in the land. In that view his possession was either adverse, in which case the plaintiff would not be barred until the expiration of 20 years, or the possession was permissive, and no length of time would bar the entry of the plaintiff. Treating the judgment as the agreement of the parties, in what respect does it differ from a common-law mortgage, in which it is always provided that upon default "the said deed and every part thereof shall remain in full force and effect"? It was to prevent the hardship growing out of the forfeiture wrought by the terms of the deed in a court of law that equity came to the mortgagor and permitted him to redeem, notwithstanding the forfeiture by paying the debt within a reasonable time. In this way the right to redeem came into existence, and from this purely equitable right, or right to relief in equity, was evolved the mortgagor's equity of redemption, which came to be and is now recognized as an estate or interest in the land, subject to sale under execution, to dower, and to many other incidents of a legal estate in land. Courts of equity, for the purpose of preserving without impairment this right to redeem notwithstanding the forfeiture, refused to recognize or enforce agreements, made at the time of the execution of the mortgage, releasing or in any manner depriving the mortgagor of his equity. From this refusal of the chancellors, the maxim came into existence, "Once a mortgage always a mortgage," which has been strictly adhered to by the courts in England and this country, so that it is a well-settled doctrine that by no agreement made by the parties can the equity of redemption be destroyed. While in exceptional cases the court would render a decree of strict foreclosure, it was only done where it clearly appeared that the rights or interests of the mortgagor were not injuriously affected. Ruffin, C. J., in Gillis v. Martin, supra, after holding that the instrument before the court was a mortgage, said: "But no agreement, at the time of the contract, that the purchaser shall, in default of the debtor, become absolute owner, even at an increased price, is permitted by the court to bar redemption, if the subject was once redeemable." The principle is strongly stated by Mr. Justice Field, in Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775: "It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed." In Macauley v. Smith, 132 N. Y. 524, 30 N. E. 997, Landon, J., said: "The agreement to turn a mortgage into an absolute deed in case of default is one that finds no favor in equity. The maxim 'once a mortgage always a mortgage' governs the case." In Jones on Mortgages, vol. 1, § 251, it is said: "Generally every one may renounce any privilege or surrender any right he has; but an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions in order to raise money." This court has always rigidly enforced the maxim invoked by the defendants. Ruffin, C. J., in Fleming v. Sitton, 21 N. C. 621, speaking of the parties in foreclosure suits, says: "Of late years a beneficial practice has gained favor, until it may be considered established in this country not absolutely to foreclose in any case, but to sell the mortgaged premises and apply the proceeds in satisfaction of the debt." Jones on Mortgages, § 1538 et seq. Treating the consent judgment as the agreement of the parties, rather than the judicial determination of their rights, we are brought to the conclusion that, notwithstanding the provision of strict foreclosure, the relation of mortgagor and mortgagee continued to exist between them.

The question next arises whether the plaintiff is barred by the statute of limitation. Prior to the Code, a presumption of abandonment arose, which precluded a mortgagee from maintaining a bill to foreclose a mortgage after 10 years from default, when the mortgagor was permitted to remain in possession, making no payment on the debt (Brown v. Becknall, 58 N. C. 423), because, as said by Pearson, C. J.: "One who sleeps on his rights for 10 years either has arranged it in some way or ought to lose it, because of his negligence." By section 152, subsec. 3, an action to foreclose a mortgage is barred after 10 years from the forfeiture,

when the mortgagor has been in possession of the property. The conditions which formerly raised a presumption of abandonment now constitute an absolute bar to the enforcement of the mortgage. It would seem, therefore, that the plaintiff can neither have a writ of possession upon the consent judgment nor maintain an action of ejectment for the land. It may be that the plaintiff may be able to show a payment on the debt or other recognition of it, preventing the operation of the statute.

The case was heard by his honor upon the record. The judgment must be reversed, and the case remanded, with permission to the plaintiff, if so advised, to amend her complaint by asking for a decree of foreclosure by a sale of the property. The defendants may then interpose such defenses as they may be advised, so that the rights of the parties may be settled in accordance with this opinion. It is so ordered.

Error.

(139 N. C. 423)

In re SCARBOROUGH'S WILL.

Appeal of SCARBOROUGH et al.

(Supreme Court of North Carolina. Oct, 31, 1905.)

1. CONTEMPT—PUNISHMENT.

Though one notified by the clerk of the superior court of G. county to exhibit for probate in such court a will in his possession, should have appeared, and there shown, if he could, that the will should be probated in another county, yet, he having on advice left it with the clerk of the superior court of L. county, where it was probated, and he being unable to again get possession of it, the judgment of the clerk of the superior court of G. county adjudging such person guilty of contempt, and ordering that he be committed to jail till he produce the will, is properly set aside, as amounting to an order of perpetual imprisonment.

2. APPEAL—TO SUPERIOR COURT—NEW EVIDENCE.

On appeal to the superior court from a judgment of its clerk, it is proper to allow additional evidence.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 3625.]

Appeal from Superior Court, Guilford County; Ward, Judge.

In the matter of the will of S. W. Scarborough. A. E. and Clyde Scarborough, executors, petitioned that B. F. Scarborough, their coexecutor, be attached for contempt. From a judgment of the superior court, reversing a judgment of the clerk thereof, adjudging B. F. Scarborough guilty of contempt, petitioners appeal. Affirmed.

Scales, Taylor & Scales, for appellants. John A. Barringer and W. P. Bynum, for respondent.

CLARK, C. J. S. W. Scarborough died May 22, 1905, in Lenoir county. The clerk of the superior court of Guilford county, being of opinion that the deceased had his legal domicile in the county of Guilford at the time of his death, on May 27th appointed collectors of his estate, and issued, by virtue of section 2154 of the Code, to the respondent, in Lenoir county, who had the will of the deceased in his possession, notice to exhibit the same for probate in Guilford county. The notice was served on the respondent May 29th. Thereafter, on the same day, the respondent consulted counsel in Kinston, Lenoir county, and the clerk of the superior court of said county, and under their advice delivered the will to the clerk of the superior court of Lenoir county, by whom, later, it was probated. The clerk of the superior court of Guilford county thereupon issued notice to the respondent to appear at his office in Greensboro on June 26th and show cause why he should not be attached for contempt. The respondent appeared and filed his answer, setting forth the affidavit of counsel that he had advised the respondent that the will should be probated in Lenoir county, and the affidavit of the clerk of the superior court of Lenoir that on May 25th he advised the respondent that the will should be probated in Lenoir; that on May 29th the respondent left the will in his office for probate, and that on June 1st the witnesses appeared, whereupon the said will was duly probated and recorded and is now on file in his office as part of the records thereof; that on May 29th or 30th the respondent came to his office and requested him to surrender said will that he might comply with the order of the clerk of Guilford superior court, but, being of opinion that the will should be probated in Lenoir, he declined to surrender it to the respondent. In the respondent's answer he avers that he was guided by the advice of counsel and of the clerk of Lenoir superior court, that he intended no contempt, and that he is unable to produce the will because the clerk of Lenoir superior court refused to deliver the same to him; and he also filed many affidavits tending to show that the testator died domiciled in Lenoir county. Thereupon the clerk of the superior court of Guilford adjudged the respondent guilty of contempt and ordered that he be committed to jail, without bail, until such will was produced. Upon appeal the judgment was reversed, and the respondent was discharged.

When the notice from the clerk of Guilford superior court was served upon the respondent, it was his duty to obey the summons, and on appearing before the clerk of Guilford superior court he could have set up his evidence to show, if he could, that the will should be probated in Lenoir county, and, if that were held against him, he could have appealed to the judge, and thence to this court. Had the respondent been held for contempt and punished for such disobedience, the judgment would have been sustained if the disobedience was willful and not an honest mistake—Code, § 648 (4)—as the clerk

seems to have adjudged; for he imposed no sentence for such contempt, but directed that the respondent be imprisoned unless he produced the will in 15 days, and to remain imprisoned until he does. As it sufficiently appears that the respondent cannot do this, and that the clerk of Lenoir superior court has custody of the will (Code, § 2154) and has refused to surrender it to the respondent, who applied for the same, that he might obey the process issued to him from Guilford, this amounts to an order of perpetual imprisonment, since it is out of the respondent's power to comply with the condition upon which he might be discharged. His honor, therefore, properly discharged the respondent.

Nor was there error in the judge allowing additional affidavits to be filed on the hearing before him. In re Deaton, 105 N. C. 62, 11 S. E. 244, it is held that, "on appeal from the superior court, the findings of fact by the judge are conclusive, and this court can only review the law applicable to such state of facts; but upon appeal from a court below the superior court to that court it is the duty of the superior court judge to review the facts, as well as the law, and in his discretion he can hear additional testimony orally or by affidavits." This case has been cited and approved. Finlayson v. Accident Co., 100 N. C. 199, 13 S. E. 739; King v. Railroad, 112 N. C. 321, 16 S. E. 929; In re Gorham, 129 N. C. 490, 40 S. E. 311; Turner v. Machine Co., 133 N. C. 385, 45 S. E. 781.

The question whether the will should properly be probated in Guilford or Lenoir county is not presented, and cannot be passed upon in this proceeding. Whether the clerk of Guilford was right or wrong in assuming jurisdiction, it was the duty of the respondent to obey the notice served upon him before he had delivered the will to the clerk of Lenoir, and he could have raised the issue in his answer to that summons. He should not have decided it himself. It is equally true that, as the respondent has it not in his power now to produce the will, he cannot be imprisoned till he does, irrespective of the inquiry whether the will should be probated in Guilford or Lenoir.

No error.

(139 N. C. 283)

COZAD v. KANAWHA HARDWOOD CO.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. PRIVATE ROADS — ESTABLISHMENT — POWERS OF AUTHORITIES—STATUTES—CONSTRUCTION.

The highway commission created by Pub. Laws 1905, p. 222, c. 210, providing for the election of a highway commission for a township, with the powers exercised by the boards of supervisors of public roads in ordering the laying out of public roads, "cartways, rights of way for tramroads," etc., in the manner provided by Code, §§ 2033, 2056, 2057, 2062, 2063, and amendments, relating to roads, has no larger power in regard to ordering the opening of cartways or tramways than is exercised by the boards having jurisdiction over such matters under the general laws.

2. SAME.

A private railroad extending from a station on a railway company's line to the owner of standing timber, constructed and exclusively operated by the owner of the timber for the transportation thereof, is not a cartway, within Code, §§ 2056, 2057, authorizing the laying out of cartways by persons settled on or cultivating any land, which cartways shall be open for the free passage of all persons.

3. EMINENT DOMAIN — RAILROADS — EXCLUSIVE USE OF PRIVATE PERSON—STATUTES—VALIDITY.

Laws 1887, p. 97, c. 46, amending Code, §§ 2056, 2057, so as to authorize the construction over the lands of others of railways by persons owning standing timber for the removal of the timber, is invalid, so far as it authorizes the construction of railways over the lands of others for the exclusive use of the owner of the timber, because authorizing the taking of private property for a use which is not public, though the removal of the timber by means of such railways would aid in the development of the natural resources of the state.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 51–54, 56, 57.]

4. SAME—STATUTES—PARTIAL INVALIDITY.

Though Laws 1887, p. 97, c. 46, amending Code, §§ 2056, 2057, is invalid, so far as it authorizes the construction of railroads over an owner's land for the exclusive use of another owning timber proposed to be carried by the railroads, the right to condemn land for a cartway, as provided by the statute, over which all persons may pass, and the right of the owners of timber to construct and operate railroads over the lands of others, over which all persons may pass, are unaffected, and the provisions conferring such rights are valid.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 51–54, 56–58.]

Appeal from Superior Court, Cherokee County; Ferguson, Judge.

Action by H. O. Cozad against the Kanawha Hardwood Company. From a judgment continuing a temporary injunction, defendant appeals. Affirmed.

Plaintiff alleged: That he was the owner of a tract of land in Cherokee county, upon which he had erected a dwelling and planted a large number of fruit trees and made many other valuable improvements, requiring outlay of many thousand dollars. That the defendants are partners, conducting a general lumber business under the firm name and style of the Kanawha Hardwood Company. That defendants are threatening, and pursuant to such threats proceeded, to construct a railway over and through his lands for the purpose of hauling timber and timber products from their own lands. That in grading the route for such railway, and erecting trestles over the mountain, great and permanent damage will be done his property, etc. He applied to the resident judge of the district for a restraining order until the hearing, and a permanent injunction, etc. Upon the return day of the order to show cause, his honor, Judge Ferguson, upon hearing the complaint and answer, supported by affidavits, found the following facts: The defendants, after notice, applied to the highway

commission of Valleytown township, in said county, for a right of way to construct and operate a private railroad from the town of Andrews, a railroad station on the Southern Railway, to standing timber owned by the defendants in Graham county, which right of way would pass over the plaintiff's land. The plaintiff filed an answer to the petition. From the order, the highway commission finding that it was necessary, reasonable, and just that the petitioners should have the right of way, and appointing a jury to lay it off, plaintiff appealed to the board of commissioners of Cherokee county. From the order of the said board of commissioners, affirming the proceedings of the highway commission, the plaintiff appealed to the superior court. The appeal is now pending in said court. That the defendants are the owners of standing timber from which no public road leads and to which no water is convenient. That the proposed road leads from a railroad station to such standing timber, and that such standing timber cannot be marketed with a profit to the defendants without the construction of a railroad. That the construction of a railroad is necessary for the profitable marketing of such timber, and that the route across the plaintiff's land is a reasonable route. That in taking such route no injustice is done the plaintiff. That there is no reason why his land should not be taken, as well as the land of any others over which the road might be constructed. That five years will not be an unreasonable time in which to remove such standing timber. Defendants have graded a considerable portion of the proposed road, not on the lands of the plaintiff, but other portions of the proposed route. They have bought and contracted for iron rails, locomotives, and other appliances for operating said road. Defendants are not a corporation, and do not propose to become liable as common carriers, but propose to construct and use the road for their sole and exclusive use in removing their timber and timber products from their lands in Graham county to the railroad station at Andrews and to the markets. There are other large boundaries of timber land of like kind contiguous to the defendants' timber. Defendants do not propose to transport over their proposed railroad such timber for reasonable charges to be fixed by the corporation commission or other authority of the state. Defendants do not claim any other right to enter upon plaintiff's land other than such as they acquired by the order of the highway commission His honor, upon the foregoing facts, continued the injunction to the hearing. Defendants appealed.

Dillard & Bell, for appellant. Jones & Johnston and Shepherd & Shepherd, for appellee.

CONNOR, J. (after stating the case). The defendants insist that, pending the proceeding instituted before the highway commission, the courts should not interfere by injunction with the construction of their proposed railway. This contention would be unanswerable, but for the fact that plaintiff insists that in no point of view can the result of that proceeding affect his right to enjoin defendants, for that: (1) No power is conferred upon the highway commission to order a railway of the character or for the purpose contemplated by the defendants to be laid out. (2) That, if the statute undertook to confer such power, it would be invalid, violating the elementary principle that private property can only be taken for a public use, and then with compensation. These contentions render it necessary to examine the provisions of the statute creating the highway commission of Valleytown township. Chapter 210, p. 222, Pub. Laws 1905.

By the first section of the statute provision is made for electing three persons, who shall constitute the highway commission for said township, naming those who shall act until the time appointed for the first election. By the second section, the commission is vested with the powers, rights, etc., exercised by the board of supervisors of public roads, etc. "They shall have power and authority to order the laying out of public roads," etc. "They shall also have power and authority to lay out cartways, rights of way for tramroads, church and mill roads, and to discontinue the same in the way and manner provided in sections 2033, 2056, 2057, 2062, 2063, of the Code or any amendments thereof." It is clear that the highway commission established by the act has no larger or other power in regard to ordering cartways or tramways to be opened than is exercised by the boards having jurisdiction over such matters under the general public laws. It is equally clear that the road proposed to be opened and operated does not come within the definition of cartways provided by sections 2056, 2057 of the Code. This right is conferred only on persons "settled upon or cultivating any land." The cartway authorized to be opened "shall be kept open for the free passage of all persons on foot or horseback, carts and wagons." Section 2057 provides that persons over whose lands cartways have been opened "may erect gates or bars across the same." The section was amended by chapter 46, p. 97, Laws 1887, by inserting in line 1 the words "or shall own any standing timber," and in lines 6 and 15, between the words "cartway" and "to," the words "tram or railway," and in line 18 striking out the word "way," and inserting the words "cartways established under this act. Section 2057 is amended by inserting in line 1 the words "tram or railways," and by inserting in line 6, between the word "just" and "and," the words "cartways, tramways, or railways for the removal of timber shall continue for a period not longer than five years, and in entering cultivated land, shall protect the same by sufficient stock guards." The effect of these

amendments is to confer upon owners of land upon which there is any standing timber the right to have opened tramways or railways, with the exclusive use of them, confining to cartways the right of all persons to pass over them. The right to maintain such tramways or railways is confined to a period of five years, with the duty of erecting stock guards when they pass through cultivated land, thus depriving the owner of the land through which such tram and rail ways pass the right to erect gates or bars across them. It appears that the highway commission ordered the laying out of a private way for a private railway through and over the plaintiff's land, with "such curves and grades as are necessary, according to the survey made, in order to reach the lowest gap on top of the mountain. * * * Said right of way, when it extends through woodland, or said tract, to be of the width of 150 feet, and through cultivated fields or cleared land to be of sufficient width for the roadbed, trestles, and cuts only.

The construction of section 2056 of the Code, being chapter 508, Acts 1798, providing for the opening of cartways, has been frequently before this court. Its constitutionality has never been questioned, and is not involved in this appeal. The validity of similar statutes has been discussed and sustained in other jurisdictions upon the ground that, although established and opened upon the petition of private landowners and primarily for their benefit, they are, as provided by our statute, open for the free passage of all persons on horse, foot, in wagons, or carts. This extension of their use impresses upon them a public character. In this way the power to invoke the right of eminent domain, for the purpose of opening and maintaining them, is sustained. It is said: "Roads and streets used by the public, with a right in all the public to use them, are undoubtedly public, and private property may be appropriated for the purpose of constructing such ways. The test is, not simply how many persons do actually use them, but how many have a full and unrestricted right in common to use them; for, if the public generally are excluded, the way must be regarded as a private one. If the public have the right to use the way at pleasure and on equal terms, it is a public one, although in reality it is little used. When the way is a private one, the right of eminent domain cannot be successfully invoked. * * * The right itself exists only for the public, and no private interest, however weighty, can call it into exercise. The question, therefore, must always be, not what private interests will be promoted, but what is the public requirement? The name given the way does not determine its character; for if a road be called a private road or a neighborhood road, but is in fact so laid out and maintained as to give the public a right to freely use it upon terms common to all, the road, notwithstanding its name, is a public one." Elliott on Roads (2d Ed.) § 192. The converse of the proposition is stated in section 193, that if the road is so laid out as to give only a limited class of persons the sole right to use it, it is for that reason a private road, without regard to the name by which it is known or called. "If a class, to the exclusion of the citizens generally, acquires a right to use the road, it is no more than a private way." Id. Discussing the same question, it is said: "Where the road laid out on the application of, and paid for and kept in repair by, a particular individual, who is especially accommodated thereby, is in fact a public road, and for the use of all who may desire to use it, then it is regarded as accomplishing a public purpose, for which the land may be condemned. But when the road, after being laid out, becomes the property of the applicant, from which he may lawfully exclude the public, then the use is strictly private, and the law authorizing the condemnation of property is void." Lewis, Em. Dom. 167. Speaking of private cartways over which the public are allowed to pass, the author says: "The roads here provided for are quasi public, and have been sustained as a valid exercise of the power of eminent domain. * * * It has never, we think, been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified." Id. A statute similar to section 2057, as amended by chapter 46, p. 97, Laws 1887, was enacted by the Legislature of Pennsylvania for the benefit of owners of land upon which there were deposits of anthracite coal. In Waddell's Appeal, 84 Pa. 90, the validity of the act was discussed and denied, because the way authorized to be opened was not for the use of the public. The Supreme Court of Indiana, in Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399, said: "Concede that the public exigency requires that a way should be opened to every man's farm, and that the state may and should provide for the establishment of a public road or highway to enable every citizen to discharge his duties and travel to and from his farm; it does not follow that such ways should be private and owned by the party applying for them. If it would be of public utility to establish the road, then it should be a highway. If not, then the right of eminent domain cannot be exercised to establish it. It is not the amount of travel, the extent of the use of a highway by the public, that distinguishes it from a private way or road. It is the right to so use or travel upon it—not its exercise." In a well-considered opinion delivered by Dillon, C. J. (Bankhead v. Brown, 25 Iowa, 540), it is said: "Could not the plaintiffs in this case, after having procured the road in question, abandon it at their pleasure? Could they not relinquish

it to the defendants without consulting the board of supervisors? If this is so, does it not incontestably establish that it is essentially private? For it must be private, if it is of such a nature that the plaintiffs can at their pleasure use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it."

The defendants' counsel, in an able and interesting argument before us, conceding the general principle governing the right to take private property or impose burdens thereon, insist that, by reason of the peculiar conditions developed by the affidavits in the record, the use for which the plaintiff's land is sought to be subjected to the easement is public in its character. They call to our attention the large and valuable timber standing upon the mountains of western North Carolina, the removal and marketing of which brings wealth into the state and opens the land to cultivation and homes for the people now there and who are coming into that section of the state. They say that while the logs may be hauled over the mountain roads, but at very large expense, the portions of the trees, limbs, tops, etc., unfit for lumber, which are now wasted, may be made useful and valuable for many purposes, and that it is their purpose to establish tanneries and factories for utilizing these products, etc.; that by these means the revenues of the state will be increased, the development of the natural resources encouraged, immigration brought into that section, and many other benefits accrue to the public. These views, with the facts upon which they were based, were presented with much force by counsel. They have received, as they were entitled to, most careful consideration. They have been made in other cases in other courts. They invite courts to find in the term "public use" a broader and larger meaning. Their persuading and almost compelling force may be seen in the legislation of the states and the decisions of the courts. While they have in some cases stimulated material growth and development, it is manifest that valuable private property rights and stores of natural wealth and resources for feeding, clothing, and making comfortable the rapidly increasing population have been sacrificed to them; that great and dangerous monopolies have been fostered by the liberal construction put upon the term "public use." It has sometimes happened that a stubborn and possibly sentimental owner of land has stood in the way of the development of the country, and of the impatient, strenuous promoter and industrial pioneer. It may be that his rights have not received, either in the Legislature or the courts, the consideration to which they were entitled. It is conceded that courts and authors have found much difficulty in defining the term. It does not concern us to attempt to do so to any other or further extent than is necessary to a decision of this appeal. Mr. Lewis, after an interesting discussion of the subject, says: "Perhaps no better example of a public use can be given than that of the ordinary highway, when the easement or right of way vests in the public for the common and equal use of all." Section 166. The terms upon which the public may use the highway are, of course, subject to legislative regulation, as on railroads or steamboats, by paying the prescribed fare, going upon and leaving at regular stations, and conforming to those reasonable regulations made by the corporation or other agency for the protection of the public, and on the ordinary country highways by conforming to those statutes or immemorial customs which have become the "law of the road," etc. In Pittsburg, etc., R. Co. v. Iron Works (W. Va.), 8 S. E. 453, 2 L. R. A. 680, the term "public use," as applied to the right of a railroad company to condemn private property for the purpose of constructing a lateral road to reach a particular customer, is discussed and the authorities reviewed; Johnson, P., concluding his opinion: "As far as the public is concerned, when what they need is for 'public use,' they have a right to invoke the exercise of eminent domain; but, in so far as that which concerns them as to their private interests, their profits, and gains is concerned, they stand as individuals, or as merely private corporations in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain." In reply to the argument of counsel that by such holding a deadly blow was aimed at the industries of the state, the learned judge said: "It seems to us, if railroad corporations were permitted ad libitum to do what this defendant in error asks to be done, no deadlier blow could be dealt at the private rights of the citizen." "The true criterion by which to judge of the character of the use is whether the public may enjoy it by right or only permission, and not to whom the tax or toll for supporting them is paid." Note 2 L. R. A. 682; 15 Cyc. 583; Board of Health v. Van Haesen, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114.

The question presented by this appeal, and the argument to sustain the right, was discussed in Healy Lumber Co. v. Morris (Wash.) 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964. A statute similar to ours, as amended, was enacted, enabling owners of timbered lands to condemn a right of way for tramroads and railroads for the purpose of transporting timber to market. The exact question before us was presented; Dunbar, J., saying: "This case presents the important question, deserving the most serious consideration, involving, as it does, the respective interests of private rights and of property of the state sought to be protected and fostered through the exercise of the

high prerogative of sovereignty; the former being guarantied by the fundamental law and the latter being the subject of universal interest and concern. Eminent domain is the right or power of a sovereign state to appropriate private property. * * * The learned attorneys for appellant have favored the court with an exhaustive and earnest argument in their brief, and a painstaking showing is made of the magnitude of the lumbering business and interests of this state and the effect that it presumably has upon the general prosperity of the commonwealth; and we are urged to announce a broad and statesmanlike principle in determining this question, and one which would further business prosperity of the state, rather than one which would hamper and retard it. But the court cannot invade the province of the lawmaking power of government and intrude into its decrees its opinions on questions of public policy. Its duty is to strictly recognize its legal limitations and confine itself to the narrower duties of interpretation and construction." To the argument that a liberal construction should be given to term "public use," because in the section of the state in which the proposed road is to be built the removal of the standing timber is promotive of the improvement of that section, the answer is that "the Constitution is the fundamental law. Its enactments, whether they constitute grants or limitations, are presumed to be stable and uniform, and to constitute a check on the more mutable sentiment and actions of members of different Legislatures. And it seems to us that the result of such construction would be a virtual removal of any constitutional inhibition on legislative power in this respect." Id. There is a distinction between public policy or public welfare and public use. "It might be of unquestionable public policy and for the best interest of the state to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment to labor, stimulate trade, and increase property values, and thereby increase the revenues of the state, even if the enterprises were purely private; for such is the relation, under our form of government, between public and private prosperity that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this was not the kind of public use that was within the minds of the framers of the Constitution, and it seems to us that the logic of those courts which have sustained appellant's contention is justified solely on the grounds of public policy." Id. The question is exhaustively discussed in Bloodgood v. M. & H. R. R. Co., 18 Wend. 9, 31 Am. Dec. 313, in which it is said: "When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term, 'public improvement,' is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations upon the benefits which may result to localities from the use which a man or set of men propose to make of the property of another, we are afloat, without any certain principle to guide." Judge Cooley says: "It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such case would be the property of him for whom it was established." Const. Lim. 652. To the suggestion that only an easement for the period of five years is imposed upon plaintiff's land, and that such period is a reasonable time to remove the timber, we quote the same eminent authority: "And, although the owner would not be deprived of the fee in the land, the beneficial use and exclusive enjoyment of his property would in greater or less degree be interfered with. Nor would it be material to inquire what quantum of interest would pass from him. It would be sufficient that some interest, the appropriation of which detracted from his right and authority and interfered with his exclusive possession as owner, had been taken against his will; and, if taken for a purely private purpose, it would be unlawful." Id. Again he says: "The public use implies a possession, occupation, of the land by the public at large or by public agencies." Id. Without pursuing the subject further, we entertain no doubt that the amendment made to sections 2056, 2057 of the Code by chapter 46, p. 97, Laws 1887, in so far as it authorizes owners of timber lands to condemn a right of way for tramways or railways over the lands of other owners for the exclusive use of the owners of the timber, is unconstitutional and invalid. This conclusion does not affect the right of condemnation of a cartway, as provided by the statute, over which all persons may pass, etc. We see no objection to the extension of this privilege to owners of timber lands under the same limitations and conditions as persons settled upon or cultivating lands. It is manifest that the defendants are not seeking this restricted right. They say that it is their purpose to construct the railway for their exclusive use. This concession deprives them of the benefits of the statute, eliminating the amendment of 1887.

Counsel call to our attention the decisions of this court sustaining the drainage acts. Without discussing these acts, it is sufficient to say that they expressly confer upon all persons having lands adjoining or capable of drainage through the drains or canals au-

thorized to be opened the right to avail themselves of these benefits. This distinguishes those statutes from the one under discussion. It is also contended that it is peculiarly the province of the Legislature to say what is a public use, and that its decision may not be reviewed by the courts. While it must be conceded that expressions are to be found in decided cases, several of which are cited by counsel, and in some text-books, which seem to sustain this contention, it will be found that they are subject to the limitation that the question is primarily one for the Legislature, but its decision is not conclusive; otherwise, the Legislature could nullify the principle protecting private property. The correct view is stated by Judge Cooley: "The question what is a public use? is always one of law. Deference will be paid to the legislative judgment as expressed in enactments providing for the appropriation of property, but it will not be conclusive." Const. Lim. 660; P., W. & K. R. R. v. Iron Works, supra. "The question whether a particular use is public or not is ultimately a question for the courts. This is necessarily true, in view of the constitutional provisions of the different states that private property can be taken only for a public use, since the interpretation of constitutional provisions is within the province of the judiciary." 10 Am. & Eng. Enc. 1066; Call v. Wilkesboro, 115 N. C. 337, 20 S. E. 468, in which Shepherd, C. J., says: "Whether a particular use is public or not, within the meaning of the Constitution, is a question for the judiciary"—citing Lewis on Em. Dom. 185; Mills on Em. Dom. 10, 11. The distinction is this, whether a use is public is for the ultimate decision of the courts. If the use is public, the expediency or necessity for establishing it is exclusively for the Legislature. In the discussion of the questions presented, we have assumed that the provisions limiting the power of the Legislature to take private property were constitutional. As is well known to the profession, no such provision is found in our state Constitution; but, since the opinion of Ruffin, C. J., in R. R. v. Davis, 19 N. C. 451, the principle has been treated as fundamental, and as existing with the same universal application as if imbedded in the Constitution. Rodman, J., in Johnston v. Rankin, 70 N. C. 555, says: "The principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina." R. R. Co. v. Platt Land, 133 N. C. 266, 45 S. E. 589. While, as found by his honor, it is reasonable, and even necessary to the successful operation of defendant's enterprise, that they carry their timber and timber products over plaintiff's land to reach the markets, and while there may be no injustice to him in permitting them to do so, and while his opposition may be either sentimental or selfish, yet the courts may not violate or weaken a fundamental principle, upon the strict observance and enforcement of which the security of all private property, so necessary to the safety of the citizen, is dependent. The guaranties upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the others is weakened.

The judgment of his honor, continuing the injunction, must be affirmed.

(139 N. C. 556)

STATE v. DEWEY.

(Supreme Court of North Carolina. Oct. 3, 1905.)

1. CRIMINAL LAW—BILL OF PARTICULARS—DISCRETION.

The refusal of a bill of particulars in a criminal case is in the discretion of the court, reviewable only for gross abuse thereof.

2. SAME—PREMATURE APPEAL.

An appeal from refusal of a bill of particulars in a criminal case, if allowable, cannot be taken at once, but only in case final judgment is against defendant.

3. SAME—TRIAL NOTWITHSTANDING APPEAL.

The taking of an appeal by defendant from the refusal of a bill of particulars before the time that it will lie does not disable the trial court from proceeding with the case.

4. SAME — REQUEST FOR WRITTEN INSTRUCTIONS—ORAL REMARKS.

For the judge, before giving his written charge, to state orally that this is important to defendant and the state, and in arriving at a verdict they must not be governed or swayed by sympathy, prejudice, or passion, but must render such a verdict as is warranted by the evidence, is not a violation of Code, § 414, requiring a judge, when requested, to put his instructions in writing; "instructions" relating to principles of law applicable to the case after the finding of facts.

5. SAME.

Nor is it an instruction, within such section (Code, § 414), for the court, on the jury returning into court and stating that they cannot agree, to tell them that he can be of no aid to them on the facts, that they are the sole triors thereof, but if it is on a point of law he will be glad to aid them, and that it is the duty of a jury to reconcile the testimony where there is a conflict, if they can, and, if they cannot reconcile the testimony, then it is their duty to adopt the most plausible theory of the evidence in arriving at their verdict, but that the state must satisfy them beyond a reasonable doubt; such remarks being mere general observations as to the province of the court and jury as to findings of fact.

6. SAME—EXCEPTIONS.

Where, after the court had made remarks to the jury on their returning into court, including the statement that if they could not reconcile the testimony they must adopt the most plausible theory of the evidence, and they had again retired, defendant's counsel merely called attention to the fact that the court had left out the question of reasonable doubt, whereupon the court recalled the jury and repeated what he had said, and his charge in full, and added that the state must satisfy them beyond a reasonable doubt, defendant's general exception then taken cannot be treated as made to the use of the word "plausible."

7. SAME—STATEMENT OF CASE ON APPEAL.
There is no authority for appellant to have his "statement of case on appeal" sent up by the clerk, to contradict the judge.
Hoke, J., dissenting.

Appeal from Superior Court, Craven County; Webb, Judge.

Thomas W. Dewey appeals from a conviction. Affirmed.

Aycock & Daniels, F. I. Osborne, A. D. Ward, and P. M. Pearsall, for appellant. W. W. Clark, D. L. Ward, O. H. Guion, and the Attorney General, for the State.

CLARK, C. J. The defendant, indicted for embezzlement, applied to the solicitor for a "bill of particulars," who replied that all the information he could give was contained in the books of the Merchants' Bank of Newbern, of which he was advised the defendant and his counsel had made a full and complete examination. The defendant then applied to the judge at the succeeding term (April, 1905), who, upon the hearing of the motion, declined the same, and the defendant appealed. Such refusal is not appealable, except, possibly, in a case of gross abuse of discretion. State v. Brady, 107 N. C. 826, 827, 12 S. E. 325; State v. Bryant, 111 N. C. 695, 16 S. E. 326; Townsend v. Williams, 117 N. C. 337, 23 S. E. 461; Goldbrick Case, 129 N. C. 657, 40 S. E. 71. In 1 Bishop, New Criminal Procedure, § 643, it is said: "The application for a bill of particulars is addressed solely to the judicial discretion; hence his decision thereon is not open to revision by a higher tribunal." Com. v. Wood, 4 Gray, 11. To the same purport, State v. Nagle, 14 R. I. 333, citing Com. v. Giles, 1 Gray, 466; Chaffee v. Soldan, 5 Mich. 242; Com. v. Wood, supra; State v. Hood, 51 Me. 363. In People v. McKinney, 10 Mich. 53, which was an indictment of the State Treasurer for embezzlement, the court fully discusses the practice, and says that, while bills of particulars should be freely allowed, especially in indictments for embezzlement, the granting of such orders is in the discretion of the trial judge and not reviewable, except, possibly, when there is a palpable and gross abuse of such discretion. State v. Van Pelt, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760, in no wise controverts this practice, which is uniform in all jurisdictions, but merely holds that a defective indictment cannot be cured by the bill of particulars, and that, when the latter is furnished, the state is restricted to its proof "to the items therein set down." If an appeal was permissible, it was premature. The defendant should have noted his exception, and, if the final judgment were against him, he could have had the refusal reviewed on appeal therefrom, with the other errors assigned, whereas, if the final judgment were in his favor, the appeal from the refusal of the order would be useless. The courts will not permit the needless delays and expense which would result from entertaining fragmentary and premature appeals, but will disallow all such appeals. Hines v. Hines, 84 N. C. 125; Guilford v. Ga. Co., 109 N. C. 312, 13 S. E. 861, and other cases collected in Clark's Code (3d Ed.) pp. 740, 743. Besides, the appeal is now useless, for, the motion for a bill of particulars being a discretionary matter and its refusal not res judicata, the motion was renewed at the July term and was granted, and the defendant had the benefit of the bill of particulars before his trial at said term.

This case came on for trial at July term, 1905, of Craven superior court. The defendant's motion for a continuance at April term was granted. At July term he again moved for a continuance because of the above-mentioned appeal from the refusal of the motion for a bill of particulars. Such appeal, as we have seen, did not lie, and the court, besides, at that time allowed the bill of particulars, which was all that the defendant could have obtained if this court had entertained the appeal and held with the defendant. It is only when the judgment is final and disposes of the entire controversy that an appeal transfers the cause to the appellate court and disables the court below from proceeding therein. Guilford v. Ga. Co., supra; Green v. Griffin, 95 N. C. 50; Carleton v. Byers, 71 N. C. 335; Isler v. Brown, 69 N. C. 125. The case being in the lower court, the granting or refusal of a continuance is a matter necessarily in the discretion of the trial judge, and not reviewable, certainly in the absence of gross abuse of such discretion. Slingluff v. Hall, 124 N. C. 397, 32 S. E. 739; Bank v. Mfg. Co., 108 N. C. 282, 12 S. E. 741; Dupree v. Insurance Co., 92 N. C. 417; Gay v. Brookshire, 82 N. C. 411; State v. Scott, 80 N. C. 365; State v. Lindsey, 78 N. C. 499; Moore v. Dickson, 74 N. C. 423; Austin v. Clarke, 70 N. C. 458, and citations thereto in the annotated edition.

The court was requested to put its instructions to the jury in writing. "Before reading the written charge to the jury, the court stated orally that this was an important matter to the defendant and the state, and in arriving at a verdict they must not be governed or swayed by sympathy, prejudice, or passion, but render such a verdict as is warranted by the evidence." There is nothing prejudicial to the defendant in this. Nor was it in violation of section 414 of the Code, which requires a judge, when requested in apt time, to put his instructions to the jury in writing. The word "instructions," as there used, relates to the principles of law applicable to the case, and which would influence the action of the jury, after finding the facts (which is their sole province), in shaping their responses to the issues submitted to them. Lowe v. Elliott, 107 N. C. 718, 12 S. E. 383; Drake v. Connelly, 107 N. C. 463, 12 S. E. 251; Dupree v. Insurance Co., 92 N. C. 417. In Currie v. Clark, 90 N. C. 361, Smith, C. J., says: "It is not the

policy or purpose of the statute, nor does the language used bear such rigorous construction as to forbid any and all oral expressions from the presiding judge. This would be to subordinate substance to form and subserve no useful purpose. * * * The instructions to be written and read are such as expound the law and are reviewable on appeal." In Jenkins v. Railroad, 110 N. C. 442, 15 S. E. 196, it is said: "The defendant had a right to insist on the entire charge as to the law being put in writing." And the reason there given is "that in the event it should be handed to the jury on their retirement (Laws 1885, p. 216, c. 137) or to avoid differences between counsel in making up the case on appeal." In the more recent case of State v. Crowell, 116 N. C. 1058, 21 S. E. 502, the above excerpt from Smith, C. J., in Currie v. Clark, is cited and approved. 2 Thompson on Trials, § 2380, says that "directions which are deemed instructions within the meaning of such a statute (similar to our Code, § 414) are statements of rules of law governing the matter in issue."

After the jury had been out some time, they returned into court and one of them said they could not agree. The court then told them that "he could be of no aid to them upon the facts; that they were the sole triors of the facts. If it was upon a point of law, he would be glad to aid them; but upon the facts they must decide. And he further stated it was the duty of a jury to reconcile the testimony where there was a conflict, if they could, and if they could not reconcile the testimony then it became their duty to adopt the most plausible theory of the evidence in arriving at a verdict. The jury then retired, and the counsel for defendant called the attention of the court to what the defendant claimed was an error in leaving out the question of reasonable doubt and fraudulent intent. The court immediately called the jury back and restated to them what he had just told them, and further stated that the state must satisfy them beyond a reasonable doubt of the fraudulent intent at the time of appropriating the funds, if you find he did appropriate the funds. The court then read the second time his charge and the special instructions of the defendant. Defendant excepted." It does not appear that the judge's remarks were oral; but, if so, they were not instructions upon the law applicable to the facts of this case, but merely general observations as to the province of the court and jury as to finding facts. The defendant made no objection on that ground, nor to the use of the word "plausible," and it is fair to assume that the judge would have corrected that, if the defendant had thought it prejudicial and objected, for the judge called the jury back and corrected his charge in the only particular specified. The judge not only charged as asked, but he again gave the special instructions asked by defendant, previously given, among them these: "Unless the jury is satisfied beyond a reasonable doubt that at the very moment of conversion the defendant had a fraudulent and felonious intent, they will find the defendant not guilty." And further: "A reasonable doubt of guilt may arise from a want of evidence." He then repeated his charge in full (which is entirely correct). The entry thereupon, "Defendant excepted," applies only to giving the charge and special instruction, and, besides, is void as "broadside." If the use of the word "plausible" was not happy, it was certainly not excepted to; and, if it had been, the inadvertence, if any, was amply cured by the full, correct, and explicit charge which was thereafter repeated. State v. McNair, 93 N. C. 631; State v. Keen, 95 N. C. 648.

After a full and careful consideration of all the exceptions (some of which were taken only "out of abundant caution" and need not be noticed), we find nothing prejudicial to the defendant entitling him to another trial. He was cashier of the bank. He was more familiar than any one else with the books which were relied on to show his changes and false entries therein and his embezzlements. He and his able counsel had full access to them in preparing his defense, and it was further in evidence that he fled the state and was absent many months, and that while so absent he wrote a letter seeking to compromise matters and escape criminal punishment, in which he fully admitted his guilt. In State v. McDonald, 133 N. C. 680, 45 S. E. 582, the court was not inadvertent to chapter 226, p. 237, Laws 1889, which amended section 1014 of the Code, by inserting after "fraudulently" in the fourth and sixth lines thereof, the words "or knowingly and willingly misapply or"; but the bill of indictment in that case was drawn solely under section 1014 as it was before amendment, and did not contain the charge authorized by the aforesaid act of 1889. The charge of the court in this case is correct, within the ruling in McDonald's Case, which was more lenient to the defendant than it would have been had the bill been drawn as authorized by the amendment of 1889.

We cannot pass over the irregularity in sending up the appellant's "statement of case on appeal." This has no proper place in the record, and we cannot consider it. It should not have been sent up by the clerk below, nor have been docketed as part of the transcript here. The statute governs such matters. It provides that, when the parties cannot agree upon a case on appeal, the judge "settles" the case on appeal, and that is the only "case" the appellate court can consider. It is true that the appellant can file his exceptions to the charge in 10 days after court, and is entitled to have them sent up, though, if such exceptions embody recitals of fact, the court, as to that, will be controlled by the judge's statement of facts. If such exceptions to the charge are refused by the

judge, the appellant can have them brought up by certiorari. Lowe v. Elliott, supra. But the practice here attempted of sending up the "appellant's statement of case" to contradict the judge is contrary to the statute and would lead to endless confusion. It cannot be entertained.

No error.

HOKE, J. (dissenting). I differ from the court in its decision of this case, and am of opinion that the defendant has not had his cause tried in accordance with law. The defendant in apt time and in proper manner requested the court below to put its instructions to the jury in writing, and where this is done the statute provides that the judge shall put his instructions in writing and read them to the jury as written, and sign and file the same as a part of the record in the cause. Code, § 414. The facts which transpired on the trial in respect to this request of the defendant are embodied in the case on appeal as follows: The judge at first put his charge in writing and read it to the jury, and the written charge seems to be free from error. The case on appeal then proceeds as follows: "After the conclusion of the charge, and after the jury had been out some time, they returned into court and one of them stated they could not agree. The court stated he could be of no aid as to the facts; that they were the sole triors of the facts; if it was upon a point of law, he would be glad to aid them, but upon the facts they must decide; and further stated it was the duty of a jury to reconcile the testimony where there was a conflict, and if they could not reconcile the testimony then it became their duty to adopt the most plausible theory of the evidence in arriving at a verdict. The jury then retired, and counsel for the defendant called the attention of the court to what defendant claimed was an error in leaving out the question of reasonable doubt and fraudulent intent. The court immediately called the jury back and restated to them what he had just told them, and further stated that the state must satisfy them 'beyond a reasonable doubt of the fraudulent intent at the time of appropriating the funds, if you find he did appropriate the funds.' The court then read the second time his charge and the special instructions of defendant." Defendant excepted. Here the judge laid down orally an erroneous proposition as to how the jury should weigh the evidence and reach a conclusion. The jury having again retired and the error being called to his attention, his honor recalled the jury and restated the erroneous proposition, and then added: "The state must satisfy the jury beyond a reasonable doubt of the fraudulent intent at the time of appropriating the funds, if you find he did appropriate them." The judge below then again read his written charge to the jury. This erroneous proposition was nowhere in terms withdrawn from the jury. We have it, then, that the judge twice told the jury orally that it was their duty to reconcile the evidence if they could, and if they could not it was their duty to adopt the most plausible theory of the evidence in arriving at a verdict; in other words, to convict the defendant, if that was the most plausible conclusion. And twice he tells them that the state must satisfy them beyond a reasonable doubt, once in the written charge, and once orally. To which direction did the jury give the most heed, and what rule has guided them to the conclusion which they reached? In my judgment, unless expressly withdrawn, this would amount to a reversible error, if the entire deliverance of his honor had been in writing.

The counsel for the defendant differ from his honor as to what he did say in his spoken charge, but this is really of no moment on the question now considered, nor is it important whether the oral part of the charge was erroneous or not. The case declares that instructions embodying legal propositions have been twice spoken to the jury, and nowhere expressly withdrawn, when the law requires that the entire charge shall be put in writing. North Carolina has been extremely fortunate in having superior court judges who are capable, learned, and impartial; but we know that there have been, and may be again, occasions and instances where the due enforcement of this statute was the only guaranty that a citizen had that his property, liberty, life, and character would be dealt with in accordance with the law of the land. It is to my mind of vital importance in the due administration of justice, and its provisions should be in no wise disregarded or ignored. The proposition here stated will find support in Currie v. Clark, 90 N. C. 365; State v. Young, 111 N. C. 715, 16 S. E. 543; Wheatley v. West, 61 Ga. 401; Thompson on Trials, §§ 2375–2377. In Currie v. Clark, supra, it is said: "Moreover, the statutory mandate positively forbids any verbal explanatory comments which may affect or modify the written language and tend to mislead the jury as to its purport or aim. The propositions embodied in the writing must stand in their assumed form, not added to or diminished by any contemporary and extraneous words falling from the lips of the judge. The jury must gather the meaning of the instructions solely from the written words in which they are conveyed, as must the revising court in passing upon their correctness in law." In State v. Young, supra, it is held that "at the request of counsel, made in apt time, the court must put its entire charge to the jury in writing, and it is error to charge them orally upon any point when they return into court for instructions." The only decision which I can find that tends to support a contrary view is State v. Crowell, 116 N. C. 1052, 21 S. E. 502, and this is more apparent than real. In Crowell's Case the judge had put his charge

in writing and read the same to the jury as the statute requires. The defendant had preferred a prayer for instructions that the case was barred by the statute of limitations. This prayer was refused; the judge saying to the jury that "the statute of limitations has nothing to do with the case." It was simply a refusal to submit an instruction preferred in writing, by which the defendant got the benefit of an exception, and was in no wise given, so that it could in any way influence the verdict, which was rendered on the facts submitted for the jury's consideration.

It is answered that this objection is not open to the defendant, because no exception was taken; but I do not so understand the record. The very feature of the trial to which this objection is urged is set out in the case on appeal and exception duly noted. I am of opinion that the statute which should govern cases of this kind has not been complied with, and that the defendant is entitled to a new trial.

(139 N. C. 337)

HICKS v. KENAN.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. APPEAL — STATEMENT OF EXCEPTIONS AND ASSIGNMENT OF ERRORS.

Under Code, § 550, requiring appellant in his case on appeal to state separately, in articles numbered, the errors alleged, and Supreme Court Rule 27 (Clark's Code, p. 920; 39 S. E. vii), providing that appellant shall set out in the statement of the case his exceptions, briefly and clearly stated and numbered, an appeal will not be affirmed, on the ground that such statute and rule have not been complied with, where the exceptions are separately stated and numbered, though not brought together at the end of the case; the error intended to be assigned being plainly apparent.

2. RELEASE — CONSTRUCTION — DEBTS AFFECTED.

K. was indorser on the note of H. to A., and had received an account as collateral security from H. for a payment on the note. Thereafter an agreement was made between H., as party of the first part, and certain others, as parties of the second part, reciting that they should retain certain merchandise received from H., in satisfaction of their "notes, drafts, and accounts." In the body of the instrument the name of K. appeared as a party of the second part; but it was signed by him, "K., Representing A." K. had no claim against H., except on account of the indorsement. *Held*, that the contract was by A., through K. as agent, and that K.'s claim against H. on account of his payment as indorser was not satisfied.

Appeal from Superior Court, New Hanover County; O. H. Allen, Judge.

Action by R. W. Hicks against Mary H. Kenan, executrix. Judgment for plaintiff. Defendant appeals. Reversed.

Rountree & Carr and Iredell Meares, for appellant. E. K. Bryan, for appellee.

Motion to Affirm

PER CURIAM. Plaintiff moved in this court to affirm the judgment upon the ground that defendant had not stated her exceptions nor assigned errors as directed by rule 27 of this court. Code, § 550, required, and it is the law now, that the appellant in his case on appeal should "state separately, in articles numbered, the errors alleged." Rule 27 is to the same effect. Clark's Code, p. 920; 39 S. E. vii. It provides that "every appellant shall set out, in the statement of the case served on appeal, his exceptions to the pleadings, rulings, and judgment of the court, briefly and clearly stated and numbered. * * * No other exceptions than those set out or filed, and made a part of the case or record, shall be considered by this court," with certain reservations therein specified. The statute and rule are plainly worded and should be easily understood. They require an assignment of the errors relied on to be tabulated and inserted in the case or record, preferably at the end. This is a reasonable requirement, and a usual one in appellate proceedings. Many courts in other jurisdictions prescribe as the penalty for nonobservance a dismissal of the appeal. We are not disposed to enforce the rules of this court harshly, but with all the leniency consistent with the prompt and orderly transaction of the business of the court. It was clearly intended that the statute and rule should be observed. Compliance with them will greatly facilitate the hearing and decision of cases upon their real merits. It will be best for counsel, the court, and suitors if due heed is given to the duty of appellants in this respect. This court has more than once called attention to this provision of the law and has endeavored to impress upon those concerned the importance of preparing cases in accordance therewith. Taylor v. Plummer, 105 N. C. 56, 11 S. E. 266; McKinnon v. Morrison, 104 N. C. 354, 10 S. E. 513; Wilson v. Wilson, 125 N. C. 525, 34 S. E. 685; State v. Blankenship, 117 N. C. 808, 23 S. E. 455. Many of the records in this court show a strict compliance with the rule, and this is sufficient evidence of the fact, not only that it has not escaped the attention of the bar, but that its provisions are well understood. We hope a word to the wise and prudent practitioner will be quite sufficient, and that in the future the transcripts sent to this court will be entirely free from this defect.

In this case the exceptions have been separately stated and numbered, though they are not brought together at the end of the case. While this is not a strict compliance with the statute and rule, the error intended to be assigned is so plainly apparent that we deny the motion; but at the same time we have deemed it a fit occasion to again remind members of the bar that there still exists the necessity of preparing cases on appeal in accordance with the simple requirement of the statute, the importance of which has been emphasized by formulating its substance into a rule of this court. We deny the motion, and the case will now be heard upon its merits.

Motion denied.

On the Merits.

Plaintiff sued defendant, as executrix of W. R. Kenan, deceased, to recover $136.25 and interest, a part of the proceeds of the collection of an account due by W. W. Blair to R. W. Hicks and assigned by the latter to H. C. McQueen, W. R. Kenan, and C. A. Healy; that being the amount received by the said Kenan. Plaintiff introduced in evidence the following paper:

"Exhibit A.

"Wilmington, N. C. Nov. 23, 1901.

"Messrs. H. C. McQueen, W. R Kenan, and C. A. Healy: I hereby transfer the account, $595, owing me by W. W. Blair, same to be divided between yourselves as interests may appear. R. W. Hicks.

"Above amount is correct and approved.

"W. W. Blair."

Plaintiff contended that the account was assigned as collateral security for a debt owing by Hicks to Kenan, McQueen, and Healy, and not as a payment.

Mr. Bryan, a witness for the plaintiff, testified: "Some time after the execution of the transfer of Blair's account or duebill, I saw Hicks, Healy, McQueen, and Kenan sign the paper which has been offered in evidence and marked 'Exhibit B.' In December, 1901, or January, 1902, there was a meeting at Mr. Kenan's office of the Murchison National Bank, W. R. Kenan, C. A. Healy, representing the molasses contracts of Hicks, myself, and Hicks with reference to his indebtedness. Hicks was then indebted to a large amount. Kenan was present and did most of the talking. He was the indorser to the Atlantic National Bank for Hicks. I asked what the creditors demanded of Hicks, and Kenan said they wanted Hicks to execute a mortgage on his store, etc. Hicks was present. They were threatening Hicks with prosecution. I submitted a proposition, which was finally consummated in the paper which I hold in my hand, marked 'Exhibit B.' After the execution of the paper, I demanded the Blair account of McQueen, which had not been paid at that time. I afterwards met Kenan and made demand on him for his part, and told him that I had been informed that it had been paid up, and he said that he would not turn it over. I then asked him if it was not put up as collateral security for the debt which Hicks owed him and McQueen and Healy. I called his attention to the Blair paper, and he said that it was, and that he would not turn it over because he understood he was to keep the paper and apply it to the debt. He said, 'If you get it, it will be by lawsuit.' He admitted that it was put up as security for the debts referred to in agreement marked 'Exhibit B.' " To each and every part of the foregoing testimony defendant objected, the objection was overruled, and defendant excepted. Cross-examination: "At the time agreement B was signed, the paper marked 'A' was not mentioned. I did not know of it at that time, and it was not discussed at the time Exhibit B was executed. The drafts and notes referred to in Exhibit B are the drafts and notes Hicks had given for the molasses, and there is nothing in the agreement about the account owed by Blair. I told Hicks to surrender all claim for his (Hicks') right to an accounting from the Murchison National Bank, Kenan, and Healy for the molasses that Hicks had turned over to them as security for his indebtedness to them, and let them keep the molasses in full settlement of their indebtedness against Hicks, and I thought they would be satisfied. Neither Hicks nor Kenan, McQueen, nor Healy, made mention of the paper A until afterwards. Kenan came into it by reason of being an indorser of Hicks at the Atlantic National Bank for $12,000 or $13,000; he having paid the note which he was holding. When I talked with Kenan he got mad, and said he had lost more than $2,000 by signing the note. Hicks' contention is that the $2,000 lost by Kenan was settled by agreement B, but not what he got on the Blair account, which Kenan now owes Hicks. The Blair duebill was not paid until I made demand for its return, but was paid at the time Kenan admitted to me it was put up as security."

Plaintiff introduced the agreement known in the case as "Exhibit B." Defendant objected to its introduction. Objection overruled and defendant excepted. It was provided in the paper, dated February, 1902, which is called in the case "Exhibit B" and is the agreement between Hicks and his creditors, that the latter should keep certain molasses, which Hicks had theretofore delivered to them as security for their claims —notes, drafts, and accounts—and the creditors should fill certain orders for molasses which Hicks had already taken, and that what was left should be the property of the creditors and be taken by them in full satisfaction and payment of their said claims, and they should make no further demand upon Hicks on any claim then existing against him. This agreement was signed as follows: "R. W. Hicks. C. A. Healy, by Cyrus Healy, Attorney, W. R. Kenan, Representing Atlantic National Bank. H. C. McQueen, President of Murchison National Bank." Plaintiff rested.

At the close of plaintiff's testimony defendant moved to dismiss and for judgment as in case of nonsuit under the statute. Motion overruled, and defendant excepted. There was no testimony for the defendant. Verdict for plaintiff. Motion for new trial overruled, and defendant excepted. Judgment for plaintiff, and appeal by defendant.

WALKER, J. (after stating the facts). The decision of this case must depend very much upon the form of the writing containing the agreement of Mr. Hicks with his creditors and the mode of its signature by

Mr. Kenan. We think that, when thus considered even, if necessary and permissible, in connection with the testimony of Mr. Bryan, it is quite conclusive that the defendant's intestate did not sign the contract for himself as a principal, but for the Atlantic National Bank, for whom he stood in the transaction. Mr. Kenan annexed to his signature the words "Representing Atlantic National Bank," and it would require extremely strong words in the body of the instrument to control the effect of that form of signature, and we do not think any such words are to be found there. The contract was intended to be a satisfaction of all notes, drafts, and accounts, and at that time Mr. Kenan did not hold any claim against Mr. Hicks thus evidenced. He was indorser on Mr. Hicks' note to the Atlantic National Bank, and for this reason, we presume, he was in the meeting of creditors to represent the bank and incidentally to protect his own interests. The fact that his name appears as one of the parties of the second part (Hicks being the party of the first part) can make no difference, and should not impose a liability on him which would not otherwise exist, especially as he was careful to use words, namely, "Representing * * * Bank," which plainly exclude the idea that he was acting for himself, and as the insertion of his name in the body of the agreement may have been purely accidental. At any rate, we will not permit it to outweigh other parts of the instrument which clearly manifest the intent.

When an agent acts within the scope of his authority and professes to act in the name and behalf of his principal, he is not personally liable. This is the general and well-settled rule. Where the question of agency in making a contract arises, there is a distinction between instruments under seal and those not under seal or by parol. In the former case it is held the contract must be in the name of the principal and must purport to be his deed, and not the deed of the agent. In the latter case the question is always one of intent, and the court, being untrammeled by any other consideration, is bound to give it effect. As the meaning of the lawmaker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal, or with the name of the principal by the agent, or otherwise. Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Sun Pr. & P. Asso. v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366. In the last-cited case, at page 648 of 183 U. S., page 243 of 22 Sup. Ct. (46 L. Ed. 366), it is said: "The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so. Now, while Lord is referred to in the body of the first writing as an individual, he signed the agreement 'for the Sun Printing & Publishing Association.' Clearly this was a disclosure of the principal, and an apt manner of expressing an intent to bind such principal." The law as thus stated and applied has been adopted by this court and commended as having been approved by the best authorities and as containing in itself a just and true exposition of the principle which should govern in such cases. Fowle v. Kerchner, 87 N. C. 49. Ruffin, J., for the court, says in that case: "When the form of the instrument clearly indicates it to be done in behalf of another, the court must give it the construction that it is not the personal contract of the party signing the instrument, and no consideration respecting the plaintiff's remedy against any other party should prevail with the court to change the contract." Rice v. Gove, 22 Pick. 158, 33 Am. Dec. 724; Breath v. Haldimand, 1 Term Rep. 172; Deslandes v. Gregory, 105 E. C. L. (2 El. & El.) 610; Lyon v. Williams, 5 Gray, 557. Fowle v. Kerchner is a very strong authority, for in that case, if the defendants were not liable, then nobody was liable to the plaintiffs on the contract, and, besides, the defendants signed the contract in their individual names. See, also, Hite v. Goodman, 21 N. C. 364; Potts v. Lazarus, 4 N. C. 180; Meadows v. Smith, 34 N. C. 18. The case of McCall v. Clayton, 44 N. C. 422, is much like our case, and governs it in principle.

We are constrained to think this is a case of agency, and that the agency is disclosed upon the face of the contract. Such being the case, Mr. Kenan was not bound by any of its terms. This appears to us to be made perfectly clear when we examine the paper in connection with the oral testimony introduced. Mr. Kenan was merely indorser of the note of the plaintiff to the bank. He was in that capacity interested, it is true, in having the bank debt paid and adjusted in some way; but there was no reason why he should become personally a party to the paper in order to accomplish this end. If the bank was paid, he was exonerated by operation of law. The bank, after it had received payment in full, could not, of course, recover of him what his principal, Mr. Hicks, did not then owe. The evidence shows that Mr. Kenan had to pay $2,000 on the note, and we do not think it can be successfully shown to have been the intention of the parties that the bank should be paid out of the proceeds derived from the sale of the molasses, and that Mr. Kenan should lose his right to a security he held for any payment he may have made on the debt to the bank.

Mr. Kenan, as we have already said, did not hold any evidence of indebtedness against Mr. Hicks of the kind described in the contract (Exhibit B). If he had paid anything on the note in the bank, his claim against Mr. Hicks was for money paid to his use. It was the intention to discharge the particular indebtedness described, and not any obligation of Mr. Hicks to his surety, which was secured by collateral. The general question as to the construction of such contracts, and the liability of a party who has signed in a representative capacity, is fully discussed by Mr. Justice Connor in the recent case of Le Roy v. Jacobosky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977.

It is evident that Mr. Hicks was in very embarrassed circumstances, and was willing to surrender absolutely what he had already turned over to his creditors, provided he obtained a full acquittance from all further liability to them. The construction we have given to the agreement is in full harmony with this scheme, which the evidence shows to have been the one contemplated by the parties. It would not be just to the surety if we should hold that he must give up a security held by him for his indemnification simply because his principal had received property which may have been sufficient to satisfy his note, or to pay whatever sum was then due thereon, if the surety had already incurred liability for, or paid any part of, the debt. It would require the plainest sort of language to convey any such idea, and there is no reason why we should so hold, unless the intention to that effect has been clearly expressed.

So far we have confined ourselves to the nature of the transaction as disclosed by the contract and to certain phases of the evidence; but it seems from the latter that Mr. Kenan himself thought there was an understanding at the time the contract was made that he should keep the Blair account and apply it to the debt, and for this reason he refused to surrender it, and added, "If you get it, it will be by lawsuit." He then said that he had lost more than $2,000 by signing the note of Mr. Hicks to the bank. Besides the evidence shows that the Blair account was not mentioned when Exhibit B was written and signed, and it was not considered in coming to the agreement embodied in that paper. We think the court erred in overruling the motion to dismiss, even if the evidence be viewed most favorably for the plaintiff, which is required to be done in testing the validity of a motion to nonsuit.

The other question, as to the competency of the oral testimony introduced by the plaintiff to show that the account against Blair was assigned as collateral security, need not be considered, as a ruling upon that question is rendered unnecessary by our decision of the case upon its full legal merits in favor of the defendant. It may be well, however, on that point to refer to the cases of McDowell v. Tate, 12 N. C. 249, Knott v. Whitfield, 99 N. C. 76, 5 S. E. 664, Vestal v. Wicker, 108 N. C. 21, 12 S. E. 1037, and Terry v. Robbins, 128 N. C. 140, 38 S. E. 470, 83 Am. St. Rep. 663, which bear upon the question presented by the exception. The case first cited is very much like ours in its facts. For the sake of the argument we have treated the assignment as if it was a collateral security, and not a payment. There was error in the decision of the court as above indicated.

Error.

(129 N. C. 553)

STATE v. HORTON.

(Supreme Court of North Carolina. Oct. 24, 1905.)

1. HOMICIDE—NATURE OF OFFENSE.

Where one engaged in an unlawful act is free from negligence, and the act is not in itself dangerous, an unintentional homicide in the commission of the act is a criminal offense only where the act is malum in se, and not merely malum prohibitum.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 4.]

2. SAME.

A violation of Laws 1901, p. 557, c. 410, prohibiting hunting on another's land in certain counties without the owner's consent, is malum prohibitum, or wrong because made so by statute, and not malum in se, or an offense naturally evil as adjudged by the sense of a civilized community; and so an unintentional homicide, committed while so hunting, is not criminal where there was no negligence and the act is not in itself dangerous.

3. SAME.

Laws 1901, p. 557, c. 410, prohibiting hunting on another's land in certain counties without the owner's consent, was not designed to prevent accidental homicide, so as to render criminal an unintentional homicide committed while violating the act.

Appeal from Superior Court, Franklin County; Councill, Judge.

W. P. Horton was convicted of manslaughter, and appeals. Reversed.

Indictment for manslaughter. The jury rendered a special verdict, and such verdict and proceedings thereon are as follows: "That in the month of November, 1904, to wit, on the ——— day thereof, the defendant, W. P. Horton, was hunting turkeys on the lands of another; that the following local statute, enacted by the General Assembly of 1901, was in force at and in the place in which said defendant was hunting, to wit, chapter 410 of the Laws of 1901; that the said Horton, at the time he was so hunting, had not the written consent of the owner of said land or of his lawful agent; that while so engaged in hunting he killed Charlie Hunt, the deceased, but that said killing was wholly unintentional; that the shooting of the deceased was done while the defendant was under the impression and belief that he was shooting at a wild turkey; that the hunting engaged in by the defendant was not of itself dangerous to human life, nor was he reckless in the manner of hunting or of handling the firearm with which the killing was done; that hunting at that season was not forbidden under the general game law of the state, but was prohibited only by the special statute referred to; that the shooting from which the killing resulted was not done in such grossly careless or negligent manner as to imply any moral turpitude or to indicate any indifference to the safeguarding of human life; that, but for the said statute herein incorporated, the killing of the deceased by defendant does not constitute any violation of the law. If, upon the above findings of fact, the court should be of opinion that the defendant is guilty of manslaughter, we for our verdict find the defendant guilty of manslaughter; but, if the court should be of opinion that the defendant is not guilty, we for our verdict find that the defendant is not guilty." Upon this special finding, the court, being of opinion that the defendant was guilty of manslaughter, so adjudged, and ordered a verdict of guilty of manslaughter to be entered, and gave judgment that the defendant be imprisoned in the county jail of Franklin for a period of four months. Defendant excepted to the ruling of the court, and appealed from the judgment against him.

F. S. Spruill and W. H. Ruffin, for appellant. The Attorney General, for the State.

HOKE, J. (after stating the case). It will be noted that the finding of the jury declares that the act of the defendant was not in itself dangerous to human life, and excludes every element of criminal negligence, and rests the guilt or innocence of the defendant on the fact alone that at the time of the homicide the defendant was hunting on another's land without written permission from the owner. The act, which applies only in the counties of Orange, Franklin, and Scotland, makes the conduct a misdemeanor, and imposes a punishment on conviction of not less than $5 nor more than $10. The statement sometimes appears in works of approved excellence to the effect that an unintentional homicide is a criminal offense when occasioned by a person engaged at the time in an unlawful act. In nearly every instance, however, will be found the qualification that if the act in question is free from negligence, and not in itself of dangerous tendency, and the criminality must arise, if at all, entirely from the fact that it is unlawful, in such case, the unlawful act must be one that is "malum in se," and not merely "malum prohibitum," and this we hold to be the correct doctrine. In Foster's Crown Law, it is thus stated, at page 258: "In order to bring a case within this description [excusable homicide], the act upon which death ensueth must be lawful. For if the act be unlawful—I mean if it be malum in se—the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intent, it will be murder; but if the intent went no further than to commit a bare trespass, it will be manslaughter." At page 259 the same author puts an instance, with his comments thereon, as follows: "A. shooteth at the poultry of B., and by accident killeth a man. If his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely

manslaughter. The rule I have laid down supposeth that the act from which death ensued was malum in se. For if it was barely malum prohibitum, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game under certain penalties will not, in a question of this kind, enhance the accident beyond its intrinsic moment."

One of these disqualifying statutes here referred to as an instance of malum prohibitum was an act passed (St. 13 Rich. II, c. 13) to prevent certain classes of persons from keeping dogs, nets, or engines to destroy game, etc., and the punishment imposed on conviction was one year's imprisonment. There were others imposing a lesser penalty. Bishop, in his work entitled New Criminal Law (volume 1, § 332), treats of the matter as follows: "In these cases of an unintended evil result, the intent whence the act accidentally sprang must probably be, if specific, to do a thing which is malum in se, and not merely malum prohibitum." Thus Archbold says: "When a man in the execution of one act, by misfortune or chance, and not designedly, does another act, for which, if he had willfully committed it, he would be liable to be punished, in that case, if the act he were doing were lawful, or merely malum prohibitum, he shall not be punishable for the act arising from misfortune or chance; but, if it be malum in se, it is otherwise. To illustrate: Since it is malum prohibitum, not malum in se, for an unauthorized person to kill game in England contrary to the statutes, if, in unlawfully shooting at game, he accidentally kills a man, it is no more criminal in him than if he were authorized. But to shoot at another's fowls, wantonly or in sport, an act which is malum in se, though a civil trespass, and thereby accidentally to kill a human being, is manslaughter. If the intent in the shooting were to commit larceny of the fowls, we have seen that it would be murder." To same effect is Estell v. State, 51 N. J. Law, 182, 17 Atl. 118; Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362. An offense malum in se is properly defined as one which is naturally evil as adjudged by the sense of a civilized community, whereas an act malum prohibitum is wrong only because made so by statute. For the reason that acts malum in se have, as a rule, become criminal offenses by the course and development of the common law, an impression has sometimes obtained that only acts can be so classified which the common law makes criminal; but this is not at all the test. An act can be, and frequently is, malum in se, when it amounts only to a civil trespass, provided it has a malicious element or manifests an evil nature or wrongful disposition to harm or injure another in his person or property. Bishop, Cr. Law, supra; Com. v. Adams, supra. The distinction between the two classes of acts is well stated in 19 Am. & Eng. Enc. (2d Ed.), at page 705: "An offense malum in se is one which is naturally evil, as murder, theft, and the like. Offenses at common law are generally malum in se. An offense malum prohibitum, on the contrary, is not naturally an evil, but becomes so in consequence of being forbidden."

We do not hesitate to declare that the offense of the defendant in hunting on the land without written permission of the owner was malum prohibitum, and, the special verdict having found that the act in which the defendant was engaged was not in itself dangerous to human life and negatived all idea of negligence, we hold that the case is one of excusable homicide, and the defendant should be declared not guilty. We are referred by the Attorney General to East's Pleas of the Crown and Hale's Pleas of the Crown as authorities against this position. We would be slow indeed to hold that the law differed from what these eminent authors declared it to be in their day and time, nor are we required to do so; for a careful examination of their writings will, we think, confirm the views expressed by the court. Lord Hale does say in volume 1, p. 39, that "if a man do ex intentione an unlawful act, tending to the bodily hurt of any person, as by striking or beating him, though he did not intend to kill him, but the death of the party struck follow thereby within the year and day, or if he strike at one and, missing him, kill another whom he did not intend, this is felony and homicide, and not casualty or per infortunium. * * * So it is, if he be doing an unlawful act, though not intending bodily harm to any person, as throwing a stone at another's horse, if it hit a person and kill him, this is felony and homicide, and not per infortunium; for the act was voluntary, though the event was not intended, and therefore, the act itself being unlawful, he is criminally guilty of the consequence that follows." But this author says, in treating of the same subject, at pages 475, 476: "So, if A. throws a stone at a bird, and the stone striketh and killeth another to whom he intended no harm, it is per infortunium; but if he had thrown the stone to kill the poultry or cattle of B., and the stone hits and kills a bystander, it is manslaughter, because the act was unlawful, but not murder, because he did not maliciously or with intent to hurt the bystander. * * * By the statute of 33 Henry VIII, c. 6, no person not having lands, etc., of the yearly value of £100 per annum, may keep or shoot a gun upon pain of forfeiture of £10. Suppose, therefore, such a person, not qualified, shoot with a gun at a bird or at crows, and by mischance it kills a bystander by the breaking of the gun or some other accident, that in another case would

have amounted only to chance medley, this will be no more than chance medley in him; for, though the statute prohibits him to keep or shoot a gun, yet the same was but malum prohibitum, and that only under a penalty, and will not enhance the effect beyond its nature." Mr. East, while he gives an instance which apparently supports the view of the state, in treating further on the subject, in volume 1, p. 255, says: "Homicide in the prosecution of some act or purpose criminal or unlawful in itself, wherein death ensues collaterally to or beside the principal intent. I say collaterally to or beside the principal intent in order to distinguish this kind of homicide from that before treated of under the general head of malice aforethought, where the immediate and leading purpose of the mind was destruction to another. And, first, it is principally to be observed that, if the act on which death ensue be malum in se, it will be murder or manslaughter according to the circumstances; if done in the prosecution of a felonious intent, however the death ensued against or beside the intent of the party, it will be murder; but if the intent went no further than to commit a bare trespass, it will be manslaughter. As where A. shoots at the poultry of B., and by accident kills a man; if his intent were to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but, if it were done wantonly and without that intent, it will be barely manslaughter. A. whips an horse on which B. is riding, whereupon the horse springs out and runs over a child and kills it. This is manslaughter in A. and misadventure in B." And again, at page 257: "So, if one be doing an unlawful act, though not intending bodily harm to any person, as throwing at another's horse, if it hit a person, and kill him, it is manslaughter. Yet in each case it seems that the guilt would rather depend on one or other of these circumstances; either that the act might probably breed danger, or that it was done with a mischievous intent." So we have it that both Sir Matthew Hale and Mr. East, to whom we were referred as supporting the claim of guilt, declared that the act must be malum in se, and the instances given by them show that these writers had this qualification in mind whenever they state the doctrine in more general terms. Sir William Blackstone also says, in volume 4, pp. 192, 193: "And in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature of the act which occasions it. If it be in prosecution of a felonious intent, or its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will be manslaughter"—citing Foster's Criminal Law. We take it that the distinguished commentator must have intended only such civil trespasses as involve an element malum in se, as he cites Foster's Criminal Law, and this author, as we have seen, states the qualification suggested.

Again, we are cited by the state to an instance put by East, at page 269: "But, though the weapons be of a dangerous nature, yet if they be not directed by the persons using them against each other, and so no danger to be reasonably apprehended, and if death casually ensue, it is but manslaughter; as if persons be shooting at game, or butts, or any other lawful object, and a bystander be killed. And it makes no difference, with respect to game, whether the party be qualified or not; but if the act be unlawful in itself, as shooting at deer in another's park without leave, though in sport and without any felonious intent, whereby a bystander is killed, it will be manslaughter; but if the owner had given leave, or the party had been shooting in his own park, it would only have been misadventure." Lord Hale, at page 475, gives the same instance. And it is urged that this instance is exactly similar to the one before us, but not so. According to Sir William Blackstone, in his Commentaries (book 2, p. 415): "For some time prior to the Norman Conquest, every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the King's forests, as is fully expressed in the laws of Canute and Edward the Confessor. 'Cuique enim in proprio fundo quamlibet feram quoquo modo venari permissum.'" And further on it is said "that if a man shoots game on another's private ground, and kills it there, the property belongs to him on whose ground it was killed; the property arising ratione soli. * * * On the Norman Conquest, a new doctrine took place, and the right of pursuing and taking all beasts of chase or venary, and such other animals as were accounted game, was then held to belong to the King, or to such only as were authorized under him." Again: "But if the King reserve to himself the forests for his own exclusive diversion, so he granted from time to time other tracts of land to his subjects under the name of chases or parks, or gave them license to make such in their own parks. And, by the common law, no one is at liberty to take or kill any beast of chase but such as hath an ancient chase or park." In Enc. Britannica we read that the chases or parks were much the same, except that the parks were inclosed, having a tendency to make the game contained therein more completely and exclusively the property of the owner. Any one who entered them was a trespasser, and in shooting the game therein his act can be likened to that of the case put by Foster, East, and Lord Hale, where one wantonly shot another's chicken. He was engaged in the effort to destroy another's property, and the act could well be considered malum in se. But not so here. We have never transplanted to this country either the Saxon or Norman

theory as to the right to take and appropriate game. Here it is considered the property of the captor, except perhaps in the case of bees. It is said in Cooley on Torts: "As regards beasts of chase, the English law is that, if a hunter shoots and captures a beast on the land of another, the property is in him as in the owner of the land. Under the civil law, the property passed to the captor. And such is believed to be the recognized rule in America, even where the capture has been effected by means of a trespass on another's land." State v. House, 65 N. C. 315, 6 Am. Rep. 744.

The act of the defendant, therefore, was not in the effort to destroy another's property, but was strictly malum prohibitum. State v. Vines, 93 N. C. 493, 53 Am. Rep. 466, and State v. Dorsey, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111, are cases apparently opposed to our present decision, but neither is really so. In State v. Vines the sport was imminently dangerous, amounting to recklessness; and in State v. Dorsey the element of criminal negligence was also present, and in this case a state statute governing the construction was given much weight. Neither the one case nor the other required any critical examination of the doctrine, as sometimes stated, that an unintentional homicide, occasioned when in the commission of an unlawful act, is manslaughter. The verdict in the case before us negatives both the elements of guilt (present in these two cases), declaring that the act was not in itself dangerous and that the defendant was not negligent.

Again, it has been called to our attention that courts of the highest authority have declared that the distinction between malun prohibitum and malum in se is unsound, and has now entirely disappeared. Our own court so held in Sharp v. Farmer, 20 N. C. 255, and decisions to the same effect have been made several times since. Said Ruffin, C. J., in Sharp v. Farmer: "The distinction between an act malum in se and one malum prohibitum was never sound, and is entirely disregarded; for the law would be false to itself if it allowed a party through its tribunals to derive advantage from a contract made against the intent and express provisions of the law." It will be noted that this decision was on a case involving the validity of a contract, and the principle there established is undoubtedly correct. The fact, however, that the judge who delivered the opinion uses the words "was never sound," and that other opinions to the same effect use the words "has disappeared," shows that the distinction has existed; and it existed, too, at a time when this feature in the law of homicide was established. And we are well assured that because the courts, in administering the law on the civil side of the docket, have come to the conclusion that a principle once established is unsound and should be rejected, this should not have the effect of changing the character of an act from innocence to guilt, which had its status fixed when the distinction was recognized and enforced.

It was further suggested that the homicide was one of the very results which the statute was designed to prevent, and to excuse the defendant would be contrary to the policy of the act. But this can hardly be seriously maintained. It will be noted that it was not the owner of the land who was killed, but the defendant's comrade in the hunt; and of a certainty, if our Legislature thought that conduct like that of the defendant was dangerous, and the statute was designed to protect human life, some other penalty would have been imposed than a fine of "not less than $5 and not more than $10. It is more reasonable to conclude that the act in its purpose was designed to prevent and suppress petty trespasses and annoyances, such as leaving open gates, throwing down fences, treading over crops, etc.

The special verdict having established that the act of the defendant was entirely accidental, it is a relief that we can declare him innocent in accordance with accepted doctrine, and that in the case at bar the law can be administered in mercy as well as justice. Quoting again from that eminent judge and humane and enlightened man, Sir Michael Foster: "And where the rigor of law bordereth upon injustice, mercy should, if possible, interpose in the administration. It is not the part of the judges to be perpetually hunting after forfeitures where the heart is free from guilt. They are ministers appointed by the crown for the ends of public justice, and should have written on their hearts the solemn engagement his majesty is under to cause law and justice in mercy to be executed in all his judgments." We know that in this spirit the judge below dealt with the defendant and his cause; for, though the judgment of his honor impelled him to the conclusion of guilt, he imposed the lightest punishment permissible for the offense.

There was error in holding the defendant guilty, and, on the facts declared, a verdict of not guilty should be directed, and the defendant discharged.

Reversed.

WALKER, J., concurs in result only.

(139 N. C. 326)

VIRGINIA-CAROLINA CHEMICAL CO. v. McNAIR & PEARSALL et al. (G. OBER & SONS' CO., Intervener).

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. ASSIGNMENTS — PROPERTY COVERED—BURDEN OF PROOF.

The burden is on a creditor, who claims specific accounts of his debtor under an assignment of all the debtor's accounts, a list of which was furnished by the debtor, of showing, as against another creditor who claims the specific accounts, that such accounts were included in the lists of accounts furnished to him by the debtor.

2. PLEDGES — EXECUTORY CONTRACT—DELIVERY OF BONDS.

The delivery of bonds by a debtor to his creditor in pursuance of a contract to deliver the same as collateral cures any defect in the contract arising from its failure to name or specify the bonds to be delivered.

3. AGRICULTURE—LIENS—ASSIGNMENT.

Under Code, § 1799, giving a lien on crops to persons making advances to aid in the cultivation of the crop, a lien bond given to secure an account for advances subsequently to be made is assignable and an assignment thereof carries with it an assignment of the account for advances actually made without any separate assignment of such account.

4. ASSIGNMENTS—CONSTRUCTION OF INSTRUMENTS.

In ascertaining what passes by an assignment, the intention of the parties will control.

5. CONTRACTS — CONSIDERATION—INDULGENCE TO DEBTOR.

Indulgence or extension of time for the payment of a debt constitutes a valuable consideration.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 317, 318.]

6. ASSIGNMENT—NOTICE TO DEBTOR—NECESSITY.

Notice to the debtor of the assignment of a nonnegotiable instrument is necessary to protect the assignee from the effect of a payment to the original creditor, but such notice it not necessary to the validity of the assignment as between the assignor and assignee.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, § 116.]

7. TRUSTS — ASSIGNED ACCOUNTS — TRACING PROCEEDS.

A creditor to whom a debtor has assigned certain accounts cannot recover money paid by the debtor to other creditors, without showing that such money was the identical money collected by the debtor from the parties owing the assigned accounts.

8. PAYMENT—ACCEPTANCE OF DRAFT.

Unless expressly so understood and agreed, the acceptance of a draft by a creditor from a debtor does not merge the debt or operate as a payment, and the creditor, upon surrendering or destroying the draft, may sue on the original cause of action.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, §§ 86, 87.]

9. PRINCIPAL AND AGENT—TRUST PROPERTY —RIGHTS OF ASSIGNEE.

Where a selling agent was bound by his contract with his principal to deliver to the latter notes of buyers to be held as collateral security, and to hold all proceeds of goods sold in trust for the payment of the notes, the agent was a mere trustee for his principal of the accounts with the buyers and the money collected thereon, and an assignee of such accounts under an assignment from the agent acquired no title thereto as against the principal, although he had no notice of the principal's claim.

Appeal from Superior Court, New Hanover County; O. H. Allen, Judge.

Action by the Virginia-Carolina Chemical Company against McNair & Pearsall and another. The G. Ober & Sons' Company intervened. From a judgment for plaintiffs, defendants and intervener appealed. Modified and affirmed.

C. H. Coble, being indebted to the plaintiff and desiring to obtain an extension of the time of payment, on January 28, 1898, executed his notes to be due on the 1st day of October and November, 1898, and at the same time, in consideration of the extension given, contracted to deliver to the plaintiff, within 15 days, lien bonds from his customers for an amount sufficient to secure the payment of his notes. No specific bonds were mentioned, and at that time two of those afterwards sent had not been executed. This paper was never registered. On January 30, 1898, the said Coble executed to McNair & Pearsall a contract, reciting an indebtedness evidenced by his promissory note bearing even date therewith of $4,952.25, due on the 1st day of October, 1898, to secure the payment of which he bargained, sold, and assigned to said defendants "all accounts whatever owing to me, as evidenced by my book of accounts or any memoranda whatever kept by me at my store in the town of Laurinburg. * * * I also contract to furnish said McNair & Pearsall a full and complete list of said accounts and notes." On the same day the said Coble executed to said defendants a mortgage on his stock of goods and a lien upon his crops; also delivered to McNair & Pearsall a list of his accounts, etc., other than the five lien bonds which are the subject of this controversy. The said contract was recorded October 8, 1898. C. H. Coble sold, in 1898, fertilizers as agent for G. Ober & Sons' Company to the persons executing the lien bonds delivered to the plaintiffs, and collected on account thereof the sum of $231. Coble collected from the persons executing the five lien bonds delivered to the plaintiff company, and on account thereof, including the amount collected for the guano prior to October 1, 1898, $257.75, which he turned over to the defendants and subsequently thereto the said defendants collected from said persons, and on account thereof, $556.99. Plaintiff had no notice of the claim of G. Ober & Sons' Company or any other person. C. H. Coble died since the beginning of this action, and his administrator was made party defendant. The debts due the plaintiff and G. Ober & Sons' Company are unpaid, and there is a balance due the defendants from said Coble. The plaintiff company demanded of the defendants payment of the amounts received by them, which was refused. "In October, 1898, the plaintiff company, by its authorized agent

A. H. Adams, obtained from Coble an accepted draft on McNair & Pearsall for $257.75, the amount collected by them, which draft recited that it was to be paid by McNair & Pearsall out of such excess as might remain in their hands after the debt to themselves had been satisfied; but the agent Adams, after offering to return the draft and being refused, tore up the draft." This action is prosecuted by the plaintiff company against McNair & Pearsall and the administrator of Coble for the purpose of establishing its debt against the estate of Coble and recovering from the other defendants the amount collected by them on account of the lien bonds. Pending the suit, G. Ober & Sons' Company intervened and were duly made parties, for the purpose of asserting their claim to the $231 collected by defendants. The cause was referred to Hon. Alfred M. Waddell, who made his report, to which the plaintiff company filed exceptions. The cause was heard by his honor, O. H. Allen, when the exceptions were sustained and the report modified in respect to the facts and conclusions of law. Judgment being rendered for the plaintiff, the defendants McNair & Pearsall and the intervener, G. Ober & Sons' Company, excepted and appealed.

E. K. Bryan, for appellants. Rountree & Carr and M. L. John, for appellee.

CONNOR, J. (after stating the facts). The record contains quite a number of assignments of error pointing to the conclusions of fact found by the judge; defendant contending that there is no evidence to sustain such conclusions. We have examined the evidence, and in our opinion the exceptions in this respect cannot be sustained. In regard to the conclusion reached by his honor that the five lien bonds in controversy were not included in the list furnished by Coble to defendants, the burden of proof was upon them. It is therefore not open to them to raise the question that there was no evidence in regard thereto. If the plaintiff acquired the title to the bonds as against Coble by the contract of January 26, 1898, and the subsequent delivery, the defendants could invalidate the right to them only by showing a superior title in themselves. The first step in making good this claim was to show that they had been assigned to them. The failure to do so changed the basis of the contest, and left open to the defendants the right to attack the plaintiff's title by showing such infirmity as to invalidate it without regard to any claim of their own. To do this they make certain well-defined contentions, which we will discuss in the order presented by the brief of their counsel.

It is first said that nothing passed by the contract of January 26, 1898, because no specific lien bonds were mentioned; that two of those afterwards delivered had not at that time been executed. However this may be, the conclusion of fact found by the judge that the five bonds described in the complaint were, some time during the month of February, 1898, delivered to the plaintiff in pursuance of the contract of January 26, 1898, removes or cures any defect in the plaintiff's title by reason of the failure to name or specify the bonds in the contract. The defendants rely upon Blakeley v. Patrick, 67 N. C. 40, 12 Am. Rep. 600, wherein it is held that the description in a mortgage of "10 new buggies," the mortgagor having a larger number of new buggies on hand, was too indefinite, and the mortgagee acquired no title to any buggies. It is clear that if, before the right of third parties attached, the mortgagor had set apart 10 new buggies and delivered them into the possession of the mortgagee in pursuance of the mortgage, he could have retained them. It may be that his right could have been sustained, either as curing a defect in the writing by rendering certain that which was uncertain, or by treating the delivery as a pledge, resorting to the mortgage to fix the terms and purpose for which it was made. In our case we do not think that the plaintiff acquired, even as against Coble, any right to demand specific performance by compelling the delivery of any specific lien bonds; but where the five bonds were, as found by his honor, in pursuance of such contract actually delivered, the right to retain possession, for the purpose and upon the terms set forth in the contract, was perfected.

The defendants contend that, conceding this to be so, the plaintiff acquired no right or title to or claim upon the accounts for securing the payment of which the bonds were given. It is undoubtedly true, as contended and as shown by the authorities cited, that "in general, in an assignment of the mortgage without any transfer of the note, bond, or debt secured thereby, the assignee takes only the legal estate, which he will hold in trust for the owner of the note or other mortgage debt." This proposition does not, however, aid us in the decision of the question presented here. There was not at the time of the execution of the lien bond, nor of the delivery to plaintiff, any note, bond, or account in existence to be assigned or delivered. The lien bond was executed to secure an account for advancements thereafter to be made to aid in the cultivation of a crop for the current year. Those instruments generally used by merchants and farmers in this state are peculiar, and unlike, save by analogy, any other form of contract. They had their origin in the conditions existing in this state, by reason of the changed method of cultivating lands, after the late Civil War, and were first authorized by the act of 1866–67. Code, § 1799. It has been found difficult to apply to them, in many respects, the principles by which the rights of parties, by assignment or otherwise, are governed by the law of negotiable instruments and mortgages securing existing debts. While they are executed only by the party to

whom the advancements are to be made, they have many of the attributes of a bilateral contract. The value of the security is largely, and often entirely, dependent upon the performance of the agreement of the party who is to make such advancements. The entire contract is set forth in one paper. There is no existing debt, as in the ordinary mortgage, to which the security is but the incident. When assigned for any purpose, they are of no value to the assignee if the account as it accrues, by reason of the advancement of supplies, does not inure to his benefit. The assignability of all choses in action or other contractual rights has in recent years, by statutes and decisions of the courts, been very much enlarged. There can be no question that a contract for money to become due in the future may be assigned, and that when the money is due the assignee may sue for and recover it in his own name, subject to such defenses as the debtor may be entitled to make as the real party in interest. We can perceive no reason why the lien bond, with all rights then existing, or thereafter in pursuance and execution of its terms accruing, may not be assigned.

In ascertaining what passes by the assignment, the intention of the parties will control. "To ascertain the intention of the assignor and assignee as to what interests, rights, or property they intended should pass under the assignment, and to carry out such intention as nearly as may be done without violence to the language used by them, is, as in the case of all other contracts, a cardinal rule." 4 Cyc. 73; Pass v. McRea, 36 Miss. 143. When a mortgage was transferred pursuant to an agreement as security for a debt, but there was no assignment of the mortgage debt, it was held that, if essential to give effect to the assignment, the assignee might be regarded as having an interest in the debt for which both the note and mortgage were securities, and that the legal effect of the transaction was to transfer to the assignee the property embraced in the mortgage as security for his advance." Jones, Chat. Mort. 505. The rule is well stated by Andrews, J., in Campell v. Birch, 60 N. Y. 214, in discussing the question presented upon this appeal. He says: "It is a general principle, applicable to the construction of grants or contracts, that they should be construed so as to give them effect according to the intention of the parties. When a thing is granted, everything possessed by the grantor passes as incident which is necessary to make the grant effectual." In that case the note was retained by the mortgagee. The court held that it passed to the assignee of the mortgage. It is also said: "It should be mentioned, as a qualification to the rule requiring the transfer of the debt along with the assignment of the mortgage, that when a mortgage has been made, and no separate obligation has been given for the payment of the money secured by the mortgage, an assignment necessarily transfers all the rights and interests under it" Am. & Eng. Enc. Law, 1086. The case before us comes clearly within the qualification. To hold otherwise would defeat the manifest intention of the parties, and attribute to them a purpose to do a vain thing, under the form of a well-considered business transaction. If Coble only intended, by delivering the lien bonds, to pass them and retain the accounts to accrue, which alone made them valuable, he was keeping his promise to the ear and breaking it to the sense. Courts should endeavor to so construe the conduct and language of men as to carry out in good faith their honest purposes.

The suggestion that the contract and delivery of the lien bonds was not supported by a valuable consideration was not pressed here. It is elementary learning that indulgence or extension of time for payment of a debt constitutes a valuable consideration. Applications of the principle are found in numerous cases in the reports. Notice to the debtor of the assignment of a nonnegotiable instrument is necessary to protect the assignee from the effect of a payment to the original creditor; but such notice is not necessary to the validity of the assignment as between the assignor and assignee. 4 Cyc. 32; Ponton v. Griffin, 72 N. C. 362. For the reasons set forth we are of the opinion that, as against Coble, the plaintiff became the owner of the five lien bonds and of the accounts as they accrued for the security of which they were executed. The finding of his honor that they were not included in the list of accounts furnished by Coble to defendants McNair & Pearsall relieves us of the necessity of considering several of the questions discussed in the argument. We have examined the contract made by Coble with the defendants of January 30, 1898, to ascertain whether the accounts passed independently of the list furnished "for identification." The description of the choses in action assigned by the contract is "all accounts whatever owing to me as evidenced by my book of accounts." If the defendants were compelled to rely upon this language as the basis of their right, it is exceedingly doubtful whether any accounts contracted subsequent to January 30, 1898, passed. With the aid of the list furnished, it is probable that the intention to pass the accounts named therein would be ascertained —to include those made after the date of the contract. This is immaterial here, because of the finding that the ones in controversy were not on the list.

The defendants' counsel say that, conceding this to be true, the plaintiffs cannot recover in this action, unless they show that Coble paid to them the identical money received by him from the parties owing the accounts. This is true, but the finding of fact is that Coble "collected on the five lien bonds claimed by the plaintiff the sum of

A. H. Adams, obtained from Coble an accepted draft on McNair & Pearsall for $257.75, the amount collected by them, which draft recited that it was to be paid by McNair & Pearsall out of such excess as might remain in their hands after the debt to themselves had been satisfied; but the agent Adams, after offering to return the draft and being refused, tore up the draft." This action is prosecuted by the plaintiff company against McNair & Pearsall and the administrator of Coble for the purpose of establishing its debt against the estate of Coble and recovering from the other defendants the amount collected by them on account of the lien bonds. Pending the suit, G. Ober & Sons' Company intervened and were duly made parties, for the purpose of asserting their claim to the $231 collected by defendants. The cause was referred to Hon. Alfred M. Waddell, who made his report, to which the plaintiff company filed exceptions. The cause was heard by his honor, O. H. Allen, when the exceptions were sustained and the report modified in respect to the facts and conclusions of law. Judgment being rendered for the plaintiff, the defendants McNair & Pearsall and the intervener, G. Ober & Sons' Company, excepted and appealed.

E. K. Bryan, for appellants. Rountree & Carr and M. L. John, for appellee.

CONNOR, J. (after stating the facts). The record contains quite a number of assignments of error pointing to the conclusions of fact found by the judge; defendant contending that there is no evidence to sustain such conclusions. We have examined the evidence, and in our opinion the exceptions in this respect cannot be sustained. In regard to the conclusion reached by his honor that the five lien bonds in controversy were not included in the list furnished by Coble to defendants, the burden of proof was upon them. It is therefore not open to them to raise the question that there was no evidence in regard thereto. If the plaintiff acquired the title to the bonds as against Coble by the contract of January 26, 1898, and the subsequent delivery, the defendants could invalidate the right to them only by showing a superior title in themselves. The first step in making good this claim was to show that they had been assigned to them. The failure to do so changed the basis of the contest, and left open to the defendants the right to attack the plaintiff's title by showing such infirmity as to invalidate it without regard to any claim of their own. To do this they make certain well-defined contentions, which we will discuss in the order presented by the brief of their counsel.

It is first said that nothing passed by the contract of January 26, 1898, because no specific lien bonds were mentioned; that two of those afterwards delivered had not at that time been executed. However this may be, the conclusion of fact found by the judge that the five bonds described in the complaint were, some time during the month of February, 1898, delivered to the plaintiff in pursuance of the contract of January 26, 1898, removes or cures any defect in the plaintiff's title by reason of the failure to name or specify the bonds in the contract. The defendants rely upon Blakeley v. Patrick, 67 N. C. 40, 12 Am. Rep. 600, wherein it is held that the description in a mortgage of "10 new buggies," the mortgagor having a larger number of new buggies on hand, was too indefinite, and the mortgagee acquired no title to any buggies. It is clear that if, before the right of third parties attached, the mortgagor had set apart 10 new buggies and delivered them into the possession of the mortgagee in pursuance of the mortgage, he could have retained them. It may be that his right could have been sustained, either as curing a defect in the writing by rendering certain that which was uncertain, or by treating the delivery as a pledge, resorting to the mortgage to fix the terms and purpose for which it was made. In our case we do not think that the plaintiff acquired, even as against Coble, any right to demand specific performance by compelling the delivery of any specific lien bonds; but where the five bonds were, as found by his honor, in pursuance of such contract actually delivered, the right to retain possession, for the purpose and upon the terms set forth in the contract, was perfected.

The defendants contend that, conceding this to be so, the plaintiff acquired no right or title to or claim upon the accounts for securing the payment of which the bonds were given. It is undoubtedly true, as contended and as shown by the authorities cited, that "in general, in an assignment of the mortgage without any transfer of the note, bond, or debt secured thereby, the assignee takes only the legal estate, which he will hold in trust for the owner of the note or other mortgage debt." This proposition does not, however, aid us in the decision of the question presented here. There was not at the time of the execution of the lien bond, nor of the delivery to plaintiff, any note, bond, or account in existence to be assigned or delivered. The lien bond was executed to secure an account for advancements thereafter to be made to aid in the cultivation of a crop for the current year. Those instruments generally used by merchants and farmers in this state are peculiar, and unlike, save by analogy, any other form of contract. They had their origin in the conditions existing in this state, by reason of the changed method of cultivating lands, after the late Civil War, and were first authorized by the act of 1866-67. Code, § 1799. It has been found difficult to apply to them, in many respects, the principles by which the rights of parties, by assignment or otherwise, are governed by the law of negotiable instruments and mortgages securing existing debts. While they are executed only by the party to

whom the advancements are to be made, they have many of the attributes of a bilateral contract. The value of the security is largely, and often entirely, dependent upon the performance of the agreement of the party who is to make such advancements. The entire contract is set forth in one paper. There is no existing debt, as in the ordinary mortgage, to which the security is but the incident. When assigned for any purpose, they are of no value to the assignee if the account as it accrues, by reason of the advancement of supplies, does not inure to his benefit. The assignability of all choses in action or other contractual rights has in recent years, by statutes and decisions of the courts, been very much enlarged. There can be no question that a contract for money to become due in the future may be assigned, and that when the money is due the assignee may sue for and recover it in his own name, subject to such defenses as the debtor may be entitled to make as the real party in interest. We can perceive no reason why the lien bond, with all rights then existing, or thereafter in pursuance and execution of its terms accruing, may not be assigned.

In ascertaining what passes by the assignment, the intention of the parties will control. "To ascertain the intention of the assignor and assignee as to what interests, rights, or property they intended should pass under the assignment, and to carry out such intention as nearly as may be done without violence to the language used by them, is, as in the case of all other contracts, a cardinal rule." 4 Cyc. 73; Pass v. McRea, 36 Miss. 143. When a mortgage was transferred pursuant to an agreement as security for a debt, but there was no assignment of the mortgage debt, it was held that, if essential to give effect to the assignment, the assignee might be regarded as having an interest in the debt for which both the note and mortgage were securities, and that the legal effect of the transaction was to transfer to the assignee the property embraced in the mortgage as security for his advance." Jones, Chat. Mort. 505. The rule is well stated by Andrews, J., in Campell v. Birch, 60 N. Y. 214, in discussing the question presented upon this appeal. He says: "It is a general principle, applicable to the construction of grants or contracts, that they should be construed so as to give them effect according to the intention of the parties. When a thing is granted, everything possessed by the grantor passes as incident which is necessary to make the grant effectual." In that case the note was retained by the mortgagee. The court held that it passed to the assignee of the mortgage. It is also said: "It should be mentioned, as a qualification to the rule requiring the transfer of the debt along with the assignment of the mortgage, that when a mortgage has been made, and no separate obligation has been given for the payment of the money secured by the mortgage, an assignment necessarily transfers all the rights and interests under it" Am. & Eng. Enc. Law, 1086. The case before us comes clearly within the qualification. To hold otherwise would defeat the manifest intention of the parties, and attribute to them a purpose to do a vain thing, under the form of a well-considered business transaction. If Coble only intended, by delivering the lien bonds, to pass them and retain the accounts to accrue, which alone made them valuable, he was keeping his promise to the ear and breaking it to the sense. Courts should endeavor to so construe the conduct and language of men as to carry out in good faith their honest purposes.

The suggestion that the contract and delivery of the lien bonds was not supported by a valuable consideration was not pressed here. It is elementary learning that indulgence or extension of time for payment of a debt constitutes a valuable consideration. Applications of the principle are found in numerous cases in the reports. Notice to the debtor of the assignment of a nonnegotiable instrument is necessary to protect the assignee from the effect of a payment to the original creditor; but such notice is not necessary to the validity of the assignment as between the assignor and assignee. 4 Cyc. 32; Ponton v. Griffin, 72 N. C. 362. For the reasons set forth we are of the opinion that, as against Coble, the plaintiff became the owner of the five lien bonds and of the accounts as they accrued for the security of which they were executed. The finding of his honor that they were not included in the list of accounts furnished by Coble to defendants McNair & Pearsall relieves us of the necessity of considering several of the questions discussed in the argument. We have examined the contract made by Coble with the defendants of January 30, 1898, to ascertain whether the accounts passed independently of the list furnished "for identification." The description of the choses in action assigned by the contract is "all accounts whatever owing to me as evidenced by my book of accounts." If the defendants were compelled to rely upon this language as the basis of their right, it is exceedingly doubtful whether any accounts contracted subsequent to January 30, 1898, passed. With the aid of the list furnished, it is probable that the intention to pass the accounts named therein would be ascertained —to include those made after the date of the contract. This is immaterial here, because of the finding that the ones in controversy were not on the list.

The defendants' counsel say that, conceding this to be true, the plaintiffs cannot recover in this action, unless they show that Coble paid to them the identical money received by him from the parties owing the accounts. This is true, but the finding of fact is that Coble "collected on the five lien bonds claimed by the plaintiff the sum of

$257.75, prior to the 3d day of October, 1898, and turned it over to McNair & Pearsall, and that subsequently thereto the defendants McNair & Pearsall collected on said lien bonds the sum of $556.99." This finding fixes the defendants with the receipt of the identical money paid on the accounts secured by the lien bonds. We can see no reason why the plaintiff may not recover the amounts thus coming into their possession. It is insisted, however, that the acceptance of the draft by plaintiff's agent, drawn by Coble upon the defendants for $257.75, to be paid out of any balance remaining in their hands after the payment of their debt, released the defendants from any claim on account of the receipt of the money. It is well settled that, unless expressly so understood and agreed, the acceptance of a draft from a debtor does not merge the debt or operate as a payment. Wilson v. Jennings, 15 N. C. 90; Mauney v. Coit, 80 N. C. 300, 30 Am. Rep. 80. The parties did not, by reason of the acceptance of the draft, in any respect change their status or surrender any rights as between each other. We can see no reason why upon surrendering, or what was equivalent, destruction of the draft, the plaintiff may not sue upon the original cause of action. We concur with his honor in this respect. This disposes of the exceptions of the defendants. The judgment in that respect must be affirmed.

The other branch of the case is presented by the exception of the intervener, G. Ober & Sons' Company. His honor was of the opinion that, as the plaintiff had no notice of their claim to the proceeds of the guano sold by Coble, they were not affected thereby. We cannot concur in that opinion. It appears from an inspection of the contract made by Coble with Ober, bearing date January 17, 1898, that he was to sell the guano and deliver to Ober notes of the planters to whom he sold, to be held by them as collateral security, and that all proceeds of guano sold were to be held in trust by Coble for the payment of his notes. As between Coble and Ober, there can be no question that the accounts were held as the property of the latter, and the money collected thereon was held in trust for them. Contracts containing the same language in respect to the terms upon which the guano was to be sold and the proceeds held were construed by this court in Chemical Co. v. Johnston, 98 N. C. 123, 3 S. E. 723, and Guano Co. v. Bryan, 118 N. C. 576, 24 S. E. 364. In the last case Mr. Justice Montgomery said: "There can be no doubt that the contract makes the defendant a trustee for the plaintiff's benefit of the guano sold to him by the plaintiff, of the notes taken by the defendant from the purchasers of the guano, of the cash money derived from the sales, and of that collected on the notes." The right which the plaintiff acquired by the contract, etc., was to have the amount due or to become due to Coble for his own property sold to his customers, not for the amount due him for the property of some other person or which he held in trust for some other person. It will be observed that the contract with Ober was made January 17, 1898, some nine days prior to the contract with the plaintiff. There is no uncertainty as to what were Ober's rights under that contract. The accounts accruing for the sale of the guano were their property, and the proceeds, when collected, were in the possession of Coble in trust for him. The plaintiff was not a purchaser, for value or otherwise, of Ober's property. The question of notice does not arise. It is one of title to the property. The same process of reasoning and an application of the same principles, which entitle the plaintiff to recover the amount which went into the possession of the defendants from the account due for Coble's goods, entitle the interveners to recover the amount representing their guano. This is not a case of conflicting equities, but of following the funds belonging to the parties. There is nothing in the testimony or the findings to show that defendants McNair & Pearsall parted with anything of value for the amounts turned over to them, or collected by them. They simply applied it to the indebtedness of Coble by mistake, supposing that it was money, whereas in fact it was the money of the plaintiff and G. Ober & Sons' Company. They will pay it to the parties entitled, and charge it back to Coble, leaving his indebtedness as it would have been if he had not erroneously turned it over to the wrong parties. It is manifest that all parties were acting in good faith, supposing that there would be enough to pay all of them. In this they seem to have been mistaken. We can see no reason why the interveners should not recover the full amount collected by Coble from the sales of their guano, which is found to be $231.

The judgment of his honor must be modified, that the plaintiff recover of defendants the amount found to have been received by them, less $231, for which the interveners will have judgment. The costs of this court will be divided between the plaintiff and defendants. We can see no reason why plaintiff may not recover judgment for their debt against the administrator of Coble, subject to a deduction of the amount recovered of defendants McNair & Pearsall.

The judgment is modified and affirmed.

(139 N. C. 278)

KELLY v. ODUM et al.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. EXECUTORS AND ADMINISTRATORS—ALLOWANCES — ATTORNEY'S FEES — PROPRIETY OF LITIGATION.

Under Code 1883, § 1524, authorizing allowance of commissions to administrators upon the amount of receipts and expenditures made during the course of administration, and providing that administrators may retain for necessary charges and disbursements in the management of the estate, an administrator may employ an attorney whenever it is necessary to protect the estate or to enable him to manage it properly, and on the settlement of the accounts he may be allowed credit, as part of the expenses of administration, for the reasonable charges paid by him for such services; but such allowance is based on the prudence and good faith of the administrator, and will not be made if the litigation has been improperly instituted by him, or was the result of his neglect or improper conduct.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 448–455.]

2. SAME.

An administrator will not be allowed attorney's fees incurred in a suit to charge his decedent's land with the payment of a judgment obtained in favor of the administrator's father against the estate, where the administrator had made no defense to the suit in which the judgment was obtained, and such judgment was attacked and defeated on the ground of collusion or connivance in the suit in which the attorney's services were rendered.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 448, 454, 460, 462.]

3. SAME—PERSONAL LIABILITY.

An executor is always personally liable to his attorney for his fee or compensation.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 411½.]

Appeal from Superior Court, Sampson County; O. H. Allen, Judge.

Suit by Ira L. Kelly, administrator of T. K. Byrd, deceased, against S. R. Odum and others. From a judgment rendered against them for costs and charges of administration, defendants appeal. Reversed.

The executor of the will of T. K. Byrd having renounced, the plaintiff qualified as administrator with the will annexed, and on the day of his qualification was sued by his father, Thomas Kelly, before a magistrate, for $100 alleged to be due by the testator for services rendered in nursing him. Plaintiff did not resist a recovery, but permitted judgment to be taken by default. This was in 1891. Plaintiff then commenced this proceeding to have the testator's land sold to pay said judgment and a debt to another party of $7.50 due for medical services, which was admitted. The land was bought from the devisees by the defendant, who denied that anything was due to Thomas Kelly and, it seems, impeached the judgment taken before the magistrate as having been obtained fraudulently. An issue was submitted to the jury, based upon this defense, who found that there was nothing due to Thos. Kelly. This verdict was set aside and the issue was submitted to another jury at a subsequent term, who found in the same way—that there was nothing due. Defendant was adjudged to pay the costs of the proceeding and the charges of administration. The clerk taxed in the bill $20 for attorney's fee paid for bringing and prosecuting this proceeding, to which exception was taken by the defendant. The court directed the clerk, as referee, to ascertain and report if the services for which the fee was charged were rendered "in the interest of a fair administration of the estate and was a reasonable allowance." The clerk reported "as a fact" that the services were rendered "in the interest of a fair administration of the estate" and that $20 was not an unreasonable charge therefor. The court thereupon rendered judgment against the defendant for the costs and charges, including said fee. Defendant excepted and appealed.

Geo. E. Butler and J. D. Kerr, for appellants. Grady & Graham, for appellee.

WALKER, J. (after stating the case). The statute provides that an executor may be allowed commissions and may retain for necessary charges and disbursements in the management of the estate. Code 1883, § 1524. Compensation is allowed in order to reward him, not only for his time, labor, and trouble in administering the estate committed to his charge, but also for the responsibility incurred and for the fidelity with which he discharges the duties of his trust; the theory of compensation being that it is incident to faithful administration, and it should not be allowed if there has been neglect or improper conduct, whereby the estate has suffered loss. In the case of charges and disbursements the same rule applies, and the statute provides that they must have been necessary to a proper management of the estate. Included in legal charges and disbursements are sums paid to an attorney or counsel for professional services rendered to the personal representative. The latter has the right, unless restricted by statute, as he is not in this state, to employ an attorney whenever it is necessary to protect the estate or to enable him to manage it properly, and on the settlement of his accounts he will be allowed credit, as part of the expenses of administration, for the reasonable charges paid by him for such services. 11 Am. & Eng. Enc. of Law (2d Ed.) pp. 1240, 1282. It has ever been the ruling of this court, founded, of course, to some extent upon the provision of the statute, that reasonable fees paid counsel for advice and assistance in the management of a trust, and even in meeting a demand by action for a settlement, will be allowed to the trustee, whenever the services were necessary or proper and the payment made fairly on account of the trust

estate. Young v. Kennedy, 95 N. C. 265; Hester v. Hester, 38 N. C. 9; Love v. Love, 40 N. C. 201; Fairbairn v. Fisher, 58 N. C. 385; Whitford v. Foy, 65 N. C. 265. We have recognized and applied the general principle at this term. Lumber Co. v. Pollock, 51 S. E. 855.

But, while such an allowance will be made, it must be remembered that it is always based upon the prudence and good faith of the trustee. Therefore the credit will not be given if litigation has been improperly instituted by him or was the result or consequence of his neglect or improper conduct; benefit to the estate being generally necessary to charge the estate with an expenditure of this character. Commissions and allowances, as we have shown, are both intended as a recompense for honest and faithful service only, and are never awarded to one who has been guilty of a breach of duty. Johnston v. Haynes, 68 N. C. 509; Whitford v. Foy, supra; Grant v. Reese, 94 N. C. 720; 11 Am. & Eng. Enc. 1281. Applying this just and well-settled principle to our case, we find that the plaintiff made no defense to his father's suit, which followed upon the very heels of his administration, but allowed judgment to be taken without any effort being made to ascertain the justness of the claim preferred. He immediately brought this suit to charge the land of his testator with the payment of the judgment thus obtained, and two juries have decided that there is nothing due to his father. The attack on the judgment is made directly, and it appears that it is founded upon an allegation of collusion or connivance. We take it that this was the true ground, as the jurisdiction of the justice must be conceded, and there was no other suggested, nor can we conceive of any other under the circumstances. Earp v. Minton, 138 N. C. 202, 50 S. E. 624. If the plaintiff had resisted the claim at the proper time and in the proper way—that is, in the magistrate's court, and by defending the action there—this proceeding would, perhaps, not have been necessary, and the developments tend clearly to show that it would not have been. Instead of doing so, he is now placed in the attitude of prosecuting for his father a claim against the devisees which two juries have said is absolutely without any merit. It would, indeed, be hard measure if the law should charge the defendants with the expenses incurred in such a prosecution. Fortunately, we are able to think that it does not, and we so declare. The rule requiring perfect good faith on the part of the trustee in such cases is a wholesome one, and we are not disposed to abate its stringency or to stay in the least its full operation. It may be that the alleged debt is a just one. If so, it is the misfortune of the plaintiff that he has not succeeded in convincing either of the two juries of the fact. Whether in any case he should be allowed the amount of an attorney's fee paid in attempting to charge his testator's estate with the payment of a debt, and thereby espousing the cause of a creditor is a question which it is not necessary for us to decide.

The plaintiff has paid his attorney, and properly, as he was clearly liable to him. What we have said has no application as between them. An executor is always personally liable to his counsel for his fee or compensation; but it is in no sense a debt of the estate. He is liable in such case in his individual, and not in his official, capacity. This is perfectly familiar learning. McKay & Devane v. Royal, 52 N. C. 426; Banking Co. v. Morehead, 122 N. C. 323, 30 S. E. 331; Lindsay v. Darden, 124 N. C. 300, 32 S. E. 678. As Pearson, J., said for the court in Hailey v. Wheeler, 49 N. C. 159: "It is not possible to conceive how a debt of the testator can be created by matter occurring wholly in the executor's time." But, if the disbursement is found to be a proper one, it will be allowed to the executor in his settlement. In this case we hold that, however reasonable and just the disbursement may have been as between the plaintiff and his attorney, it is not a proper charge against the defendant, and it will be stricken from the bill. There was error in the ruling of the court.

Error.

(139 N. C. 353)

HODGE v. HUDSON.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. DEEDS—VALIDITY—FRAUD—CANCELLATION—ACTIONS—EVIDENCE.

In an action to set aside a deed for fraud, where plaintiff testified that he could not read, and that the purport of the deed, which was written by defendant, was different from what had been represented, it was competent to ask plaintiff who told him that the deed conveyed all his interest in the land, in order to corroborate further testimony of plaintiff that, as soon as he learned that fact, he put up notices on the land repudiating his deed.

2. EVIDENCE — DOCUMENTARY — AUTHENTICATION.

Indorsements upon a mortgage are properly excluded from evidence, where the mortgage note is not produced and the signatures of the alleged indorsers are not proven.

3. MORTGAGES—ASSIGNMENT—EFFECT OF INDORSEMENTS.

Indorsements on a mortgage do not convey the debt, nor do they convey the property, where title is not shown in the indorsers.

4. SAME — OWNERSHIP OF DEBT—EVIDENCE—DECLARATIONS OF ALLEGED OWNER.

Where the debt claimed to be secured by a mortgage was not shown or proven, a declaration of a stranger that he owned the debt was incompetent as evidence.

5. TRIAL — INSTRUCTIONS—PRAYERS—EXCUSES FOR REFUSAL.

The fact that a prayer for an instruction was on the reverse side of the paper on which the prayers were written, and was overlooked by the court, does not of itself obviate error of the court in failing to give the instruction.

6. DEEDS — FRAUD—ACTIONS FOR CANCELLATION—EVIDENCE.

In a suit to set aside a deed on the ground of fraudulent representations inducing its exe-

cution, testimony as to defendant's purchase of a mortgage on the land from one who was not shown to have a legal title was irrelevant.

Appeal from Superior Court, Cumberland County; Ferguson, Judge.

Action by Isham Hodge against W. L. Hudson. From a judgment for plaintiff, defendant appeals. Affirmed.

H. L. Cook, Pou & Fuller, T. H. Sutton, and W. A. Stewart, for appellant. N. A. Sinclair, for appellee.

CLARK, C. J. This is an action to set aside a deed because it was obtained by fraudulent representations and without consideration. The plaintiff was an illiterate colored man, who had been in possession of the land for 21 years under a deed therefor. The defendant, an educated man and a physician, went to the plaintiff's premises, and, representing that he had bought in an old mortgage debt of plaintiff (which the latter claimed had been paid), procured from the plaintiff, without any payment to him, the deed now sought to be set aside. Both parties gave in their version of the transaction, and the jury found for plaintiff. There was evidence to permit the cause to be submitted to the jury, and the motion for nonsuit was properly refused.

The plaintiff testified that the deed was made on Wednesday or Thursday and that he put up notices Friday or Saturday forbidding the defendant to come on the land. As he had testified that the purport of the deed which was written by the defendant was different from what was represented, and the plaintiff could not read, it was competent to ask him, "Who told you that the deed conveyed all your interest in the land?" not to prove the declaration of the third party, but to corroborate the plaintiff that, as soon as he learned that fact, he put up notices repudiating the deed.

The indorsements upon the mortgage were properly excluded. The mortgage note was not produced. The alleged indorsements on the mortgage would not have conveyed the debt nor the property (for title in the indorsers was not shown), and it does not appear that the signatures of the alleged indorsers were proven.

Nor was it competent to show by plaintiff that Louise Robeson owned the debt. It would have been only her declaration, if she had made it; the debt not being shown or proven. Besides, the defendant testified that he bought the mortgage from her agent, E. Smith, her uncle, agent, and former guardian, who, when introduced as a witness for the defendant, and asked if he had such transaction with defendant, limited his reply to a statement that he had never seen the alleged mortgage note. The existence of the note is not proven by any one, nor is its loss, if lost, attempted to be accounted for.

The defendant's prayers for instructions were given, except the fourth, which was on the reverse side of the sheet and was overlooked by the court. This would not of itself correct the error in failing to give it; but, the existence of the debt not having been shown and the note not having been produced, the prayer should not have been given, except that part which was given in the charge.

The evidence offered as to the purchase of the mortgage by the defendant from Louise Robeson, who was not shown to have the legal title, was irrelevant. The matter at issue is whether the defendant procured the execution of the deed by fraudulent representations, of which there was evidence, if believed by the jury. It appears from the defendant's evidence that he paid the plaintiff nothing, the existence of the alleged mortgage debt is not shown, and, in the conflict of testimony as to the representations made to the plaintiff, the jury found that "the deed from plaintiff to the defendant was procured by the fraudulent misrepresentation of the defendant."

The other exceptions do not require discussion.

No error.

(139 N. C. 308)

HUDSON v. HODGE.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. JUSTICE OF THE PEACE — JURISDICTION — TITLE TO LAND—DISMISSAL OF ACTION.

Under Code, §§ 836, 837, authorizing defendant, in an action before a justice involving title to real estate, to set forth the matter showing that such title will come in question, and requiring the justice, if it appears on the trial that the title to real estate is in controversy, to dismiss the action, an action for rent begun before a justice was properly dismissed by the justice, when defendant denied plaintiff's title and lease.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 89.]

2. SAME—APPEALS—DISMISSAL OF ACTION.

Where an action commenced before a justice was properly dismissed under Code, §§ 836, 837, because the title to real estate was involved, the superior court, on appeal from the justice, should have taken the same course and dismissed the action.

Appeal from Superior Court, Cumberland County; Ferguson, Judge.

Action by W. L. Hudson against Isham Hodge. From the judgment rendered, defendant appeals. Action dismissed.

N. A. Sinclair, for appellant.

PER CURIAM. Action for rent, begun before a justice of the peace. The defendant denied plaintiff's title and lease, and the justice properly dismissed the action. Code, §§ 836, 837; Hahn v. Guilford, 87 N. C. 172. The judge below should have taken the same course. The litigation over the title and tenancy were before us at this term. Hodge v. Hudson, 51 S. E. 954.

Action dismissed.

(139 N. C. 583)

STATE v. MAULTSBY.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. PENALTIES — CONSTITUTIONAL PROVISIONS —QUI TAM ACTIONS.

Const. art. 9, § 5, appropriating the clear proceeds of all penalties to the school fund, does not preclude the Legislature from authorizing qui tam actions for penalties.

2. FINES—DISPOSITION OF PROCEEDS.

Under Const. art. 9, § 5, appropriating the clear proceeds of all penalties and forfeitures of all fines to the school fund, the "clear proceeds" of a fine includes the total sum, less only the sheriff's fees for collection in case the fine and costs are not collected in full.

3. SAME—CONSTITUTIONAL PROVISIONS.

Under Const. art. 9, § 5, appropriating the clear proceeds of forfeitures of fines to the school fund, the General Assembly cannot appropriate the clear proceeds of fines to any other purpose than the school fund; and Laws 1903, p. 146, c. 125, § 9, providing that the informant, in a prosecution for an illegal sale of liquor, shall receive one-half of the fine imposed, is unconstitutional.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fines, § 25; vol. 39, Cent. Dig. Penalties, § 12.]

Appeal from Superior Court, Cumberland County; Ferguson, Judge.

W. C. Maultsby was convicted of an illegal sale of liquor on the information of John Evylin, and said Evylin petitioned for a division of the fine. From a judgment denying the petition, petitioner appeals. Affirmed.

N. A. Sinclair and R. H. Dye, for appellant. The Attorney General, for the State.

CLARK, C. J. Under the provisions of Const. art. 9, § 5, the "clear proceeds of all penalties and forfeitures and of all fines" are, with other sources of revenue named in said section, appropriated to the school fund. "Penalties" are recoverable by civil action, and from time immemorial accrue to the state only when the act creating them so directs. The above section is in the article on "Education," and was not intended as a restriction upon the immemorial legislative power to authorize qui tam actions for penalties (and, if so intended, it would have been placed in article 2 of the Constitution on the "Legislative Department"), but is merely a provision that the net proceeds of such penalties as accrue to the state shall be devoted to the public schools. This has been fully discussed and settled (Katzenstein v. R. Co., 84 N. C. 688; Hodge v. R. Co., 108 N. C. 30-32, 12 S. E. 1041; Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968, and cases there cited), and reaffirmed in Goodwin v. Fertilizer Co., 119 N. C. 122, 25 S. E. 795; Carter v. R. Co., 126 N. C. 445, 36 S. E. 14; Board of Education v. Henderson, 126 N. C. 695, 36 S. E. 158; School Directors v. Asheville, 137 N. C. 508, 50 S. E. 279.

While it is true that it is competent for the Legislature to give penalties, which must be sued for, either wholly or in part to whomsoever shall sue for the same, and only the clear proceeds of such as accrue to the state go to the school fund, it is otherwise as to "fines." From their very nature, being punishment for violation of the criminal law, they are imposed in favor of the state, and, belonging to the state, the General Assembly cannot appropriate the clear proceeds of fines to any other purpose than the school fund. By "clear proceeds" is meant the total sum, less only the sheriff's fees for collection when the fine and costs are not collected in full. This, also, has been fully discussed and settled. Board of Education v. Henderson, 126 N. C. 689, 36 S. E. 158; School Directors v. Asheville, 137 N. C. 508, 50 S. E. 279. The distinction is that section 5, art. 9, is an appropriation of certain existing sources of revenue, and penalties accrue to the state only when so prescribed, but fines belong to the state in all cases. Hence the Legislature, in the act here in question (Laws 1903, p. 144, c. 125), under which the judge imposed a fine of $100 for selling whisky contrary to its provisions, exceeded its powers in section 9 thereof, in providing that the informant "shall receive one-half of the fine imposed." A penalty is always for a sum certain (Commissioners v. Harris, 52 N. C. 281; State v. Crenshaw, 94 N. C. 877), and is recoverable in a civil action by the party entitled (Middleton v. Railroad, 95 N. C. 167; Burrell v. Hughes, 116 N. C. 437, 21 S. E. 971). A fine is discretionary within the limits prescribed, and is paid to the state.

In refusing the petition of the informant for one-half of said fine there was no error.

(139 N. C. 440)

DAVIS v. EVANS.

(Supreme Court of North Carolina. Oct. 31, 1905.)

1. TRIAL—MISCONDUCT OF COUNSEL—INSTRUCTIONS.

Where, in an action on a note against the maker's administratrix, defendant's counsel, in his closing argument, contended that plaintiff had failed to testify that he had ever demanded payment of the note, whereupon plaintiff's counsel requested the court to charge in writing that, the maker being dead, plaintiff was not competent to testify that he demanded payment of the note of him in his lifetime, it was error to refuse such request and to charge that the case presented only a question of fact, and that defendant's counsel was right in stating that there was no law in it, etc.

2. WITNESSES — COMPETENCY — TRANSACTION WITH DECEASED PERSON.

In an action on a note against an administratrix of the maker, whether plaintiff ever demanded payment of the maker in his lifetime involved a transaction with the deceased, as to which plaintiff was precluded from testifying by Code, § 590.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 673.]

Appeal from Superior Court, Granville County; Bryan, Judge.

Action by S. E. Davis against M. E. Evans, as administratrix of Mark Evans, deceased. A verdict and judgment for defendant was rendered on appeal from a justice's judgment. The plaintiff declared on a note given to him by the defendant's intestate, and, the defendant having pleaded payment, the question was held on that issue. Verdict and judgment for the defendant, and the plaintiff excepted and appealed. Reversed.

Graham & Devin, for appellant.

HOKE, J. The question presented for consideration is stated in the case on appeal as follows: "When counsel for defendant, in his closing speech to the jury, contended that plaintiff had failed to testify that he had ever demanded payment of the note from Mark Evans in his lifetime, and proceeded to argue that that was some evidence that the note was not due, the counsel for plaintiff arose and called attention to the fact that under section 590 of the Code the plaintiff was not competent to testify as to any transaction or conversation with the deceased, and at once requested the court in writing to charge the jury as follows: 'That, Mark Evans being dead, the plaintiff could not testify as to any transaction or conversation with him, except some conversation about which the administratrix had testified, and therefore could not have testified that he demanded payment of the note of Mark Evans in his lifetime.'"

The court charged the jury as follows: "Defendant having admitted the execution of the note, the burden of proof as to its payment is upon her, and she must show payment by the preponderance of the evidence. She contends the note has been paid, and the plaintiff contends it has not been paid. It is a mere question of fact. Counsel for defendant was right in stating that there is no law in it. If you find for defendant, you will answer the issue, 'Yes.' If you find for plaintiff, you will answer the issue, 'No'" —and made no other response to plaintiff's prayer for instruction, nor other reference to the argument of defendant's counsel objected to by plaintiff, either in the charge or at the time the same was made. If the plaintiff had undertaken to testify in his own behalf that he had or had not made a demand for payment of the note of the defendant's intestate, such evidence should, on objection, have been excluded by the court. It clearly involved a transaction with the deceased, and was incompetent under section 590. Armfield v. Colvert, 103 N. C. 147, 9 S. E. 461; Hopkins v. Bowers, 108 N. C. 298, 12 S. E. 984; Davidson v. Bardin (at this term) 51 S. E. 779; Stocks v. Connon (at this term) 51 S. E. 802. When the counsel for defendant proceeded to comment on the failure of the plaintiff to testify on this question of demand, he was commenting on a fact not relevant to the issue, and when he further argued to the jury that such testimony would not have been as to a transaction or conversation with the deceased, he was urging an erroneous proposition of law. This was immediately brought to the attention of the court, both by objection and by the prayer for instruction presented at the time. The argument was continued with the apparent sanction of the court, and was well calculated to make a wrong impression on the jury to the plaintiff's prejudice. In failing to advert to the matter either at the time or in the charge, there was error, which entitles the plaintiff to a new trial.

Furthermore, the statement in the charge that the case presented only a question of fact, that the counsel for the defendant was right, and that there was no law in it, tended to confirm the impression the jury had no doubt already conceived that the court approved as sound the legal proposition maintained by counsel. There is error. 2 Enc. Pl. & Pr. 710; Thompson on trials, § 950; People v. O'Brien, 68 Mich. 468, 36 N. W. 225; State v. Erb, 9 Mo. App. 589; State v. Ussery, 118 N. C. 1177, 24 S. E. 414.

New trial.

(139 N. C. 95)

Ex parte McCOWN.

(Supreme Court of North Carolina. Sept. 26, 1905.)

1. HABEAS CORPUS—CONTEMPT—REVIEW.

On a writ of habeas corpus to determine the legality of petitioner's confinement for contempt, the only question presented for consideration is the jurisdiction or power of the judge to proceed as he did, since such writ cannot be made to perform the office of a writ of error or of an appeal.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, §§ 20–95.]

2. CONSTITUTIONAL LAW—COURTS—POWERS—LEGISLATIVE RESTRICTION.

The power of the superior courts to punish for contempt being derived from their very constitution, without express statutory aid, the Legislature is without authority to restrict such power as it existed at common law.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 84.]

3. SAME—MISCONDUCT.

Where a judge of a superior court, after having sentenced a person convicted of an offense before him, adjourned his court to meet again at his call, and then retired to his living apartments, where petitioner went and complained to the judge in an angry manner for not having imposed a more severe sentence, and, in addition, committed an assault upon the judge, such acts constituted a contempt, as defined by Code, §§ 648–654.

4. SAME—PUNISHMENT—SUMMARY PROCEEDINGS.

Where, pending an adjournment, petitioner resorted to the dwelling house of a judge of the superior court, and there committed an assault on him because of the judge's official action, petitioner was properly punished for contempt by attachment in summary proceedings.

M. E. McCown was attached and convicted for contempt, and he brings habeas corpus. Writ denied.

The petitioner was attached for contempt by his honor, Judge Ward, at the last term of the superior court of Durham. He was adjudged in contempt and ordered to be imprisoned in the county jail for 30 days and fined $200. Having no right to appeal from the decision (State v. Mott, 49 N. C. 449; In re Davis, 81 N. C. 72), he applied to the writer of this opinion as a justice of this court for a writ of habeas corpus, which was issued and made returnable before him on Monday, the 4th day of September, 1905. At the hearing, as counsel wished to avoid the necessity of two arguments of the case, and it was also desired, owing to the great importance of the question and the peculiar circumstances of the case, that when the matter was heard in the Supreme Court all the justices should sit, it was agreed that argument should be waived, and the matter should be decided upon the papers, and an appeal entered, so that the case could be heard at once in this court by a full bench; all defects and irregularities in the manner of bringing the case before this court for review being waived. An order was thereupon made remanding the petitioner to the custody of the sheriff in further execution of Judge Ward's sentence, and the whole matter has been brought into this court by exception and appeal for full hearing and consideration; argument of counsel being made here for the first time. If a direct contempt was committed, it is conceded that the respondent was properly committed and fined, and that the final judgment is unassailable. Judge Ward's findings of fact are as follows:

"On Friday, September 1, 1905, one Allen Haskins was put on trial for murder in the second degree in the superior court of Durham county, over which the undersigned judge was presiding. The jury, on Saturday afternoon in the same week, rendered a verdict finding the defendant guilty of manslaughter, and at the same time recommended the defendant to the mercy of the court. Judgment was prayed by the solicitor. It appeared to the court that the defendant had already been confined in the common jail of Durham county for more than 10 months awaiting trial. After due and careful consideration of the case, the court, in view of all the evidence, the recommendation of the jury, and the length of time that the prisoner had already been imprisoned in jail, sentenced the prisoner to 15 months at hard labor upon the public roads of Durham county. There being still unfinished business of the court, the court, between 4 and 5 o'clock p. m., announced that it would not adjourn court sine die, as there was other business to transact, and told the court crier to announce that the court was adjourned until further notice from the judge, which the crier accordingly did, and the court was left open for the transaction of further business. The judge then left the courtroom and went to his room at his boarding house near by. In a short while thereafter, to wit, about 6 o'clock p. m., the respondent, M. E. McCown, came to the room of the judge and called him out on a porch adjoining his room. The judge responded, and went on the porch to meet the respondent, whom he found perfectly rational, and who at once accosted him in a very angry and menacing manner, complaining of the judgment rendered in the case of State v. Allen Haskins, and demanded that the court at once should impose a longer term than the one already announced or turn the prisoner out of jail. The court listened to the statement, and respectfully considered it, as the respondent stated that he was there to see him about this case. The court then asked the respondent in a quiet and mild manner if he was accustomed to speaking to the court in that way, adding that in the course of the case the court had exercised its best judgment and discretion in the matter. Whereupon the respondent began to curse the judge violently, using most offensive language, and following it up with an assault on the person of the judge. The minutes were not signed, and the judge intended to return and sign the same, and did sign them later. The court was a one-week term, and for the trial of criminal cases only, and all of the jurors had been discharged before the assault by respondent was committed. The judge had transacted no other business after the adjournment as above stated, before taking up this matter with the respondent on the porch, except to change the sentence of one defendant, and adjust a matter of costs in another case, which he did before he left the courtroom, but after the crowd had left. The respondent was present in court in person, and represented by attorneys, Messrs. Guthrie & Guthrie and Fuller & Fuller, and the state was represented by the solicitor. The respondent filed no answer in writing; his counsel waiving the same after suggesting to the court other facts, which it included in the findings above."

The Attorney General and A. L. Brooks, for the State. Fuller & Fuller and Guthrie & Guthrie, for respondent.

WALKER, J. (after stating the case). This matter, as now presented to us, really involves the correctness of the ruling of Judge Ward in the proceedings which resulted in the commitment of the respondent and the imposition of a fine upon him for contempt of court. If upon the facts, as found by the judge, a contempt was committed within the meaning and intent of the law upon that subject—or, to express the same idea in somewhat different words and as it is usually stated, if the judge was in the exercise of a rightful jurisdiction in the particular case—his decision cannot be reviewed in a collateral way by the writ of habeas corpus. This court is bound by the judge's findings of fact, which were spread upon the record as required by the statute. In re Deaton, 105 N. C.

59, 11 S. E. 244; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405. We cannot decide whether there was any merely erroneous ruling of the court or any irregularities in respect to judgment and procedure, as the writ of habeas corpus can never be made to perform the office of a writ of error or of an appeal. We are confined in our investigation to the question of jurisdiction or power of the judge to proceed as he did, and cannot otherwise pass upon the merits of the controversy. There must have been a want of jurisdiction over the person or the cause, or some other matter rendering the proceedings void, as this is the only ground of collateral attack. The law in this respect has been definitely settled, we believe, by all the courts. Ex parte Terry, supra; Ex parte Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150; Rapalje on Contempts, § 155. In Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538, the doctrine is thus clearly and concisely stated: "A writ of habeas corpus cannot be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not only erroneous, but absolutely void." The range of our inquiry, therefore, is narrowed to the question of jurisdiction and the validity of the order of Judge Ward. That the court had general jurisdiction of the subject of contempt cannot be denied; but do the facts stated in the record constitute a contempt within the meaning of the law? This is precisely the question now before us.

We would have had less difficulty in deciding this case, if by the act of 1871 (Code, §§ 648–657) the Legislature had not defined contempts of court and declared that no other acts or conduct not mentioned therein should be "the subject of contempt," and repealed the common law, in so far as it recognized as contempts other acts or conduct not specified in the statute. We are satisfied that at common law the acts and conduct of the petitioner, as set out in the case, constituted a contempt of court, and if the statute does not embrace this case, and in terms repeals the common law applicable to it, we would not hesitate to declare the statute in that respect unconstitutional and void, for reasons which we will now state. That courts have inherent power to punish summarily for any direct contempt has unquestionably been settled by the authorities. 4 Bl. Comm. c. 283, says that the method of punishing contempts by attachment has been immemorially used by the superior courts of justice. Contempts that are thus punished are either direct, which openly insult or resist the powers of the court or the persons of the judges who preside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create universal disregard of their authority. And, after enumerating specially contempts which fall within the two descriptions, he says generally that they may be committed by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people. And he proceeds to say that the process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves; for laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. The power, therefore, to suppress such contempts by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal, and has been actually exercised as early as the annals of our law extend. And hence he concludes that the power is not derived from any statute, not even St. Westm. II (13 Edw. I) c. 39, which was merely declaratory of the law; but it was originally "a part of the law of the land, and as such is confirmed by the statute of Magna Charta." 2 Bishop, Criminal Law (8th Ed.) §§ 242, 243, lays down substantially the same doctrine in these words: "It is not possible for any judicial tribunal to fulfill its functions without the power to preserve order and to enforce its mandates and decrees. And the common and apparently only practical method of doing these things is by the process of contempt. Therefore the power to proceed thus is incident to every such tribunal, derived from its very constitution, without any express statutory aid. The doctrine is generally asserted in these broad terms, and is believed to be sound. The narrower doctrine, about which there is no dispute, is that this power is inherent in all courts of record. As explained in the first volume, it is a common-law offense to obstruct any course of the government or its justice. When, therefore, a man does anything which interferes with the judicial tribunal in the conduct of a cause, he commits an obstruction of a criminal nature. This is a common form of contempt of court."

In King v. Almon, 8 State Trials, 53, Wilmot, C. J., says: "The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution. It is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court acted in the face of it (1 Vent. 1), and the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law. It is as much the 'lex terræ,' and within the exception of Magna Charta, as the issuing any other legal process whatever. I have

examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law. There is no priority or posteriority to be discovered about it, and therefore it cannot be said to invade the common law, but to act in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society." "Every court of record," says Bacon, in his Abridgment ("Courts," E, vol. 2, pp. 633, 634), "as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court, and may immediately order them into custody. The courts of record, as incident to them, have a power of protecting from arrest, not only the parties themselves, but also all witnesses eundo et redeundo; for since they are obliged to appear by the process of the court, it would be unreasonable that they should be molested whilst paying obedience to it." 1 Hawk. P. C. (8th Ed.) p. 63. McKean, C. J., forcibly summarized the doctrine more than a century ago (1788) in Respublica v. Oswald, 1 Dall. (Pa.) 319, 1 L. Ed. 155, 1 Am. Dec. 246, when he said: "Some doubts were suggested whether even a contempt of the court was punishable by attachment; but not only my brethren and myself, but likewise all the judges of England, think that without this power no court could possibly exist; nay, that no contempt could, indeed, be committed against us, we should be so truly contemptible. The law upon the subject is of immemorial antiquity, and there is not any period when it can be said to have ceased or discontinued. On this point, therefore, we entertain no doubt." It was held in Cartwright's Case, 114 Mass. 230, that the right summarily to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts as being essential to the exercise of their jurisdiction, to the execution of their powers, and to the maintenance of their authority. It is therefore a part of the fundamental law, within the meaning and intent of Magna Charta and the Declaration of Rights in our Constitutions against depriving any person of life, liberty, or property, except by the judgment of his peers or the law of the land, and is not contrary to any guaranty of trial by jury or due process of law.

The language of the court in Cooper's Case, 32 Vt. 257, is peculiarly applicable to the facts of our case. "The power to punish for contempt," says the court, "is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers. It is indispensable to the proper transaction of business. It represses disorder, violence, and excitement, and preserves the gravity, tranquility, decorum, and courtesy that are necessary to the impartial investigation of controversy. It secures respect for the law, by requiring respect and obedience to those who represent its authority. Its exercise is not merely personal to the court and its dignity. It is due to the authority of law and the administration of justice. The power to punish for contempt is indispensable to the proper discharge of their duties by magistrates. Without it the magistrate would be in a pitiable condition, compelled to hold court, to investigate controversies, examine witnesses, and listen to arguments, and yet powerless to secure order in his proceedings, to enforce obedience to his decisions, to repress turbulence, or even to protect himself from insult. The mere power to remove disorderly persons from his courtroom would be wholly inadequate to secure either the proper transaction and dispatch of business or the respect and obedience due to the court and necessary for the administration of justice." In Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405, where most of the authorities are collected, the court, affirming the rulings to be found in its earliest decisions, holds that certain implied powers result to courts of justice from the very nature of their constitution, and thus they possess the power to fine for contempt, imprison for contumacy, and enforce the observance of order. "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates. The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." The moment that courts are called into existence and vested with jurisdiction over any subject, they become invested with this power. This doctrine of the law is well stated in Clark v. People, Breese (Ill.) 340, 12 Am. Dec. 177, where will be found a valuable note collating the principal cases on the subject.

Rapalje, in his work on Contempts (section 1 and notes), says: "It is conclusively settled by a long line of decisions that at common law all courts of record have an inherent power to punish contempts committed in facie curiæ, such power being essential to the very existence of a court as such, and granted as a necessary incident in establishing a tribunal as a court." The doctrine has been fully recognized by this court. In

State v. Woodfin, 27 N. C. 199, 42 Am. Dec. 161, Ruffin, C. J., for the court, says: "The power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances, and the only means of doing that is by immediate punishment. A breach of the peace in facie curiæ is a direct disturbance and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial. Necessarily there can be no inquiry de novo in another court as to the truth of the fact." Ex parte Summers, 27 N. C. 149; Ex parte Schenck, 65 N. C. 366; Pain v. Pain, 80 N. C. 322; In re Oldham, 89 N. C. 23, 45 Am. Rep. 673; Kane v. Haywood, 66 N. C. 1. From this doctrine, so firmly established, and from the reasoning of the authorities cited in its support, it must necessarily follow that, as the power to attach for a certain class of contempts is inherent in the courts and essential to their existence, and the due performance of their functions, the Legislature cannot, as to them, deprive the courts of this power or unduly interfere with its exercise.

The Constitution provides for a distinct separation of the three co-ordinate branches of the government, and vests the judicial power in the several courts mentioned in article 4, § 2. It further provides that the General Assembly shall not deprive the judicial department of any power or jurisdiction which rightfully pertains to it. Article 4, § 12. If the power to attach for a direct contempt is inherent in the courts and necessary to their vitality and usefulness, any interference with its exercise which prevents the courts from proceeding against contumacious or disorderly persons must needs be a deprivation of the power. But argument is not required to establish so plain a proposition. Rapalje, at page 13, § 11, says: "In the absence of a constitutional provision on the subject, the better opinion seems to be that legislative bodies have not power to limit or regulate the inherent power of courts to punish for contempt. This power being necessary to the very existence of the court as such, the Legislature has no right to take it away or hamper its free exercise. This is undoubtedly true in the case of a court created by the Constitution. Such a court can go beyond the provisions of the statute, in order to preserve and enforce its constitutional powers, by treating as contempts acts which may clearly invade them. On the other hand, the Circuit and District Courts of the United States being the creatures of Congress, their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction." In Ex parte Schenck, 65 N. C. 366, a case which has frequently been cited with approval, and a case, too, in which the validity of the act of 1871 was recognized to a certain extent, it is said: "Courts of justice are established by the Constitution, and are invested with certain inherent powers, which are essential to their existence, and of which they cannot be deprived by the Legislature. Their province is to construe existing laws and to administer justice, and they must necessarily have the power by summary remedies to preserve order during their sessions, control the action of their officers, and enforce their mandates and decrees. If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes."

In Holman v. State, 105 Ind. 515, 5 N. E. 556, the court states what it declares to be the principle settled by the words of the Constitution, as well as by actual decision: "The power," says the court, "to punish for direct contempts is inherent in all courts of superior jurisdiction. This power is not conferred by legislation, but is an inherent power residing in all superior courts. It is a power that the Legislature can neither create nor destroy. It is as essential to the preservation of the existence of courts as is the natural right of self-defense to the preservation of human life. The judicial is a co-ordinate department of the government, and courts are not the mere creatures of the Legislature; for, if they were, the judicial department would be a subordinate one, dependent for existence and power upon the will of the Legislature. This it is not, as the Constitution expressly declares and the united voice of the courts affirm. As it is a co-ordinate branch of government, and as judicial power can only live in the courts, it must follow that courts possess inherent powers which they do not owe to the Legislature; and among these powers is that of the right to punish direct contempt. This subject has been many times discussed, and the doctrine often affirmed, without diversity of judicial opinion, that courts do possess power to punish contempts independent of legislation, and that this power is one that the Legislature can neither destroy nor abridge." This court said, in Deaton's Case: "So inherent is the power to attach for contempt that the Legislature would have no power to deprive the courts of its exercise." And in Herndon v. Insurance Co., 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547, it was held that the Supreme Court was created by, and derives its power and jurisdiction from, the Constitution. Its mandate comes from the people, and the source of its authority is the same as that of the legislative and executive departments. "The same organic law which gives the Legislature power to make rules and regulations for the orderly and regular dispatch of business in its sessions, free from the control or interference of the executive or of this court, gives the like

power over its own procedure to this court, free of interference from either of the other co-ordinate branches of government. Neither body has shown any disposition to encroach upon the constitutional perogatives of this court." The power of the Legislature to require this court to rehear a case otherwise than is prescribed by its own rules of practice and procedure was denied in that case. The superior court, being a constitutional body, must be governed by the same law as this court and is under the same protection from legislative interference, so far, at least, as its inherent rights and powers are concerned, which are specially shielded by the Constitution against infringement. In re Woolley, 74 Ky. 98; People v. Wilson, 64 Ill. 196, 16 Am. Rep. 528; State v. Morrill, 16 Ark. 384; State v. Kaiser, 20 Or. 56, 23 Pac. 964, 8 L. R. A. 584. See, also, Scott v. Fishblate, 117 N.C. 265, 23 S. E. 436, 30 L. R. A. 696, in which the inherent power to punish summarily for contempt was said to reside even in a mayor of a town, as being necessary to the very existence of the court.

The validity of the act of 1871 was settled by Ex parte Schenck, "with certain savings in respect to the inherent rights of the court," said this court, by Pearson, C. J., in Kane v. Haywood, 66 N. C. 31; that is, its operation was restricted to those contempts which are constructive, and the right to attach for which is not essential to the full and free exercise of the powers and jurisdiction conferred upon the courts by the Constitution. It would be useless to multiply authorities in support of this reasonable and necessary doctrine that the Legislature cannot deprive the courts of any of their vital powers, such as are requisite for their preservation and for their protection from unlawful interference in the exercise of their jurisdiction and the performance of their judicial functions. The doctrine is recognized as perfectly sound and well settled in all the cases we have cited, and is a logical deduction from the other proposition that the power to attach for contempt is inherent. If, therefore, the Legislature by the act of 1871 (Code, §§ 648–654) had attempted to destroy or abridge this power, it would become our duty to declare the act to that extent void and of no effect. The Legislature has the same inherent power to preserve order and to attach for any act which tends to interrupt its deliberations and proceedings, or which is committed in contempt of its authority, as is vested in the courts. Rapalje, § 2. With the lawful exercise of this undoubted power, the judiciary will not interfere. It is recognized as being necessary to the proper and orderly transaction of its business, and is clearly implied from the other powers conferred and duties imposed upon that honorable body, under the elementary and familiar rule that, when a power is given, every other power necessary to its execution is to be considered as also granted. As we will not attempt to restrict or regulate the exercise of this power, and it would not be seemly to do so, we will not assume that the Legislature intended to trench upon the right which inherently belongs to the courts to protect themselves, by punishing those who unlawfully obstruct their proceedings or act in contempt or defiance of their authority. But, fortunately, we are relieved from the necessity of deciding that question by the fact that this court has construed that statute, and held that it "does not take away any of the inherent powers of the courts which are absolutely essential in the administration of justice, and is not such an encroachment upon the rights of the judicial department of the government as to warrant us in declaring it to be unconstitutional and void." Dick, J., in Ex parte Schenck, 65 N. C. 368. In view of what the court had before said in that case, which we have already quoted, it must be taken as settled that the act of 1871, as brought forward in Code, §§ 648–654, is in respect to the law of contempt as broad and comprehensive in its scope and meaning as the common law itself, so far as it relates to those "inherent powers of the courts which are absolutely essential in the administration of justice."

With these observations as to the power of the courts, let us now inquire whether the facts found by the judge and "specified on the record" show that the petitioner has committed a contempt, within the meaning of the act of 1871 and the common law, for which he could be summarily punished. There is no case to be found precisely like this one in all of its facts and circumstances. Insults to judges and assaults upon them while in the discharge of their official duties, in resentment for some imagined grievance growing out of their official action have been so rare, be it said to the credit of a law-abiding and law-respecting people, that it is difficult to find an exact precedent for our ruling in this matter, but authority is abundant in support of the principle upon which our decision must rest. If the respondent had not committed a contempt of court for which he could be summarily punished, we might well join with Lord Langdale in his assertion that, without such a power in the court, "it will be impossible that justice can be administered. It would be better (in such circumstances) that the doors of justice were at once closed." Littler v. Thompson, 2 Beav. 129. He was there speaking of an attack upon a party to a cause then pending. How much more aggravated is one made upon the presiding judge of the court. The same idea is advanced in Ex parte McLeod (D. C.) 120 Fed. 130, a case much like ours in its facts, if it does not fully cover the very question here involved. It there appeared that a commissioner had been assaulted by a party of whom he had required an appearance bond. With reference to these facts, it was substantially said that, as courts can exercise judicial functions only through their judicial officers,

an assault upon such an officer because he has discharged a required duty is necessarily an attack upon the court for what it has done in the administration of justice. It is vital to the welfare of society that courts, which pass upon the life, liberty, and property of the citizen, be free to exercise their reason and conscience unawed by fear or violence; and the highest considerations of the public good demand that the courts protect their officers against revenges induced in consequence of the performance of their duties, as well as violence while engaged in the actual discharge of duty. It is a high contempt of court to seek to punish a judicial officer for his official act elsewhere than before a constituted tribunal of impeachment. The evil is that the judge has been held to accountability for his judicial acts, and punished contrary to the law because he has performed them. That acts like this, which degrade the judicial office, unfit the incumbents for calm deliberation, awe them in the exercise of their functions, and undermine their independence, must recoil fearfully on the orderly and decent administration of justice, cannot be denied. Who would have any respect for the authority of a court whose judge, the moment he left the courthouse, could be subjected with impunity to insult and assault because of acts done in his judicial capacity while on the bench? Is it in the power of any person, by insulting or assaulting the judge because of official acts, if only the assailant restrains his passion until the judge leaves the court building, to compel the judge to forfeit either his own self-respect and the regard of the people by tame submission to the indignity (without summarily arraigning the culprit), or else set in his own person the evil example of punishing the insult by taking the law into his own hands? If he forbear for the time and resort to the criminal law, the remedy is hardly better than the wrong, since then he must become a private prosecutor in some other court, and depend on it to vindicate the independence of his own.

We will now refer to a decision which at least one eminent judge has pronounced to be "the ablest one on the law of contempts to be found in the books." Hammond, J., in Kerr v. Southwick, 120 Fed., at page 772, 57 C. C. A. 136. It is the case of Commonwealth v. Dandridge, 2 Va. Cas. 408. The respondent, who was interested in the event of the suit then pending in the court over which the judge presided, met the latter on the steps of the courthouse, as he was returning from his chambers to open court, and grossly insulted him, charging him with corruption in the trial of the case. The court was not actually in session, but in recess. It was adjudged to be a contempt for which summary punishment could be inflicted. "Judicial independence," says the court, by Dade, J., "has been an object of constitutional care in this country. In the origin of this government it was thought expedient to make that department independent even of the executive and legislative branches, who are not presumed to do wrong; and shall it be said that it is wholly unnecessary to make it independent of the passions and prejudices of all who may conceive themselves injured by its legitimate proceedings? Shall a judge be called independent who is unavoidably placed in a situation in which he comes in conflict with the jealousies and resentment of those upon whose interests he has to act, and be reduced to the alternative of either submitting tamely to contumely and insult, of resenting it by force, or resorting to the doubtful remedy of an action at law? In such a state of things it would rest in the discretion of every party in court to force the judge either to shrink from his duty or to incur the degradation of his authority, which must unavoidably result from the adoption of either of the above alternatives. To assume that the personal character of the judge would be a sufficient guaranty against this is to imagine a state of society which would render the office of the judge wholly unnecessary." In another part of the opinion, this able and scholarly judge said: "When I see the juror and the witness protected from insult for what they may have said or done in court, I ask whether it is more necessary to defend these characters, who may perhaps never be again called into a court of justice, than the judge, who must be so often exposed to similar trials. When in all these cases I find the great object to be the preservation of the authority, dignity, impartiality, and independence of the judiciary, without which it has been said it could not exist, or, if existing, would be a curse, rather than a blessing, I cannot feel justified in excepting a case which is in all its particulars in direct hostility to this principle, because I cannot back my opinion by a reported case." After citing Blackstone and numerous other authorities, he proceeds: "With this array before our eyes, can it be credited that it should be so highly penal to assault or abuse a judge in court for his judicial proceedings, and no offense to do the same thing to him the moment after his leaving the bench, on account of the same provocation? Can it be considered a matter of so much consequence to protect the person of the suitor, the lawyer, the witness, the juror, and the jailer, and none to defend the judge? Not that I mean to arrogate any higher personal privilege for the judge than for the humblest of these, but because it is obvious that the principle which suggests the necessity for protecting them rises with the grade of the officer, and that the majesty of the laws may be more degraded in the person of the highest than of the lowest officer intrusted with their administration."

Judge White, who wrote a separate concurring opinion, answers the argument there made by the respondent's counsel, and now advanced in this case, in very forceful words:

"It is contended that, in general and upon principle, no contempt can be committed in any court, unless it be in session at the time and the contempt be committed in its face, and that no contemptuous words, spoken to or of a judge during the recess or vacation of his court, however deeply they may implicate his judicial conduct, can be thus punished. The argument upon this point was specious and imposing. Whether it was substantially correct, and whether the result endeavored to be produced by it be in accord with either the public good or the great principles of law long since established (not for the private gratification of the judges, but to insure the well being of society), is another question—a question of solemn import to every man who looks to the laws of his country for the preservation of all he holds dear. We cannot prostrate the courts of the country at the feet of every disappointed suitor who may happen to lose his cause, or whose conduct may necessarily elicit from a judge observations unpleasant to his feelings, without the most fatal consequences. Nay, destroy the protection which the law now gives to your court, unloose the hands and tongues of such persons, expose your magistrates to their abuse, contumely, and vituperation for their judicial conduct without any immediate and efficacious means of restraint, and, instead of that happy, dignified, and peaceful state of society which we now enjoy, we shall soon find that we have neither laws nor magistrates; and let it be remembered that in this country we ought not to have, we have not, any privileged order of men. If one man is restrained from such conduct, every man must be subject to a like restraint. If one man is at liberty to pursue it, every other man must enjoy the same liberty."

We might well stop here and rest our decision upon the reasoning in that case and the deduction of that able court that, in such a case as the one there and here presented, an attachment for a direct contempt will lie and punishment can be summarily imposed. But we are impressed, and the court was in that case, with the great importance of the question, which induces, if it does not require, us, especially in view of the ability and zeal with which counsel have argued before us, to investigate fully this doctrine of attachment for contempt, and deliberately and maturely weigh the reasons for and against it, aided by the learning we find in the books, to the end that our conclusion may be formed after the most careful thought and deliberation, and with due regard for the maintenance of the rightful powers of the courts, as well as the preservation of the personal liberty of the citizen. If, in an attempt to do this, more time is consumed than we could wish, an apology will be found in the desire we have to reach a just and safe conclusion. When we use the term "attachment for contempt," it must be understood that we refer to the summary proceeding, and not to the remedy by citation or rule to show cause, when the contempt is indirect or constructive and the offense can now be punished only "as for a contempt," as provided by the statute. Code, § 654. With this explanation of a term, we proceed to the further discussion of the authorities.

In U. S. v. Anonymous (C. C.) 21 Fed. 761, where the question here involved is examined at great length in a well-considered opinion by Judge Hammond, who reviews the cases with marked discrimination, and sustains his views by the most cogent reasoning, it is held that "where the act or conduct takes the form of an assault upon an officer, as when he was beaten and made to eat the process and its seal, the impediment to the efficient administration of justice may be quite as direct in its operation to that end, happen where it may, as if the party had ridden his horse to the bar of the court and dragged the judge from the bench to beat him. Be this as it may, wherever the conduct complained of ceases to be general in its effect, and invades the domain of the court to become specific in its injury, by intimidating or attempting to intimidate, with threats or otherwise, the court or its officers, the parties or their counsel, the witnesses, jurors, and the like, while in the discharge of their duties as such, if it be constructive because of the place where it happens, yet, because of the direct injury it does in obstructing the workings of the organization for the administration of justice in that particular case, the power to punish it has not yet been taken away by any statute, however broad its terms may apparently be." This is a very important case and a strong authority, as in it the court construes the act of Congress of 1831 upon the subject of contempts, which greatly limited the power of the federal courts to punish summarily for contempts, and confined it to misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, and misbehavior of the officers of the court, and disobedience or resistance to its process. The act, if anything, is more restricted in its provisions than our statute (Code, §§ 648–654), and yet it was held in the case cited that it was not necessary that the offensive act should have been committed in the immediate presence of the court while actually sitting in the courthouse with the judge on the bench; but, though merely constructive, because of the place where it is committed, it becomes a thing done in facie curiæ within the meaning of the statute, if it affects an officer in the discharge of his duty and directly tends to obstruct the proceedings of the court or the administration of justice. It is generally understood that the object of the act of Congress was to enlarge the liberty of criticism by the press and others, by curtailing the power to punish adverse com-

ments upon the federal courts, their officers, and proceedings. U. S. v. Anonymous (C. C.) 21 Fed., at page 768; Ex parte Poulson, Fed. Cas. No. 11,350; Cuyler v. Railroad (In re Daniel) 131 Fed. 95. In other respects the common law prevails as it did under the act of 1789, as to all contempts committed in the presence of the court. Cases supra.

In U. S. v. Patterson (C. C.) 26 Fed. 509, where it appeared the respondent had assaulted an attorney in the courtroom during the recess of the court, it was held that he could be attached for contempt; the court assigning the following reason: "The mistake of the respondent was in assuming that, when the judge left the bench, he might, so far as the court was concerned, proceed to accomplish his purpose of making the assault, supposing that it was only when the judge was on the bench that any question of contempt could arise. But it must be apparent to every one that this is a misconception, and far too restricted to admit of approval anywhere. The court would deserve the contempt of public opinion if it permitted so narrow a view of its prerogatives to prevail, and could not complain if, during its recess, the courtroom could be used for a cock pit or a convenient place to erect a prize ring. That is the logic of the false assumption that was made in this case. But, wholly aside from this consideration, there is a principle of protection to all who are engaged in and about the proceedings of a court that requires preservation against misbehavior of this kind. The defendant in court whose attorney was attacked, is entitled to the protection of the court against any personal violence towards its attorney while he is in attendance on the court. Otherwise, attorneys might be driven from the court, or deterred from coming to it, or be held in bodily fear while in attendance, and thereby the administration of justice be obstructed. This principle might be pressed beyond reasonable limits, to be sure; but it certainly is not going beyond the true confines of the doctrine to apply it here. It protects parties, jurors, witnesses, the officers of the court, and all engaged in and about the business of the court even from the service of civil process while in attendance, and certainly should protect an attorney at the bar from the approach and attack of those who would do him a personal violence. A former ruling of this court on that subject has been especially approved by very high authority."

Lord Cottenham committed to the Fleet for contempt a barrister, who was also a member of Parliament and who had threatened a master in chancery with a view of inducing him to reverse his decision, upon the ground that his conduct tended to pervert the course of justice and to obstruct its due administration. This ruling was approved by the House of Commons upon the report of its committee of privileges, and the claim to be discharged by reason of privilege was disallowed. A like decision was made by Lord Eldon, when a witness was interfered with, in Ex parte King, 7 Vesey, Ch. 315, and also in Ex parte Burrous, 8 Vesey, Ch. 535, when violence was committed in one of the offices of the court, though not in its immediate presence. The court of chancery, in Williams v. Johns, 2 Dickens, 477, attached the defendant for having compelled the officer, who had served him with a subpœna, to eat the same and otherwise illtreating him. In each of these cases, the offense was regarded as a criminal contempt by reason of its direct tendency to thwart the administration of justice, as much so as if it had been committed in the very "face of the court." It was held in State v. Garland, 25 La. Ann. 532, that the use of abusive language towards a member of the court and an assault upon him during a recess, and in the courtroom, under the pretext of resenting what he had said or done when on the bench, was a direct and aggravated contempt of the court, for which he could be summarily punished; and in Baker v. State, 82 Ga. 776, 9 S. E. 743, 4 L. R. A. 128, 14 Am. St. Rep. 192, it was held that a court was not dissolved by a mere recess or necessary adjournment from one day to the next, and misbehavior affecting public justice in the courtroom, and in the immediate presence of the judge during such a recess, and whilst he is attending there to resume business, but before the hour of recess had expired, was a contempt committed in the presence of the court, and punishable summarily. The court by Bleckley, C. J., said: "What right did he, the respondent, have to discuss his case if the court was not in session? And what right did he have to do it in an improper manner if it was in session? It was urged in the argument before us that he was merely complaining to the judge, and in so doing was in the exercise of a legal right. But what law confers on a suitor the right to converse about his case with the judge out of court? Are the state's judges to be questioned by suitors about their cases and listen to complaints elsewhere than in court? We think not. The office of judge would be intolerable to the holder and degrading to the state, were the incumbent subjected by law to personal and private approach, questioning, and harassment at the will of anxious and discontented suitors. The only place for intercourse with a judge touching business pending in court is the place where the court sits, and the only time for it is during the sitting."

In People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528, it is held that the power to punish for contempts is an incident to all courts of justice, independent of any statutory provision. Referring to the statute of that

state attempting to restrict the power of the courts in this respect, it was further held that if the statute should be regarded as a limitation upon the power of the court to punish for any other contempts than those committed in its presence, yet in this power would necessarily be included all acts calculated to impede, embarrass, or obstruct the court in the administration of justice, and such acts would be considered as done in the presence of the court. See, also, on the subject of contempts not committed in the courtroom, Ex parte Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150; In re Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154; In re Healey, 53 Vt. 694, 38 Am. Rep. 713; Littler v. Thompson, 2 Beavan, 129; In re Cary (D. C.) 10 Fed. 630, note; Wellesley's Case, 2 Rus. & Mylne, 639. In Rex v. Wigley, 7 Car. & P. 4 (32 E. C. L. 415), it appeared that a witness in a prosecution tried at the King's Bench sittings struck the defendant after the trial was over as both were in the lobby of the court. The witness being brought to the bar, and evidence given of these facts, the judge (Coleridge) committed him to the custody of the marshal for three days for this contempt of the court. So, in the case of In re Pryor, 18 Kan. 72, 26 Am. Rep. 747, the facts were that an attorney had sent to a judge, out of court, a letter of an insulting character, and containing an imputation upon his integrity with reference to a cause which was being tried before him, and it was held to be a contempt of court, and one which could be summarily punished. "If the language or conduct of the attorney is insulting or disrespectful," says the court, by Brown, J., "and in the presence, real or constructive, of the court, and during the pendency of certain proceedings, we cannot hold that the court exceeded its power by punishing for contempt." In Savin's Case and in Cuddy's Case, supra, the offense was not committed in the immediate presence of the court, but in a room in another part of the courthouse, which was held to be within the precincts of the court and in its constructive presence, and the offender therefore subject to summary punishment. 131 U. S. 267, 280, 9 Sup. Ct. 699, 33 L. Ed. 150.

A case more like ours, perhaps, than any other, is that of Steube v. State, 3 Ohio Cir. Ct. R. 383, first heard below and then on appeal, the full report of which is not accessible to us. The facts appear to have been that during a recess of the court the prosecuting attorney was without provocation assaulted by a witness in a criminal case then pending; he being also a defendant in a like case not yet called for trial. The assault was made at a place about five blocks from the courthouse, and grew out of the attorney's conduct in the pending case. The statute of Ohio provides that a person guilty of misbehavior in the presence of a court, or of a judge at chambers, or so near as to interrupt the proceedings or to obstruct the administration of justice, may be punished summarily. It was held that the case was within the terms of the statute and the respondent was properly punished in a summary manner. Another case very similar in its facts is In re Brule (D. C.) 71 Fed. 943, in which it appeared that the respondent had bribed a witness at the latter's residence. The court held that, even within the words of the act of Congress, it was a direct, and not a constructive, contempt, for which summary punishment could be meted out. It cites and relies on Savin's and Cuddy's Cases, among others, and pertinently inquires: "If it is a contempt to bribe a witness in front of the courthouse, is it not a contempt to attempt to do the same thing on the street opposite the court building, or even four blocks away? Is not the result the same? Is not the motive of the accused the same?" How, we ask, can the mere element of distance change the character of the act or take from it the quality of being a direct offense against the authority of the court and a palpable obstruction of the administration of justice. A ruling which would ignore the complete identity of the two kinds of offenses would sacrifice the substance to the form. "Qui hæret in litera, hæret in cortice." In Ex parte Summers, 27 N. C. 149, an officer had refused obedience to an order to return process in his hands and accompanied his refusal with an insolent message to the court. Commenting on these facts, the court, by Ruffin, C. J., said: "But, had there been no legal default, and admitting that this person might have insisted before the court, on the delay of the return to the next day as his absolute right, yet the message to the court, in its terms and manner, *and while he was in the verge of the court* (italics ours), was as offensive and disrespectful as it could be, and in itself justified the fine."

We have thus reviewed at much length the authorities bearing either directly or indirectly upon the important and delicate questions under consideration, and have found abundant support, as we think, for the conclusion we have reached, that within the meaning of our statute (Code, §§ 648–654) the conduct of the respondent was a direct contempt of the court, as much so as if the assault had been made when the judge was sitting on the bench in open court. The insult was given and the assault made "within the verge of the court," as aptly expressed by Chief Justice Ruffin in Summer's Case.

It may well be doubted if the case of In re Gorham, 129 N. C. 481, 40 S. E. 311, is not in conflict with that of In re Oldham, 89 N. C. 23, 45 Am. Rep. 673, and does not virtually overrule it, though it may not in terms have done so. Indeed, we doubt if the Oldham Case can well be sustained, in view of

the principles herein stated, and the authorities relied on. The court in that case held that there was no contempt at all and that the offense could only be punished by indictment, while in Gorham's Case it was held that the attempt to corrupt a juror could be punished as for a contempt, it being an unlawful interference with the proceedings of the court in an action, which tended to defeat, impair, impede or prejudice the rights of a party thereto within the meaning and intent of Code, § 654, subsec. 3, and section 656; the only difference between the two cases being that in Oldham's Case the offense consisted in handing to a person summoned as a juror printed circulars containing matter calculated to prejudice the jurors against the defendant in a cause then pending, with a request that he would distribute them among the jurors during the term, while in Gorham's Case, the offense was committed during the term, though in the recess of the court. We perceive no practical difference between the two cases. Indeed, we think that in both cases, if the respondents were not guilty of a contempt, under section 648 of the Code, which could have been punished summarily, because of the direct interference with the proceedings of the court and contempt of its authority, continuing to the very moment of the trial of the cases, Oldham, as well as Gorham, was at least guilty under section 654, subsec. 3, and section 656, upon the facts found and stated in the record. What difference can there be, under the latter section, between corrupting jurors during the term of the court and unlawfully influencing one of their number before the term, with the understanding that he will in turn influence his fellows during the term to decide a particular way? "Qui facit per alium, facit per se." Does not the one as directly tend to pervert or defeat the administration of justice as the other, and is not the one as much a contempt of the authority and dignity of the court as the other?

In both classes of contempts, the punishment is of the same kind, a fine not to exceed $250 and imprisonment not to exceed 30 days; but in direct contempts the proceedings are generally of a summary character and there is no right of appeal, the facts being stated in the committal, attachment, or process, and reviewable by habeas corpus, while in indirect contempts the proceedings are commenced by citation or rule to show cause, with the right to answer and to be heard in defense, and also with the right of appeal. The statute provides (section 648) that direct contempts shall consist in "disorderly, contemptuous or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court and directly tending to interrupt its proceedings, or to impair the respect due to its authority," and "any breach of the peace or noise or other disturbance tending to interrupt the proceedings of any court," and these and other acts and neglects, not necessary to be here mentioned, are declared to be the only acts and neglects which shall be the subject of contempt of court. Tested by reason and authority, we think the statute must be so construed as to embrace the case presented in this record. If we thought otherwise, and that resort to the common law is necessary to protect the judge from insult and to shield him against assault for his judicial acts, we would not permit the statute to stand in our way. As said by the present Chief Justice in his concurring opinion in the case of In re Gorham, 129 N. C. 491, 40 S. E. 311, with reference to this very statute: "It cannot be justly imputed to the General Assembly that it passed an act intended or so worded as to justly mean that the administration of justice can be defeated, impaired, and impeded. Were it possible that such an act had been passed, it would be our duty to declare it unconstitutional, and with as great reason as the court has ever done so in any case." And in this connection other words of his in that opinion are equally applicable to the facts of this case as they were to the case then being decided: "The contempt," he says, "could not be more direct or palpable if a band of armed men had followed the jury to the courthouse, with threats of violence if their verdict was unfavorable, and had stood just outside the door to execute punishment if disappointed. It is equally a contempt of court whether a man meets a juror just outside the courthouse with a bribe or a bludgeon in his hand. If the court cannot prevent either, because not done within the courtroom, the administration of justice is no longer free. The independence of the judiciary no longer exists." While this court will always be disposed to safeguard the personal liberty of the citizen, and enforce all constitutional guaranties in his favor, even to the extreme limit, it must at the same time look to its own preservation, as the power of the court to protect itself is a part of the supreme law, and the corresponding duty plainly enjoined to exercise this power, whenever necessary, is as imperative, if not as mandatory, as any other obligation resting upon it under the Constitution. The courts derive their authority and jurisdiction from the people through the organic law, and the respect of the people for and their confidence in their judges are absolutely essential to the maintenance of that power and authority. They are the foundation upon which the whole fabric rests, and whoever impairs either of the former to that extent threatens the very existence of the latter. In Dunham v. State, 6 Iowa, 254, it is well said that the power given to the courts to punish for contempts is not alone for their own protection, but also for the safety and benefit of the public. The life, liberty, and property of every citizen are safeguarded, and the true welfare of society insured and promoted, in the preserva-

tion of this power in its proper vigor and efficiency.

We conclude the discussion with the language of Chancellor Kent, when speaking of the exemption of a judge from civil liability for his judicial acts, which is peculiarly applicable to this case, as the prosecution of a judge for a wrong alleged to have been committed in the execution of his office is assuredly less harmful than an unprovoked assault upon his person. "Whenever," said the chancellor, "we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible, and we thereby embolden the licentious to trample upon everything sacred in society and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty." Yates v. Lansing, 5 Johns. 282.

The cases cited by the petitioner's counsel are not in point. Delafield v. Construction Co., 115 N. C. 21, 20 S. E. 167; Hinton v. Ins. Co., 116 N. C. 22, 21 S. E. 201. The judge had not left the bench for the term, as in those cases it appeared he had done, but by express direction the court was kept open for the transaction of other business, the signing of the minutes, and some unfinished matters.

Having disposed of the legal questions involved, we cannot take leave of the case without commending the able and fearless judge who presided in the superior court for the perfect control and complete mastery of himself which he exhibited under most trying and exasperating circumstances. His subordination of self, in deference to the demand of his high office, is worthy of the highest praise, and must command at once for him the respect, confidence, and esteem of all. It was the best tribute he could have paid to the judiciary and the most perfect example he could have presented to the people of one of their chosen representatives in judicial station, who, tested by the severest ordeal, worthily sustained himself, and by his own submission and self-restraint enhanced the respect due to the power and the majesty of the law. Guided by the same spirit which prompted Lord Coke's simple but impressive answer to his King, when he was asked by him, out of court and in advance, what his opinion as Chief Justice would be concerning the extent of the royal prerogative, we can safely expect that, whenever occasion requires, "he will always do that which shall be fit for a judge to do." In the proceeding before him, and he was the proper, and, indeed, the only, judge to initiate it, he was fully within the pale of his jurisdiction, and in all respects has proceeded in accordance with the law, and in a most exemplary manner has vindicated the dignity and authority of his court.

The opinion in this case is not intended, nor must it be construed, as approving what is said in the authorities cited, where they go beyond what is actually necessary for the decision of this case. Whether it is a direct contempt to insult or attack a judge for any of his official acts after the court has adjourned for the term is a question which, with others of a like character, is not presented, and not within the scope of this decision. We pass upon what is now before us, nothing more.

We have not discussed the questions raised below as to the proper method of bringing a decision in habeas corpus proceedings into this court for review, whether by direct appeal or writ of certiorari, as all irregularities have been fully waived. In re Briggs, 135 N. C. 118, 47 S. E. 403. The matter is mentioned in the hope that the law upon this subject may be made clear by legislative enactment, as there seems to be no speedy, and at the same time adequate, remedy in such a case. In some instances, although they may be rare, it might be proper to allow bail; but this is a matter which addresses itself to the wisdom of the Legislature, and does not fall within our province.

There is no error. The petitioner will pay the costs of the proceeding, including the costs of this court.

No error.

(139 N. C. 145)

CARRAWAY et al. v. LASSITER et al.

(Supreme Court of North Carolina. Sept. 26, 1905.)

1. APPEAL—CONCLUSIVENESS OF FINDINGS.
The approval by the judge of the superior court of findings of the clerk is conclusive on appeal, unless there is no evidence to sustain them.

2. EXECUTORS AND ADMINISTRATORS—SALES.
A person, being indebted, may not, by devising his lands to one for life, with remainder to parties not in esse, prevent their sale for payment of his debts until all are born who may by possibility take under the will.

3. INFANTS—GUARDIAN AD LITEM.
The superior court, or the clerk acting for such court, has power, independently of Clark's Code, § 181, to appoint a guardian ad litem for an infant devisee in proceedings for the sale of property for payment of the testator's debts; the executor being also guardian of the infant.

4. SAME.
In proceedings by an executor to sell real estate, an error of the clerk in appointing a guardian ad litem before any summons was issued was cured, where the clerk on the same day issued summons, which was duly served on the infant and on the guardian ad litem, who appeared and answered.

5. EXECUTORS AND ADMINISTRATORS—SALES—RIGHTS OF PURCHASERS.
The purchaser of land at an administrator's sale is only required to see that the court has jurisdiction of the person and the subject-matter, and, in the absence of fraud, he may rely on the judgment of the clerk ordering the sale, followed by the approval of the proceedings by the resident judge of the district before payment of the price.

6. INFANTS—GUARDIAN AD LITEM.
In proceedings to sell land of a decedent,

it is not necessary to appoint a guardian ad litem for the minor husband of a devisee of a life estate in the property.

7. EXECUTORS AND ADMINISTRATORS—SALES—RIGHTS OF PURCHASER.

Code, § 2160, providing that, when a caveat to a will has been filed and issue made, the clerk shall further issue an order to the personal representative to suspend all further proceedings, does not affect the rights of a purchaser at a sale made by an executor under order of court after a caveat has been filed, where no order was made suspending proceedings.

8. SAME.

The pendency of litigation in regard to the title of land of a decedent and the issuance of a devisavit vel non do not constitute ground for setting aside the judgment and sale thereunder, but can only be considered in a separate action attacking the sale for fraud by showing that the purchaser was cognizant of the facts and took some unfair advantage of them.

Appeal from Superior Court, Greene County; Bryan, Judge.

Petition by G. W. Carraway and others against T. U. Lassiter and others to set aside an executor's sale of real estate. From a judgment denying the petition, petitioners appeal. Affirmed.

G. M. Lindsay and A. D. Ward, for appellants. Galloway & Albritton and Jarvis & Blow, for appellees.

CONNOR, J. This case, entitled in the transcript sent to this court "Carraway v. Lassiter," is a motion in a cause lately pending in the superior court of Greene county, in which R. L. Davis, executor of L. V. Whitehead, is plaintiff (petitioner) and Geo. W. Carraway and wife, Inez, and others, are defendants. The plaintiff, R. L. Davis, executor, instituted the original proceeding by filing a petition in said court in the usual form, asking for license to sell a portion of the lands of his testatrix to make assets to pay her debts, etc., pursuant to section 1436 et seq. of the Code. The record contains over 200 pages of printed matter, a large portion of which is irrelevant and immaterial. The facts, as we gather them from the petition, answer, and findings of the clerk, material to a decision of the questions raised by the exceptions of the petitioners, are:

Mrs. L. V. Whitehead, late of the county of Greene, died on the 14th day of December, 1895, seised and possessed of a plantation in said county, containing 1,100 acres, known as the "Streeter Place." She left a last will and testament, devising and bequeathing her entire estate, real and personal, to her granddaughter, Inez, for life, remainder to such children as she might leave surviving, and, in default of issue, to the Oxford Orphan Asylum, naming R. L. Davis executor and guardian to her said grandchild, who was then a minor. The said will was duly admitted to probate in common form, and the said Davis duly qualified as executor thereto. He was also appointed and qualified as guardian to the said Inez. Thereafter a caveat to said will was filed by the next of kin, and the issue raised duly docketed in the superior court of Greene county on the ——— day of March, 1896. At the time of her death the said L. V. Whitehead was indebted in an amount exceeding $4,000, the payment of which was secured by mortgages on the said land. On or about the 12th day of October, 1896, the said Davis, executor, filed his petition in the superior court of said county, containing the averments prescribed by the statute, and asking for an order to sell 846 acres, being a portion of said land. The remaining portion contained the dwelling house and improvements. The said Inez had, prior to the filing of said petition and during her minority, intermarried with Geo. W. Carraway, who was also a minor, being about 20 years of age. Upon the filing of said petition, it appearing that the said Davis was both executor and guardian, he asked that some suitable person be appointed guardian ad litem for his ward, etc. On the 12th day of October, 1896, and before any summons had issued, the clerk made an order appointing T. E. Barrow guardian ad litem for said infant defendants. The petition named as defendants the said Inez and her husband, J. L. Wooten and wife, who held mortgages on said land, and the orphan asylum. On October 15, 1896, the clerk issued a summons, directed to the sheriff of said county, commanding him to summon the defendants Inez and her husband, J. L. Wooten and wife, the orphan asylum, and the said T. E. Barrow, guardian ad litem, to appear and answer the petition on the 6th day of November, 1896. The petition is lost, and the facts in regard thereto are found by the clerk upon the affidavits of the former clerk and the attorney who filed the same. The order appointing the guardian ad litem and the summons are in the judgment roll. The sheriff made a return of said summons, stating that he had served the same on the defendants Carraway and wife by reading it to them, and on T. E. Barrow, guardian ad litem, by delivering a copy. The summons on J. L. Wooten and wife was served by the sheriff of Pitt county. There is no record of any service on the orphan asylum. On the return of the summons the said guardian ad litem filed his answer, drawn by the clerk and signed by said guardian, admitting the allegations of the petition. This paper is lost. On November 6, 1896, the clerk made an order reciting that proper service of the summons had been made on all the parties defendant, and that the guardian ad litem had filed an answer directing "the sale of the land described in the petition," after duly advertising the same, and that the executor make report to the court, etc. This order is on file. The said executor filed his report, stating that pursuant to said order (inadvertently referring to it as having been made on November 13th) he had sold the lands on December 7, 1896, at public auction at the courthouse door in Snow Hill, after duly advertising the same, and that T. U. Lassiter

was the last and highest bidder, at the sum of $4,000, which was a full and fair price therefor, and that he was ready to comply with his bid, etc. The executor recommended that the sale be confirmed. On December 18, 1896, the clerk made an order confirming said sale, in which it was recited that due and legal service of summons was made on all of the defendants, and that they had admitted in their answers the allegations of the petition, etc. He directed the executor to collect the purchase money and make title to the purchaser. The purchaser paid the purchase money, and the executor executed to him a deed for said lands dated the 30th day of December 1896, which was recorded on the 30th day of December, 1897. The order of confirmation was approved by the resident judge of the district on December 26, 1896. The clerk finds that the attorney for the petitioner did not have any conversation with the guardian in regard to his appointment, or the preparation or filing of his answer. Nor did the petitioner attempt to use any undue influence to induce him to accept the guardianship; that said T. U. Lassiter was a bona fide purchaser of said land for full value and without any notice of any irregularity, if there was any, in the special proceedings under and by virtue of which the land was sold; that the sale was fair and open, and the land brought its full market value at the time of sale; that Lassiter had no notice of any irregularity in the proceeding, or of any cloud upon the title, or of any other matter or thing, if there was any, which prevented him from getting a good title; that he bid on said land at the urgent request of Geo. W. Carraway, husband of Inez, and that he became the purchaser, believing that he would get a good title under the decree of the court; that the personal estate of the said L. V. Whitehead was insufficient to pay her debts and that it was necessary to sell the land for that purpose; that the petition set out a description of the portion of the land to be sold. The petition contains a number of allegations and records referring to litigation pending in Pitt county, at the time of her death, by and against Mrs. Whitehead in regard to her property. It is charged that one of said actions affected the title to a portion of the lands sold by the executor. It also appears that on April 12, 1897, Lassiter sold and conveyed to R. L. Davis 330 acres of the Streeter place for about $5 per acre. There is no evidence tending to show any agreement prior to or at the time of the sale, or during the pendency of the proceedings between Davis and Lassiter, in regard to the purchase of any portion of the land by Davis. They both expressly deny any such agreement. It appears that prior to December, 1897, the said Geo. W. Carraway, having attained his majority, qualified as guardian of his wife; that at the December term, 1897, R. L. Davis, executor, the said Carraway and wife, and Carraway, as guardian, were made parties to one of the actions pending in Pitt superior court; and that they were also parties to an action pending Greene superior court. At the time the petition was filed by R. L. Davis, executor, Mrs Carraway had no issue. A child was born to her on November 18, 1896. The said child died in its infancy. Davis, executor, filed his final account November 7, 1899, showing the receipt and disbursement of the proceeds of the land sold by him. On the 7th day of November, 1904, this petition was filed by Geo. W. Carraway and wife and their children, all of whom were born subsequent to the final decree in Davis, Ex'r, v. Carraway. The purchaser, Lassiter, and R. L. Davis filed their answers to said petition, and the motion was heard by the clerk upon the petition, answers, affidavits, and oral testimony. He found the facts as set forth, and refused the motion. The petitioners noted a number of exceptions to the rulings of the clerk, and appealed to the judge of the district, who overruled the exceptions, approved the findings of the clerk, and affirmed his judgment. Petitioners excepted and appealed.

The petitioners except to a number of the clerk's findings, for that there is no evidence to sustain them. The approval by the judge of the findings is conclusive, unless the exceptions can be sustained. We have read with care all of the affidavits, exhibits, and admissions. In our opinion there is not only evidence to sustain the clerk, but, in respect to the most material matters, it is ample and uncontradicted. The exceptions cannot be sustained. In regard to the compromise of the litigation respecting Mrs. Whitehead's estate, the record shows that prior to the settlement the husband of Mrs. Carraway had qualified as her guardian and had been made a party thereto, together with his wife; that all parties were represented by learned and eminent counsel. The judgment of compromise indicates a careful regard for the rights of all parties. We find nothing in the record to sustain the suggestion that the debts paid by the executor from the proceeds of the land were not bona fide or the mortgages valid. The final account of the executor shows that they were paid and the estate duly and honestly administered. These matters are material only upon the assumption that the proceedings under which the land was sold are irregular, in which event it would be proper to inquire whether the petitioners show such merit as make it the duty of the court to set aside the judgments rendered in the cause. Stancill v. Gay, 92 N. C. 455. It appears that since the filing of this petition Mrs. Carraway has died. The petitioners are not parties to the original proceeding. They claim title to the land as remaindermen after the termination of the life estate of Mrs. Carraway under the will of Mrs. Whitehead. If, as they contend, they are not bound by the judgment, they may not

be heard to attack it. Hinsdale v. Hawley, 89 N. C. 87; Knott v. Taylor, 99 N. C. 511, 6 S. E. 788, 6 Am. St. Rep. 547. Being of opinion, however, that they are bound, we proceed to consider their exceptions.

If the proceeding had been one in which the life tenant had for any proper reason invoked the aid of the court to sell the land, as for partition, only those who were parties, either personally or by representation, would be bound by the decree. The proceeding is based upon the theory that the executor is by order of the court selling the lands of his testatrix which are subject to the payment of her debts, and the devisees or heirs at law are brought in that they may show cause why he may not have license to do so. If the petitioners had been in esse at the time the proceeding was instituted, it would have been necessary to divest their interest to make them parties. It cannot be that a person indebted may, by devising his lands upon contingent limitations to parties not in esse, prevent their sale for payment of his debts until all who may by possibility take are born or every possible contingency is at an end. Mrs. Carraway, for the purpose of enabling the court to proceed in the cause, represented the entire title, and children thereafter born to her are bound by the judgment. The child born November 18, 1896, pending the proceeding, but after the decree of sale, died in infancy and took no interest which could be affected by the sale.

The petitioners contend that under the terms of the statute (Clark's Code, § 181) the clerk had no power to appoint a guardian ad litem, and that such power is given only where the infant defendant has no general guardian. Their counsel contends that the clerk in respect to this proceeding derives his authority from the statute and is restricted to its terms, differing in that respect from the superior court, which has a general jurisdiction, confined only by express limitations. The general principle is correct, and has been so held by this court in the cases cited and relied upon. We think that the construction contended for is too narrow. Certainly the superior court has, independently of the Code, the power to appoint a guardian ad litem for an infant defendant. It may at any time during the progress of the cause, for sufficient reason, looking to the proper protection of the infant's interests, remove a guardian theretofore appointed and name some other person. We can see no good reason why the clerk, who acts as and for the court, may not do the same in special proceedings pending before him. The object to be obtained is the protection of the infant, whose interests are the special care of the court. The guardian ad litem is the officer of the court, and we can see no good reason, or conflict with well-settled principles, why it may not for any good reason appoint such guardian. We find no authority in this state, but in Townsend v. Tallant, 33 Cal. 45, 91 Am. Dec. 617, the question was considered. The administrator, who filed the petition in the probate court for a sale of the lands of his intestate, was also guardian of the infant heir at law. The court said: "Schollenberger could not represent both sides of the record at the same time. The minor heir, then, having no guardian quoad the petition, it became the duty of the court, before proceeding to act, to appoint some disinterested person his guardian, for the sole purpose of appearing for him and taking care of his interest."

The only serious question of law presented by the exceptions is whether the court acquired jurisdiction of the person of Inez Carraway. The petition was filed on or about the 12th day of October, 1896, and the clerk on the 15th day of the same month, and before any summons was issued, made an order appointing a guardian ad litem. This was certainly irregular, and, if not cured, would have been fatal to any further proceeding. Clark's Code, § 181, and cases cited. The clerk on the same day issued summons, which was duly served upon the infant defendant and her husband and the guardian ad litem. This certainly brought her into court, as it did the guardian prematurely appointed. He filed his answer, and the court upon the return day proceeded to judgment. The petitioners earnestly contend that the failure to observe the proper order is fatal and renders all further proceedings void. If the petitioners are correct in this contention, the facts appearing of record, they insist the purchaser was fixed with notice, and cannot avail himself of the defense that he was a purchaser for value and without notice, notwithstanding the recital in the judgment of sale, "proper service of summons having been made on all parties defendant." We have carefully examined the cases relied upon by petitioners, and find that the court has, in cases wherein the proceedings were instituted since the adoption of the Code, set aside judgments, etc., when no service of process was made upon the infants, and refused to do so when the infant was in court, notwithstanding irregularities in the proceeding. In Moore v. Gidney, 75 N. C. 34, Gulley v. Macy, 81 N. C. 356, Young v. Young, 91 N. C. 359, and Stancill v. Gay, 92 N. C. 462, no summons was served on the infant defendant, and guardians ad litem were appointed without personal service on the infants and filed answers. This court has in such cases invariably held that the court acquired no jurisdiction. When, however, personal service was made on the infants, a contrary ruling has been made. In Howerton v. Sexton, 90 N. C. 581, Smith, C. J., says: "While it must be conceded that there is a want of precision and a great disregard of form manifested in the record, they are not, in our opinion, sufficient to invalidate the sale made under the order of the court, in the absence of evidence of any fraudulent

practice in bringing it about, and when it plainly appears to have been to the interests of all to have the sale confirmed." In Williamson v. Hartman, 92 N. C. 239, it appeared that, while there was personal service on the infant, there was none on the guardian ad litem, nor was any answer filed by him. Upon a motion to set the judgment aside, this court, by Merrimon, J., said: "This, however, does not imply that every judgment affected in any degree, directly or indirectly, by some or any irregularity in the course of the action leading to it, will be set aside. Some irregularities are unimportant, and do not affect the substance of the action or the proceedings in it. * * * Whether the court will or will not grant such a motion in any case must depend upon a variety of circumstances, and largely upon their peculiar application to the case in which the motion shall be made." White v. Morris, 107 N. C. 92, 12 S. E. 80. In Ward v. Lowndes, 96 N. C. 367, 2 S. E. 591, it is said: "This statute (section 181, Clark's Code) should be strictly observed, but mere irregularities in observing its provisions, not affecting the substance of its purpose, do not necessarily vitiate the action, or special proceeding or proceedings in them. The substantial purpose of this statute is to have infants in proper cases made parties defendant, have them make proper and just defense, and to have their rights protected, and to this end have guardians make defense for them." Fowler v. Poor, 93 N. C. 466. Without undertaking to cite all of the many cases found in our Reports involving the questions presented by this appeal, we are of the opinion that the service of process upon the infant defendant and the guardian ad litem, followed by the filing of an answer by him, cured the irregularity in the order of the appointment. Certainly no harm came to the infant by reason of the irregular method pursued. At most, it was an irregularity, and the adjudication made by the clerk that process had been duly served, if conceded to be erroneous, was not void. The parties were certainly at that time in court. The purchaser might with safety rely upon that judgment, followed by the approval of the proceedings before the payment of his money by the resident judge of the district. That the purchaser is only required to see that the court has jurisdiction of the person and the subject-matter for his protection, in the absence of fraud, is settled by abundant authority. Williams v. Johnson, 112 N. C. 424, 17 S. E. 496, 21 L. R. A. 848, 34 Am. St. Rep. 513.

The petitioner states the fact that the husband of Mrs. Inez Carraway was a minor of about the age of 20 years and that no guardian ad litem was appointed for him. This fact was not brought to the attention of the court. We do not think that the failure to appoint such a guardian affects the validity of the decree. He had no interest in the land; his wife having but a life estate. It would have been an idle thing to have two guardians ad litem in the record.

The petitioners further insist that by reason of the pendency of a caveat to Mrs. Whitehead's will the executor had no power or authority to file the petition or proceed with the sale of the land. It will be observed that the will had been proved in common form and Davis duly qualified. Code, § 2160, provides that, when the caveat has been filed and issue made, the clerk shall further issue an order to the personal representative to suspend all further proceedings, etc. It does not appear that any such order was made. In the absence of such order, we do not think that the acts of the executor were void, or that the rights of purchasers could be affected.

But it is insisted that other litigation was pending in regard to the title to a portion of the land sold, and that, by reason thereof and the pendency of the issue of devisavit vel non, persons were restrained from bidding for the land. If this were true, it would not constitute ground for setting the judgment, etc., aside. Such matters could only be considered as evidence in a separate action brought to attack the proceeding and sale for fraud, by showing that the purchaser was cognizant of the facts and took some unfair advantage of them. The affidavit of the purchaser shows that he bid at the sale at the solicitation of the husband of Mrs. Carraway, and his affidavit and affidavits of several other persons present and bidding show that these facts were not known to them and did not affect their bids. Being of the opinion that the court acquired jurisdiction of the person and subject-matter, and complied substantially with the requirements of the statute, we cannot conclude that the proceeding, judgment, etc., are void. Before the parties were in court no order was made affecting their rights, and thereafter the proceeding was in all respects regular. In this view of the case we do not deem it necessary to consider many other questions discussed by counsel, such as the effect upon the purchaser's rights of the adjudication that the process was duly served, etc.

In sustaining the action of the clerk in this case, we do not wish to be understood as encouraging or giving our sanction to the method of procedure adopted in the proceeding. The statute and rules for the guidance of courts in acquiring jurisdiction of the persons and estates of minors and all subsequent proceedings in such cases are mandatory, and should in all cases be observed, not only for the protection of the parties to the proceeding, but of the purchasers at judicial sales. It is to be regretted that records constituting important links in the chain of titles are so frequently lost. The statutes prescribe the manner in which records shall be kept. These mandatory provisions of the law should be observed. It is also contemplated that a minute docket of all

special proceedings shall be kept, in which shall be noted at the time all steps taken, from the issuance of the summons to and including the final decrees. It also contemplates that all orders, judgments, and reports in the cause shall be spread upon the record. While, in accordance with a wise policy, the courts, in the absence of fraud, uphold judicial sales when attacked for irregularities, it is not because the law looks upon the order in which such proceedings are conducted as unimportant. It appears from the record in this case that the proceedings antedate the term of the present clerk.

After a careful consideration of the entire record and the briefs of counsel, we find no error in the judgment. It must be affirmed.

(139 N. C. 382)

CHARLOTTE TROUSER CO. v. SEABOARD AIR LINE RY. et al.

(Supreme Court of North Carolina. Oct. 24, 1905.)

1. CARRIERS — PASSENGERS' EFFECTS — MERCHANDISE OTHER THAN BAGGAGE — LIABILITY.

If a railroad receives for carriage from a passenger trunks containing articles other than personal baggage, either with or without payment of an extra charge, and with knowledge of the contents of the trunks, the carrier is liable as an insurer for any loss or damage not resulting from the act of God or the public enemy.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1531.]

2. SAME—ARRIVAL OF BAGGAGE—WAREHOUSEMAN.

When baggage has arrived at its destination, and been deposited in the usual or customary place of delivery, and kept there a sufficient time for the passenger to claim and remove it, the carrier's liability as such ceases, and it is thereafter only a warehouseman.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1541, 1542.]

3. WAREHOUSEMEN—CARE REQUIRED.

A warehouseman is only bound to the exercise of ordinary care.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Warehousemen, § 48.]

4. CARRIERS—CARE OF BAGGAGE AS WAREHOUSEMAN.

Where a carrier's duty in relation to baggage has become that of a warehouseman, such duty requires the carrier to place the baggage in a proper and suitable place and to exercise ordinary care and diligence in safely keeping it there and in protecting it from exposure to the weather.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1541.]

5. SAME — GOODS OTHER THAN BAGGAGE — KNOWLEDGE OF CARRIER.

Where a carrier knew that trunks of a passenger contained samples, but received them as baggage, it was liable for any loss sustained through its lack of ordinary care after the passenger had had a reasonable time to remove the trunks after arrival at their destination.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1531, 1541, 1542.]

6. SAME—NEGLIGENCE.

Though a carrier did not know that the trunks of a passenger contained samples, it had no right, after arrival of the trunks at their destination, to practically abandon them and leave them for three days on a station platform, exposed to the weather.

Appeal from Superior Court, Union County; Neal, Judge.

Action by the Charlotte Trouser Company against the Seaboard Air Line Railway and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Action for injury to sample trunks. One J. D. Futch, plaintiff's traveling salesman, boarded with defendant's permission one of its freight trains, with a caboose, on which he had been accustomed to travel, at Wingate, for Monroe, and delivered at the same time to defendant two trunks containing samples to be carried with him on said train to his destination. Futch paid his fare to the conductor, but nothing extra for the baggage. The train stopped at the freight depot in Monroe, which defendant contended upon the evidence was its usual stopping place, where baggage carried on that train was received and delivered, though it appeared that the baggage room was in the passenger depot not far away. The trunk was placed on the platform of the freight depot, and remained there from Friday, the day of arrival, until the next Monday. There was a rain Sunday at noon, which greatly damaged the samples. The transfer clerk at the freight depot, about an hour after the train arrived, promised Futch to take care of his trunks and transfer them to the passenger depot, where he expected to get them the next Monday, as Saturday was a holiday, and he supposed that he could not get them on that day or Sunday. There was testimony tending to show that Futch delivered the trunks to the conductor of the train as baggage, and the latter knew what they contained. Issues were submitted as to negligence, contributory negligence, and damages, to each of which the jury responded in favor of the plaintiff. After overruling a motion for a new trial, judgment was entered on the verdict, and the defendant appealed.

J. D. Shaw and Adams, Jerome & Armfield, for appellant. Reswine & Stack, for appellee.

WALKER, J. (after stating the case). It is settled by the great weight of authority that if a railroad company receives for carriage from a passenger trunks containing merchandise or articles other than the personal baggage of the passenger, with knowledge of their contents, it is liable on its contract as an insurer for any loss of or damage to the property not resulting from the act of God or the public enemy. Railroad v. Swift, 12 Wall. 262, 20 L. Ed. 423; Railroad v. Bowler, 57 Ohio St. 38, 47 N. E. 1039, 63 Am. St. Rep. 702; Railroad v. Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212; Jacobs v. Tutt (C. C.) 33 Fed. 412; Railroad v. Carrow, 73 Ill. 348, 24 Am. Rep. 248; Railroad v. Conklin, 32 Kan. 55, 3 Pac. 762; Humphreys v. Perry, 148 U. S.

627, 13 Sup. Ct. 711, 37 L. Ed. 587; Railroad v. Hochstim, 67 Ill. App. 514; Oakes v. Railroad, 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126. It is in such a case held to the full measure of its common-law liability for the reason, so well expressed by Justice Field in the case first cited: "If at any time reasonable ground existed for refusing to receive and carry passengers applying for transportation, and their baggage and other property, the company was bound to insist upon such ground, if desirous of avoiding responsibility. If, not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed." The same case and many other authorities also establish the proposition that, while the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault. Oakes v. Railroad, 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126; Macrow v. Railroad, L. R. 6 Q. B. 612; Railroad v. Bowler, supra.

When the baggage has arrived at its destination, and has been deposited at the usual or customary place of delivery, and kept there a sufficient time for the passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care. This newly arisen duty requires the company to place the baggage in a proper and suitable place, such, for example, as a baggage room, and then to exercise ordinary care and diligence in safely keeping it there and, wherever the place of deposit may be, in seeing that the baggage is protected from injury by exposure to the weather or by other cause. Hoeger v. Railroad, 63 Wis. 100, 23 N. W. 435, 53 Am. Rep. 271. If a railway company, without knowing their contents, receives from a passenger trunks to be carried over its line which contain articles other than personal baggage, such as merchandise, some of the courts hold that, while the company is not liable as a common carrier for any loss of or damage to the merchandise, it is bound by the law to the exercise of ordinary care in handling the trunks, and for any loss or damage resulting from the failure to use such care the company is liable to the passenger, it having assumed the relation to the property of an ordinary bailee; the duty of the latter being to take such care of the property as an ordinarily prudent man would of his own under like circumstances. Pennsylvania Co. v. Miller, 35 Ohio St. 541, 35 Am. Rep. 620. Other courts hold that the company is liable, as a gratuitous bailee, only for gross negligence (Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587; Railroad v. Carrow, 73 Ill. 348, 24 Am. Rep. 248); and still other courts hold that the passenger cannot recover at all, there being no contract as to any article not baggage, and no consideration paid for its carriage or its care (Blumantle v. Railroad, 127 Mass. 322, 34 Am. Rep. 376), although it was held by the same court which decided Blumantle's Case that it would undoubtedly be competent for a railway company to agree to transport at its risk merchandise by its train for the price of the ticket sold to the passenger (Alling v. Railroad, 126 Mass. 131, 30 Am. Rep. 667). The subject is fully discussed and the authorities collated in 2 Fetter on Carriers of Passengers, §§ 587 to 614.

It clearly appears from the form of the issues that the court below tried this case upon the theory that the defendant was liable as a bailee only for negligence, and not that it could be held to answer as an insurer by virtue of its common-law liability as a carrier. If care is required to be used by the company, where the character of the articles is not disclosed, some difficulty is found in determining the exact measure of responsibility, because some courts have held that the negligence must be gross. It was said by Baron Rolfe (afterwards Lord Cranworth) in Wilson v. Brett, 11 M. & W. 113, that gross negligence is ordinary negligence with a vituperative epithet; and the court in Railway v. Arms, 91 U. S. 489, 23 L. Ed. 374, adopting the view of Baron Rolfe, which had been approved in Beal v. Railroad, 3 H. & C. 337, and Grill v. Collier Co., L. R. 1 C. P. 600, said that "gross negligence" is a relative term, and is doubtless to be considered as meaning a greater want of care than is implied by the term "ordinary negligence." But, after all, it means the absence of the care that was necessary under the circumstances, or as it was the duty of the defendant to use. In this case, while the court refused to give the instruction asked by the defendant in its first prayer, it did give the one contained in the second prayer, which, with the general charge, sufficiently called upon the jury to find whether the defendant's conductor knew there were samples in the trunk; and we think the verdict, which should be read in the light of the evidence and the charge, clearly indicates that they did so find.

The evidence in regard to this knowledge was positive and unequivocal. The witness Futch testified that he delivered the trunks to the defendant as baggage and that the conductor knew what they contained. The conductor was not introduced as a witness, nor was there any evidence offered to contradict this statement. The defendant introduced no evidence at all. In the state of the proof the judge would have been well warranted in charging the jury that, if they believed the facts to be as stated in Futch's testimony, they should answer the issues as to negligence and contributory negligence in favor of the plaintiff. If the defendant knew that the

trunks contained samples, and nevertheless received them as baggage, it was certainly liable for any loss sustained if, after the plaintiff had a reasonable time to claim and remove the trunks, it failed to take ordinary care of them. If it had no knowledge of their contents, we yet think that some care, at least, should have been taken of the trunks, and that as matter of law it had no right to practically abandon them, or leave them for three days on the platform of its depot building, exposed to the weather. This was certainly not ordinary care, but, in our opinion, was the very smallest degree of care, if care at all, that could have been exercised under the circumstances. The best-considered cases, and the most numerous, bind us on the point that the defendant must have exercised some degree of care before it can be relieved of liability.

In the view we take of it, there is no element of contributory negligence in the case. The only question is, did the defendant do its duty with reference to the care of the trunks after they reached their destination at Monroe? And upon the uncontroverted facts we are of the opinion that it did not. There was no error committed by the court in the trial below.

No error.

(139 N. C. 303)

PEGRAM v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. EVIDENCE — HEARSAY — ORAL DECLARATIONS.

A declaration of a stranger, to the effect that a statement shown to have been made by a witness in his presence was true, is not competent to corroborate the witness, but is hearsay.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1174, 1175.]

2. TRIAL—INSTRUCTIONS—CONFLICT.

In an action for death by wrongful act, instructions that, if plaintiff's intestate left a place of safety and entered a burning building and attempted to extinguish the fire at a time and in a manner in which an ordinarily prudent person would not have done so, he was guilty of contributory negligence, and that the only limitation of the rule that one may incur risk to save property is that he must not recklessly expose himself to danger, were conflicting, and must necessarily have confused the jury.

3. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE —DANGER INCURRED TO SAVE PROPERTY.

Where an employer's building was set on fire by the negligence of a third person, and an employé, who had escaped from the building and from all danger, voluntarily returned to the building to save his employer's property, and was killed, his administrator could not recover for his death from the third person, unless he showed that the employé acted with such care and caution as a reasonably prudent man would have exercised under the circumstances; and it was insufficient for him to show merely that the employé did not act recklessly.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 103.]

4. DEATH—ACTION FOR—BURDEN OF PROOF.

In an action for death by wrongful act, the burden is on plaintiff, not only to show negligence on defendant's part, but also that the death of his intestate was proximately caused by such negligence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 75–78.]

Appeal from Superior Court, Wake County; Moore, Judge.

Action by B. W. Pegram, administrator of John M. Wilson, deceased, against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Reversed.

T. B. Womack and Murray Allen, for appellant. Argo & Shaffer, for appellee.

BROWN, J. The plaintiff contends that defendant, by means of its engine, negligently set fire to a cotton compress and warehouse at Hamlet, N. C., from which it communicated to the interior of the compress building, and while endeavoring to extinguish the flames the plaintiff's intestate was burned to death, and that defendant is liable therefor. It is further contended that Wilson, the intestate, was an employé of Chas. E. Johnson & Co., lessees of the compress and warehouse at the time, and was endeavoring to save the property of his employer from destruction. There was evidence tending to prove that, when the alarm of fire was given, Wilson escaped from the building and went out on the platform, but voluntarily went back in the burning building, where he was caught and burned to death. Plaintiff contends he went back for the purpose of saving his employer's property, and that it was in the line of duty that he met his death. The court submitted these issues: "(1) Was the injury and death of the intestate caused by the negligence of the defendant as alleged in the complaint? (2) Did the intestate by his own negligence contribute to his death? (3) What damage is plaintiff entitled to recover?" The jury answered the first issue "Yes," the second issue "No," and assessed the damages.

1. The witness Gibson had testified that the fire originated in the bagging on the platform. For the purpose of corroborating Gibson, a witness (Breeden) was permitted to testify that Gibson had repeatedly told him the same thing. On one occasion he testified that one Taylor was present. The witness was asked what Taylor said when Gibson made the statement. The defendant objected, the evidence was admitted, and defendant excepted. Witness then testified that Taylor said: "That is right. I saw it when it first blazed up outside." This evidence was not admitted to contradict Taylor, but only to corroborate Gibson. The court so stated. Taylor had been a witness, and was asked nothing about it. The defendant excepted, and we are of opinion that the exception is well taken. Gibson cannot be corroborated by what the witness Breeden heard another witness (Taylor) say. Taylor had not been examined on this subject, and the evidence was not offered to contradict

Taylor. His unsworn declaration, therefore, delivered by the mouth of another, is not competent for the purpose of corroborating Gibson. It is hearsay. Merrill v. Whitmire, 110 N. C. 367, 15 S. E. 3. It is simply the unsworn declaration of Taylor as to a past event, and was incompetent. Egerton v. Railroad, 115 N. C. 645, 20 S. E. 184.

2. His honor gave the following instructions, among others, to the jury: "(16) That if the jury shall find from the evidence that Wilson, being in a place of safety, left it and entered the burning building and attempted to extinguish the fire, at the time and in the manner in which an ordinarily prudent person would not have done so, they will answer the second issue 'Yes.' * * * (22) The only limitation of the rule that an employé or servant or other person may incur risk to save property is that one must not recklessly expose himself to danger. Where he does not recklessly expose himself, because of the duty he owes his employer to attempt to save his property, his act is relieved of the character of legal cause, and the liability is remitted to the negligence of the defendant." These two instructions are conflicting, and must necessarily have confused the jury. As it is impossible to tell upon which one the jury acted, the defendant has just reason to complain. It is very generally held by the courts of this country that, where one is exposed to peril by the negligence of another, the latter is liable in damages for injuries received by a third person in a reasonable effort to rescue the person imperiled. Considerable divergence, however, exists between the courts as to how far this rule will be extended in an effort to save property endangered by the negligence of another. This question has provoked much judicial discussion. Some jurisdictions deny the right to recover at all, while others have extended the rule so as to give the party injured redress where his effort to save property has been such as a reasonably prudent man would have made under similar circumstances. No one, however, should be permitted to recover for injury sustained in attempting to recover mere property in the face of obvious danger such as no reasonably prudent man would under the circumstances incur. Shearman & Redfield, vol. 1, pars. 85, 87; Berg v. Great Northern, 70 Minn. 272, 73 N. W. 648, 68 Am. St. Rep. 524; Liming v. Ill. Central, 81 Iowa, 246, 47 N. W. 66; Railway Co. v. Roberts, 44 Ill. App. 179. Mr. Watson, in his work on Damages for Personal Injuries, discusses this subject very fully and clearly, and sums up his views in the following language: "The doctrine that a party may recover for personal injuries sustained in a prudent and reasonable endeavor to save or protect his own or another's property, threatened with injury by the defendant's negligence, has the support of several well-considered cases, and, properly limited, commends itself to the writer's view." We are willing to hold with many able jurisdictions that, when the employer's property is set on fire by the negligence of another, the employé may attempt to rescue it, but not in the presence of obvious danger. If the employé exposes himself rashly to obvious danger solely to rescue property, he cannot recover if he is injured in his attempt. Power Co. v. Hodges (Tenn.) 70 S. W. 616, 60 L. R. A. 459.

It is contended here that the intestate had reached a place of safety, that he had escaped from the building and from all danger, and that his return to the burning building was voluntary and unnecessary on his part. If those facts be true, then the plaintiff cannot recover, unless he can show that in voluntarily returning into the burning building, from which he had safely escaped, his intestate acted with such care and caution as a reasonably prudent man would have exercised under such circumstances. The burden of proof is upon the plaintiff, not only to show negligence upon the part of defendant, but that the death of his intestate was proximately caused by such negligence. If it be proven that the intestate had escaped from the burning building and had reached a place of safety, the defendant is absolved from liability for his death, unless the plaintiff replies by showing that intestate re-entered the burning building for the purpose of saving his employer's property, and that at the time he did so a reasonably prudent person might well have done the same thing.

In his instruction No. 22 the court below imposed only one limitation upon the right of an employé to recover his employer's property endangered by fire, viz., he must not act recklessly. "Reckless" is defined to be "desperately heedless." Century Dict. To be reckless is to be regardless of consequences. It is more than carelessness. It implies willfulness. Any conduct that falls short of recklessness would therefore, in his honor's opinion, not bar a recovery. We cannot concur in that view. The instruction was erroneous. Had human life been imperiled, it is more than doubtful if the instruction would have been warranted in favorem vitæ, but certainly not in the case of mere property. Power Co. v. Hodges, supra; Plummer v. Kansas City, 48 Mo. App. 484; La Fayette Railroad v. Adams, 26 Ind. 76. There is nothing in Burnett v. Railroad, 132 N. C. 261, 43 S. E. 797, relied on by plaintiff, which at all conflicts with the views herein expressed.

As the case goes back for a new trial, it is unnecessary to discuss the other exceptions.

Error.

(58 W. Va. 140)

BROWN v. BECKWITH, Constable, et al.

(Supreme Court of Appeals of West Virginia. Oct. 24, 1905.)

1. EXEMPTIONS—PERSONAL PROPERTY—FORCED SALE—HOW LOST.

A person who has acquired, under the provisions of chapter 41 of the Code of 1899, the right to have personal property exempted from forced sale, does not forfeit it on the ground of nonresidence until he begins to remove his person from his place of abode in this state to another state or country, with intent to fix his residence in such other state or country, although he may intend to leave the state permanently, and has made complete preparation so to do, and delivered his personal property and effects for shipment to a point outside the state.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Exemptions, § 33.]

2. JUDGMENT—RES JUDICATA.

A finding of nonresidence on a suggestion and motion to require security for costs in a pending action is not res judicata in another action between the same parties. Such proceeding is a collateral one, not reaching the merits of the case.

3. EXEMPTION—CLAIM—SUFFICIENCY.

An exemption list and claim, irregular in form, considered, and pronounced sufficient.

4. SAME—ORDER OF ATTACHMENT.

An order of attachment is process, within the meaning of sections 23 and 24 of chapter 41 of the Code of 1899, against which the right to exempt personal property may be exercised.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Exemptions, § 131.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County.

Bill by Minnie Brown, alias Minnie Blake, against B. F. Beckwith, constable, and others. Decree for defendants, and plaintiff appeals. Reversed.

Walter E. McDougle, for appellant. H. B. Dodge and L. R. Via, for appellees.

POFFENBARGER, J. Minnie Brown complains of a decree of the circuit court of Wood county dissolving an injunction by which she attempted to prevent the sale of certain personal property claimed by her as exempt under the provisions of sections 23 and 24 of chapter 41 of the Code of 1899, and dismissing her bill. The property consisted principally of household goods, and B. F. Beckwith, constable, was proceeding to sell the same under orders of a justice of the peace in attachment proceedings instituted by three several creditors of the plaintiff, Samuel L. Koonse, Samuel Cross, and A. E. Beatty. The attachments were levied on the 9th day of December, 1902, exemption claims were delivered to the officer on the 13th day of December, 1902, judgments were rendered and orders of sale made on the 18th day of December, 1902, and on said last-named day the debtor served on the constable written instruments demanding the release of the property, notifying him that, in case of his refusal to do so, she would claim the damages allowed by law for detention thereof. By some collateral proceedings which need not be here detailed, action was delayed, so that the time fixed for sale was the 5th day of March, 1903, on which day a preliminary injunction was awarded on the plaintiff's bill against the justice, constable, and creditors, restraining the sale. Answers were filed by the defendants, depositions were taken and filed, and on the 20th day of August, 1903, the order complained of was made and entered.

The defense relied upon mainly is the alleged nonresidence of the plaintiff at the time she presented her claim of exemption. She had occupied as tenant a certain house in the city of Parkersburg, from which, on the day on which the actions were commenced and her property seized, she had removed all her property and effects, including her wearing apparel not in actual use, to the wharfboat at said city, and had them consigned to herself at Marietta, in the state of Ohio, and had vacated the house in which she had resided. She testifies that she stayed at the De Witt hotel, in Parkersburg, on the night of the day on which her property was sent to the wharfboat and levied upon, and later went to the residence of a Mrs. Core, in Parkersburg, with whom she staid for some time, and then went to another place in said city. She denies that she ever had any intention of leaving the city, and explains the shipment of her property by saying she had rented it to certain persons in Marietta. In addition to the fact of the removal of plaintiff's property and the evidence of intent on her part to take up her residence at Marietta, the defendants rely upon testimony showing her presence at Marietta at a time subsequent to the presentation of her exemption claim, and also an admission made by her in an action which she prosecuted in a justice's court against the constable for damages for the detention of the property. This trial was had at Williamstown, directly opposite the city of Marietta, and a witness testifies that she came to Williamstown on the morning of the trial from Marietta. On that occasion she testified that she had no legal residence. If it be conceded that the evidence justifies the finding by the court of a fixed intention on the part of the appellant to remove from Parkersburg to Marietta, and of preparation by her to do so, we are confronted with the question whether there does not yet remain to be supplied one essential element of change of residence, namely, actual commencement of removal, not of the property, but of the person—personal departure from the old place of residence in the state for the new outside of it. Burt v. Allen, 48 W. Va. 154, 35 S. E. 990, 50 L. R. A. 284, 86 Am. St. Rep. 29, decides that within the meaning of the attachment laws a person becomes a nonresident the moment he begins the removal of his person from the place of his residence with intent to acquire a residence in another state, even before he gets outside the state. To the same effect are Moore v. Holt, 10 Grat. 289, and Clark v.

Ward, 12 Grat. 440. According to many authorities, such commencement of removal, coupled with an intent to abandon the state, falls short of the requisites of nonresidence. Shinn on Attach. § 96, says it is necessary that the defendant acquire a residence and place of abode outside of the state. Drake on Attach. § 64, says a mere purpose to change residence, evidenced by acts of the removal of the party's property, will not make him a nonresident of the state from which he purposes to depart until he shall have begun at least the removal of his person. Wade on Attach. § 78, accords with the proposition last above stated. No case has been found which propounds a doctrine more rigid and illiberal toward the defendant. Hence it may be safely said that by the great weight of authority nothing short of such act of removal, accompanied by intent to abandon the state, will render the party amenable to an attachment on the ground of nonresidence.

This proposition seems to be in accord with the general principles of the law relating to domicile and residence, enunciated by this court in White v. Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896, as follows: "The original domicile continues until it is fairly changed for another. It is a legal maxim that every person must have a domicile somewhere; and he can have but one at a time for the same purpose. From this it follows that one cannot be lost or extinguished until another is acquired. Baird v. Byrne, 3 Wall. Jr. 1, Fed. Cas. No. 757. When one domicile is definitely abandoned and a new one selected and entered upon, length of time is not important. One day will be sufficient, provided the animus exists. Even when the point of destination is not reached, domicile may shift in itinere, if the abandonment of the old domicile and the setting out for the new are plainly shown. Munroe v. Douglass, 5 Hadd. 495. Thus a constructive residence seems to be sufficient to give domicile, though an actual residence may not have begun." Burt v. Allen, cited, further declares that the elements of nonresidence in the law of attachment and the elements of nonresidence within the meaning of the statutes conferring a right to exempt personal property from forced sales are the same. This position seems to be supported by both principle and reason. Surely the law is not less favorable to the claimant of a constitutional right of a character so high that the statutes providing for its vindication are by the courts of almost all the states liberally construed (12 Am. & Eng. Enc. Law, 75) than to the right of a debtor to defeat an attachment. In the former case the law impresses upon the property a status, immunity from forced sale, and withdraws it from the reach of the creditor; in the latter, the party is only given the benefit of a strict construction of remedial statutes, designed to give the creditor a means of obtaining from him what he is entitled to have, satisfaction of his debt out of the property. In both instances the law is liberal to the debtor. Hence it would seem that in both cases the same rules for determining the question of nonresidence ought to govern.

What evidence in the case supplies this element of personal removal? Nobody testifies to any departure by the appellant from Parkersburg. A witness states that she came from Marietta to Williamstown to attend the trial of an action brought by her against the constable, and that on that occasion she said she had no legal residence. Her coming from Marietta is in no sense inconsistent with the retention of her residence in Parkersburg at the time, which she establishes by the testimony of herself and other witnesses. The statement that she had no legal residence must be subject to the rule that she did have a legal residence somewhere; for, having had a residence in this state, it continued until she acquired one elsewhere. The language in Burt v. Allen, importing that one need not acquire a domicile or residence in another state in order to render him a nonresident of this state, means that there need not be an actual domicile or residence in another state. There may be a constructive residence in either state for the purpose of working out the legal rights of parties. Appellant not having acquired either an actual or constructive residence elsewhere, her residence in this state must be deemed to have continued. Our conclusion is that the evidence wholly fails to establish the element of actual removal to a place out of the state, and also the inception or beginning of such removal within it. On the question of residence, the principle of res judicata is relied upon. In the action by the appellant against the constable, an affidavit of her nonresidence was filed and a demand made for security for costs. This motion was resisted and evidence was heard upon it, and the justice, believing nonresidence to have been established, required security to be given, and, in default thereof, dismissed the action. This was not a hearing on the merits, but one upon a mere collateral motion. "A judgment not based upon the merits is not final and conclusive in the sense that a plea of res judicata may be founded on it." 21 Am. Eng. Enc. Law, 266. A nonsuit is not res judicata. Id. 271. The dismissal in equity for want of jurisdiction, or any cause precluding inquiry into the merits, is not res judicata. Id. 271.

But one other proposition remains to be disposed of, namely that the claim of exemption is insufficient, which contention is based upon two grounds, one of which is predicated upon the following language in the affidavit: "That she is entitled to have and claims all the above-listed property claimed by her as husband and parent exempt from execution or other process in the above cause." The point made is that she does not specify

the character in which she claims. To determine this question it is necessary and proper to read the language above quoted in connection with another part of the affidavit, in which the appellant says she is a parent and resident of the state. This language established her character as a female parent, and is wholly inconsistent with the character of husband. Moreover the word "husband" was used by way of recital and description of the property, and its use appears to have been a mere inadvertence. So read, the affidavit plainly asserts a claim as parent and resident. In this respect the demand is sufficiently certain in a legal sense.

The other is based upon the assertion that at the time the officer received the lists and claims of exemption he held no execution or other process authorizing a sale of the property. The statute clearly includes an order of attachment within the term "process." In section 25 of chapter 41, attachment is specifically mentioned, and provision made for release by the officer of claims and demands garnished under the order of attachment. While there is no specific direction to him as to property levied upon and taken into his possession under an order of attachment, the provision for the release of claims and demands suggested and garnished shows a clear legislative intent that the officer shall not, after the delivery to him of the lists specified in the statute and the lapse of the time prescribed for appraisement, withhold the possession of the property taken under process of any kind, unless it be in respect to claims which are excepted from the operation of the exemption laws.

The conclusion resulting from this examination of the record and authorities is that the circuit court erred in dissolving the injunction and dismissing the bill, and that the decree must be reversed, with costs in this court to the appellant, the bill reinstated, and a decree entered perpetuating the injunction and requiring the appellees to pay to the appellant her costs in the circuit court.

(58 W. Va. 136)

KNOX v. HORNER.

(Supreme Court of Appeals of West Virginia. Oct. 24, 1905.)

1. JUDGMENT—NOTICE OF MOTION—RETURN.

A notice of a motion for judgment for money due on contract, under the provisions of section 6 of chapter 121 of the Code of 1899, need not be returned to the clerk's office of the court in which the motion is to be made 20 days before the commencement of the term at which the motion is to be heard.

2. SAME—FILING.

Such notice must be filed in such clerk's office before the commencement of such term, so that it may be docketed under the requirement of section 1 of chapter 131 of said Code, else the right to have the motion heard at such term is not acquired; but the length of time between such filing and the commencement of the term is not prescribed.

(Syllabus by the Court.)

Error from Circuit Court, Harrison County.

Action by John M. Knox against Vance L. Horner. Judgment for defendant, and plaintiff brings error. Reversed.

Sperry & Sperry, for plaintiff in error. Harvey W. Harmer, for defendant in error.

POFFENBARGER, J. The circuit court of Harrison county having quashed a notice given by John M. Knox to Vance L. Horner of a motion for judgment on promissory notes, and dismissed his proceeding on said notice, which was given under section 6 of chapter 121 of the Code of 1899, said Knox has brought the case here on a writ of error.

The court certifies that the notice was served on the defendant, Horner, on the 3d day of June, 1905, informing him that the motion for judgment would be made on the 3d day of July, 1905, and was received by the clerk of the court and filed in his office on the 6th day of June, 1905, 7 days before the commencement of the term, and more than 20 days prior to the date specified in it as the time for moving the court for judgment. In the opinion of the court the proceeding was defective in this: that the notice had not been filed in the clerk's office 20 days or more before the first day of the term at which the motion was to be heard. The statute provides that upon certain demands judgment may be taken on motion after 30 days' notice thereof, and the return of the notice to the clerk's office of the court 20 days before the motion is heard. It will be observed that the time fixed in this notice for the hearing of the motion was not the first day of the term, but a later day within the term. This seems not to be regarded as important; the sole contention being that the notice should have been returned to the clerk's office at least 20 days before the first day of the term and docketed under the provision made by section 1 of chapter 131 of the Code of 1899.

The basis of this contention is found in the syllabus of Hale v. Chamberlain, 13 Grat. 658, reading as follows: "In a proceeding under Code, p. 640, c. 167, § 5, to recover money due upon contract, by notice, the notice must be returned 40 days before the commencement of the term, and put upon the docket of the court, or it cannot be tried at that term." The statute referred to in that case is exactly like section 6 of chapter 121 of our Code, except as to the length of time required for service of the notice and return thereof to the clerk's office before the hearing of the motion. An examination and analysis of the opinion in that case shows that the defect in the proceeding was the giving of the notice after the commencement of the term at which the motion was to be heard, in consequence of which the clerk had had no opportunity to docket it under the first section of chapter 177 of the Code of Virginia of 1860, requiring the clerk to

make out, before every term of court, a docket of the cases pending, and carried with it no worse consequence to the plaintiff than inability to demand a trial at the term to which the notice had been given. The court did not quash the notice and dismiss the action. This clearly appears from the conclusion and judgment of the court, stated by Allen, P., as follows: "The court erred in overruling the motion of the defendant to remove the motion from the docket, as set forth in the first bill of exceptions taken by the defendant, and in proceeding to hear and render judgment on said motion, being founded on a notice bearing date on a day after the commencement of the term at which the motion was heard and judgment rendered. The judgment should be reversed, and the cause remanded, for the notice to be docketed and cause proceeded in." Nowhere in the opinion is it stated that the notice should have been returned to the clerk's office 40 days before the commencement of the term, and no language importing this to have been the view entertained by the court is to be found in the opinion. The explanation of this contradiction, apparent on the face of that report, lies in the fact that the syllabi in the cases then decided were not prepared by the court or the judges, but by a reporter appointed by the court for the purpose of preparing the manuscript reports of the decisions for publication. Code Va. 1860, c. 166, § 1. The reporter simply misapprehended the ground, character, and scope of the decision, and by his erroneous statement in the syllabus made the court appear to have decided what it did not decide. In Hanks v. Lyons, 92 Va. 32, 22 S. E. 813, Riley, J., reviews the case of Hale v. Chamberlain and reaches the conclusion above set forth as to what the court actually decided. He says: "The notice was not only not returned before the term, but was not even served until after the term began. It could not, therefore, be put on the docket at that term, and the court necessarily held that it could not be heard at that term."

As the notice, in respect to the time intervening between the service thereof and the hearing of the motion and between the return thereof to the clerk's office and the hearing of the motion, complies literally with the statute, nothing more should be required unless some good reason is shown therefor. No precedent for requiring more is found in Hale v. Chamberlain, and nothing is urged in the brief, except that the case must be matured for hearing before the commencement of the term; and this is based upon certain language used in the opinion in Hale v. Chamberlain and in Higginbotham v. Hazelden, 3 W. Va. 266, which must be read in the light of what was actually decided in those cases. What is said in the latter case emanated from the former, and what is decided there is simply that the case was not in a condition to be docketed for hearing at the term, because the order of publication was completed, not before the commencement of the term, but on the first day of the term, a fact which put the case in the class of Hale v. Chamberlain. Unless some good reason for the inability of the clerk to docket the notice which was returned to his office seven days before the beginning of the term can be shown, the action of the court must be held to have been erroneous. We are unable to find such reason in the brief of counsel, and also to perceive any. Section 1 of chapter 131 requires a docket to be made out before every term of court, including all pending cases. As this notice had been filed in the clerk's office 7 days before the commencement of the term, it could have been docketed just as well as if it had been returned 20 days before the term. The statute is plain and certain in its terms, and needs no construction beyond what is necessary to make it operate in harmony with other parts of the law. Its purpose is to provide a simple, informal, expeditious mode of recovering money due on contract, under which such a case may be matured for trial without professional aid, and its efficacy will be greatly impaired, if not wholly destroyed, and the legislative will defeated, if the courts ingraft upon it latent technical rules and requirements. As to its character, see Board v. Parsons, 22 W. Va. 308; White v. Sydenstricker, 6 W. Va. 46; 4 Min. Inst. (pt. 2) 1091. As already intimated, such a defect in the proceeding as is charged would not call for the quashing of a notice and dismissal of the proceeding. It would only prevent the docketing of the case for, and trial thereof at, the term specified in the notice.

For the reasons given, the judgment will be reversed, and the case remanded to the circuit court for further proceedings therein according to law.

(72 S. C. 363)

EARLE v. OWINGS et al.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. EVIDENCE—PAROL—WRITTEN INSTRUMENT.
Parol evidence which does not contradict or vary a written instrument is admissible to show the object of its execution and to show a contemporaneous independent agreement.
[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2048.]

2. TRUST—EVIDENCE.
Evidence *held* to sustain a finding of a contract to convey land in trust, to be conveyed by the trustee to others on payment by each of his share of a mortgage given to secure the whole payment.

3. USURY—WHAT CONSTITUTES.
A note payable "with interest thereon at the rate of 10 per cent. annually from this date" draws interest only at 10 per cent. until due, and at 7 per cent. after due, and the collection of interest of 10 per cent. after maturity is usury.
[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 281.]

4. SAME—DEFENSE.

Where a trustee borrows money on behalf of himself and his beneficiaries, he may plead usury as a defense for the benefit of himself and the beneficiaries.

5. SAME—COUNTERCLAIM—LIMITATIONS.

A counterclaim for usury runs with the contract, and is not barred within three years, under Code Civ. Proc. 1902, § 113.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Usury, §§ 237, 267, 268.]

6. SAME—PENALTY—WHAT STATUTE GOVERNS.

Under the act of 1898 (22 St. at Large, p. 749) relating to usury, providing that it shall not apply to contracts made before it goes into effect, the penalty attached to the collection of usury by the act of 1882 (18 St. at Large, p. 35) applies to a contract executed before the passage of the act of 1898.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Usury, § 18.]

7. SAME—COSTS.

Under the usury statute, providing that a plaintiff can only recover for the balance due of the principal sum, without interest or costs, as defendant cannot, under the statute, be liable therefor, equity may make the plaintiff liable as the mover of the litigation.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 81; vol. 47, Cent. Dig. Usury, § 363.]

Appeal from Common Pleas Circuit Court of Greenville County; Townsend, Judge.

Action by J. E. Earle against Samuel Owings and others. Judgment for defendants, and plaintiff appeals. Modified.

Heyward, Dean & Earle, for appellant. Adam C. Welborn, for respondent Owings.

JONES, J. On December 3, 1885, plaintiff executed a deed conveying 50 acres of land in Greenville county, S. C., to the defendant Samuel Owings. On the same day defendant Owings executed to plaintiff a mortgage to secure the balance of purchase money for said land, represented by 10 promissory notes given by Owings to plaintiff. This action was to foreclose said mortgage for the balance claimed to be due upon the last 5 of said notes. The defendants answered separately, each alleging that on December 3, 1885, plaintiff divided 50 acres of his land into five lots, and sold said lots to Samuel Owings, Jacob Harris, Wilson Easley, and James Harris, and by agreement of all the parties the deed to the whole 50 acres was made to Samuel Owings, for the benefit of himself and all the other purchasers, and Owings mortgaged the same to the plaintiff to secure the balance of the purchase money, for the benefit of himself and the other purchasers, and alleging, further, that it was agreed by all the parties that, as each defendant purchaser paid plaintiff for his or her lot, Owings was to execute a deed for the same to the purchaser, and the mortgage should be released thereon by the plaintiff.

1. The circuit court considered parol testimony, taken by the master subject to objection, which was offered to show this defense of defendants, and the first question presented is whether such evidence is admissible, as violating the rule excluding parol testimony tending to contradict or vary a written instrument. We think the testimony admissible. The testimony showing why the deed was executed to Owings, instead of to each defendant separately, and why the mortgage was executed by defendant Owings on the whole land, falls within the rule which permits parol testimony to show the object or purposes with which the parties executed the instruments. Moses v. Hatfield, 27 S. C. 324, 3 S. E. 538; Brick v. Brick, 98 U. S. 514, 25 L. Ed. 256; 1 Elliott on Evidence, § 584. The testimony that plaintiff agreed to release the mortgage on each separate lot, as the purchase money therefor was paid by said purchasers, falls within the rule that when the written evidence of the contract does not contain all the terms of the transaction between the parties, parol evidence, which does not really contradict or vary the writing, is admissible for the purpose of showing a contemporaneous, collateral, and independent agreement. Chemical Co. v. Moore, 61 S. C. 166, 39 S. E. 346; Ashe v. Railroad Co., 65 S. C. 138, 43 S. E. 393.

2. The next question is whether the circuit court erred in affirming the master in the conclusion that the testimony established the above agreement as contended for by the defendants. After a careful review of the evidence, we cannot say that the conclusion of the circuit court is against the preponderance of the same.

3. The next question involves a proper construction of the notes in question, as to whether they bear 10 per cent. interest after maturity. A copy of one of the notes will suffice, and it is as follows: "$120. By the third day of December, 1895, I promise to pay James E. Earle or bearer one hundred and twenty dollars, with interest thereon at the rate of ten (10) per cent. annually from this date. This third day of December, 1885, Samuel his X mark Owings. Test: H. P. Johnson." There is nothing in the terms of the note to suggest that interest after maturity is to be 10 per cent. On the contrary, the plain contract is to pay interest annually at that rate up to maturity. The term "annually" may have full effect between the making and maturity of the note. After maturity the law fixes the interest at 7 per cent. Ehrhardt v. Varn, 51 S. C. 550, 29 S. E. 225.

4. We inquire next whether the plea of usury is available to the defendant Owings. He was allowed by the master to amend his answer so as to plead usury in behalf of himself and his codefendants, and set up a counterclaim under the usury statute. It is excepted that Owings could not avail himself of such plea. The contract, as shown, was made with Owings

for the benefit of himself and others. He was, therefore, a borrower or debtor, in the sense of the statute, notwithstanding his relation as trustee for others. The exception, therefore, cannot be sustained.

5. Is the counterclaim for usury barred by the statute of limitations—three years—as for a penalty or forfeiture? The circuit court held that the statute of limitations has no application, and this ruling is supported by the cases of Mortgage Co. v. Gillam, 49 S. C. 359, 26 S. E. 990; Allen v. Petty, 58 S. C. 240, 36 S. E. 586. Section 113, Code Civ. Proc. 1902, provides a three-year limitation for "an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved or to such party and the state, except where the statute imposing it, prescribes a different limitation." The statute imposing the penalty does not expressly provide a different limitation, but the plain implication is that the counterclaim is available, and is effective, as long as the right of action exists on the principal sum. It is not without force or plausibility to suggest that the counterclaim is but a cross-action, and, if a direct action for the penalty could be barred in three years, the defense of counterclaim could also be barred in that time. But the design of the statute was to prevent usury by giving the debtor these two distinct remedies, and to hold otherwise than was held in the cases cited above would put it in the power of a creditor, who has violated the usury law, to deprive a debtor of the remedy intended to prevent usury, by merely postponing his action for the principal sum.

6. The next question which arises is whether the plaintiff actually received usurious interest, and, if so, how much. The case of Ehrhardt v. Varn, 51 S. C. 550, 29 S. E. 225, shows that though the contract on its face is not usurious, yet that subsequently charging and receiving interest thereon at a greater rate than allowed by law is usury. Inasmuch as the notes in question bear only 7 per cent. after maturity, and the plaintiff himself testified that he charged and collected interest at 10 per cent. up to February 1, 1901, it is clear that the circuit court was right in holding that usury had been collected. This was not a mere mistake in calculation, and consequent collection of excessive interest against the intent of the parties, such as in Rushton v. Woodham, 68 S. C. 110, 46 S. E. 943, exonerated from the charge of usury. The most favorable view that might be taken of plaintiff's conduct is that he honestly believed he had a right to collect 10 per cent. interest after maturity under the terms of the note, but such belief or mistake of law cannot exempt him from the penalty of usury. Mitchell v. Bailey, 57 S. C. 345, 35 S. E. 581.

7. With respect to the amount of usury and the consequent penalty as a counterclaim, we think the circuit court was in error. The rule adopted by the master, which was affirmed by the circuit court, was that the counterclaim should be "made up of double the amount of unlawful and usurious interest charged and received by the plaintiff under the act of 1882 (18 St. at Large, p. 35), and double the total amount received in respect of interest since the act of 1898 (22 St. at Large, p. 749)." Under this rule the circuit court held that $210.75 unlawful interest had been received, and allowed a counterclaim for double that sum, or $421.50, thereby applying the penalty of the act of 1882 up to the time the act of 1898 went into operation, and then applying the penalty of the act of 1898, because of the receipt of unlawful interest after that date. We think the act of 1898 has no application to this case, because it is expressly provided in that act that it shall "not apply to contracts made before it goes into effect." Because of this provision the rule stated in Hardin v. Trimmier, 27 S. C. 110, 3 S. E. 46, cannot apply. It cannot be said that payments of interest after March 2, 1898, were upon contracts then made separate and distinct from the contracts sued on, as there is no evidence whatever to that effect. On the contrary, the testimony is that the interest was charged and received upon the notes in suit. It must follow that the penalty provided in the act of 1882 applies in this case. Under our view the amount of excessive interest received was $105.54, and therefore a counterclaim should have been allowed for only double that sum, or $211.08. Deducting this sum from the principal sum claimed, $515, leaves $303.92, for which plaintiff is entitled to judgment, without costs, in the circuit court.

It appears that, of the 50-acre tract, lot No. 1 was sold to Wilson Easley, to whose rights defendant Ella Easley has succeeded, and that Ella Easley has paid the amount agreed to be paid therefor; that lot No. 2 was sold to Jacob Harris, and that Yancy Carter has acquired his rights, but has not fully paid the amount due thereon; that lots Nos. 3 and 4 were sold to Samuel Owings and have been paid for; that lot No. 5 was sold to James Harris, and defendant Lucy Harris has acquired his right therein, but has not fully paid for the same. The circuit court, in accordance with the recommendation of the master, held that only lot No. 2, claimed by Yancy Carter, and lot No. 5, claimed by Lucy Harris, should be sold for the payment of the balance due. And this is approved as equitable, inasmuch as defendant Ella Easley has paid for her lot and received a deed therefor from Samuel Owings, and Samuel Owings has paid for his lot, which, under the agreement, entitled them to have the mortgage released as to their said lots. With respect to the proportions due on lots of Yancy Carter and Lucy Harris, we are bound to be governed by the proportions fixed by the master, to which no objection was made in the circuit court and which the circuit court

adopted as correct. The circuit court, allowing a counterclaim of $421.50, found the balance due to be $93.50, and that the lot of Yancy Carter should be liable for $80.57 thereof, and the lot of Lucy Harris for $12.93. Under this proportion the lot of Yancy Carter should be liable for $261.89, and the lot of Lucy Harris for $42.03, of the amount held to be due by this court.

8. With respect to the matter of costs in the circuit court, the master recommended that plaintiff "pay all the costs of this action," and this was approved by the circuit court, to which exception has been taken. Under the usury statute plaintiff can only recover for the balance due of the principal sum, without interest or costs. No costs can therefore be taxed in favor of plaintiff. But the costs should be paid by some one; and, as the defendant cannot under the statute be liable therefor, it is competent for a court of equity to make the plaintiff liable as the mover of litigation. The order as to the costs, as we construe it, does not justify any taxation of costs in favor of defendants or their counsel against the plaintiff, but makes the plaintiff liable for all the costs which, but for the usury statute, would ordinarily have been taxed, under the decree, in his favor.

The judgment of the circuit court is therefore modified, so as to conform to the views above announced.

(72 S. C. 363)

WALTER PRATT & CO. v. FRASIER & CO.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. EVIDENCE—PAROL—WRITTEN CONTRACT.
Where a written contract of sale is silent as to the time of delivery, parol evidence of the circumstances of the sale is admissible to determine what is a reasonable time.
[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1887.]

2. APPEAL—HARMLESS ERROR.
Where the delivery of goods to a certain railroad at Iowa City was in issue, it was harmless error for the court to state that they were to be delivered to the railroad "in Chicago"; there being no dispute as to the place of delivery, and that being the seller's address.

3. SALE—ENTIRE CONTRACT—PERFORMANCE.
Where a contract of sale was entire, failure of the seller to ship an essential article authorizes the buyer to refuse to accept the part shipped.
[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 387.]

4. SAME.
Where plaintiffs sold to defendants an assortment of toilet articles and a counter showcase, the contract was an entire one, and a failure to deliver the showcase excused defendants in accepting the goods.
[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 387.]

Appeal from Common Pleas Circuit Court of Abbeville County; J. E. McDonald, Judge.

Action by Walter Pratt & Co. against Frasier & Co. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. Fraser Lyon, for appellant. Wm. N. Graydon, for respondents.

JONES, J. Of the 16 exceptions by plaintiffs to the judgment in favor of defendants in the above entitled case, the first 6 relate to rulings on the admissibility of testimony, the next 8 relate to the charge and the refusals to charge the jury, and the last 2 relate to the refusal to grant a new trial; but all the exceptions except the eighth, twelfth, thirteenth, and fourteenth, really depend upon one proposition—whether the court committed error in allowing certain testimony as to the object or purpose of the purchase of goods in question by defendants, and as to the time in which said goods were to be delivered to the Chicago, Rock Island & Pacific Railway Company, upon the ground that such testimony tended to vary or contradict a written contract between the parties. If the testimony was properly admitted, it was not error to charge the jury in accordance with that ruling, and to refuse to charge propositions in conflict therewith, and in declining to grant the motion for a new trial based upon the incorrectness of such ruling. We therefore will direct attention to this controlling question.

1. The plaintiffs brought this action against defendants for certain goods, sold and delivered to defendants at their request, consisting of an assortment of toilet articles, perfumery, drugs, and merchandise, counter showcase, and sundry advertising matter, amounting to $133.38. In support of their case, plaintiffs offered a written contract and order for said goods, signed by the parties, dated October 30, 1902, which, among other things, contained these provisions: "We deliver all goods to purchasers by delivering them to the transportation company herein specified [the Chicago, Rock Island & Pacific Railway]. * * * We have no agreement or understanding with salesmen, except as printed or written on this order. * * * Time is the essence of the agreement. Separate verbal or written agreements with salesmen are not binding upon Walter Pratt & Co. All conditions of sale must be shown on the order." The order was silent as to the time of shipment; the language being: "Please ship us, care of Chicago, Rock Island & Pacific Railway, the assortment of goods listed above," etc. The testimony on behalf of the plaintiffs was to the effect that the order was for one of plaintiffs' regular $133.38 assortments of perfumery and toilet preparations, with a floor counter showcase, instead of the regulation revolving showcase with iron pedestal; that the order was communicated by wire on November 1, 1902; and that on same day plaintiffs delivered to the Chicago, Rock Island & Pacific Railway Company, at Iowa City, Iowa, three packages

consigned to defendants at Mt. Carmel, Abbeville county, S. C.—one package containing the perfumery and toilet preparations, and the showcase in two packages, one containing the glass showcase and the other the counter base for same; and the advertising matter called for in the order was shipped by express on November 11, 1902, and the drafts for sterling silver thimbles were mailed to list of names furnished by defendants on November 17, 1902, in accordance with the contract between the parties. The defendant offered parol testimony for the purpose of sustaining the following defense set up in the answer: "That said goods were ordered on or about the 30th day of October, 1902, and were to be shipped immediately, but the plaintiffs failed to ship said goods when they agreed to ship them, and when the goods came they were not as represented; no complete showcase being sent in which to display said goods. That the object of these defendants in ordering said goods was to have them for holiday trade, and the defendants, having failed to receive a proper showcase in which to display said goods, notified plaintiffs of the defect, and they promised to remedy the same, but failed to do so until too late to make any sale of said goods for the holidays, and these defendants declined to receive said goods from the railroad company, and notified plaintiffs that they were in the depot, subject to the orders of the plaintiffs." The defendants were, over the objection of plaintiffs, permitted to testify to the effect that no such showcase as ordered reached Mt. Carmel; that the goods were to be shipped in time for the holiday trade, and were not so shipped; that upon examination of the shipment which reached Mt. Carmel there was no base to the showcase, which they promised to send by the 1st of November; that the goods could not be displayed for the holiday trade in the condition in which they were received (referring to the absence of the counter base to the showcase); that the purpose for which the goods were to be shipped was for the holiday—Christmas—trade.

The testimony was admitted on the grounds, first, because the contract was silent as to the time of delivery of the goods; and, second, the testimony was responsive to the allegations of the answer. We think the testimony was admissible for the purpose of showing that the complete showcase was not delivered to the railroad company for transportation within a reasonable time after the contract was made. If nothing is said in a written contract of sale as to the time of delivery, parol evidence of the facts and circumstances attending the sale is admissible in order to determine what is a reasonable time. 2 Benjamin on Sales, § 1023. The testimony related to the facts and circumstances of the sale, so as to enable the jury to say whether the goods were delivered to the railroad company for transportation within a reasonable time, and was also, in part, intended to show that the counter base for the showcase was not delivered to the railroad company within a reasonable time. There was no doubt that the plaintiffs delivered what they supposed were the goods as ordered on November 1, 1902; but, on the other hand, the testimony on the part of defendants was that, while three packages reached Mt. Carmel consigned to defendants, as a matter of fact no counter base for the glass showcase was among the packages, and two of the packages contained glass tops of showcases. If this was true, there was room for an inference that plaintiffs in shipping the goods, probably kept in stock in regulation packages ready for prompt shipment, made a mistake in shipping two top cases, instead of one top case and one counter base. The evidence was that defendants, finding no base for the case in the shipment as it arrived at Mt. Carmel, notified plaintiffs of same, and after some correspondence the base was shipped by express, arriving Christmas Eve, and that defendants declined to receive the goods because they could not display them without the complete showcase, and that no such case was shipped in time for the Christmas trade. In the case of Buist Co. v. Lancaster Mercantile Co., 68 S. C. 523, 47 S. E. 978, the court held that where an order for goods is silent as to freight, parol evidence is admissible to show the agreement of parties as to payment of freight. In that case the evidence was to the effect that plaintiffs agreed to deliver the goods at Lancaster, S. C., at prices named. In the present case the testimony merely goes to show the time of delivery, as to which the written contract was silent, and is well within the principle of the case cited.

2. We notice briefly an additional point in the eighth exception. It is complained that the court erred in charging the jury: "The contract so provides that a showcase was to be furnished in which to display the goods, and Pratt & Co. bound themselves to deliver to the railroad company a showcase in which to display the goods; and if they failed to furnish the showcase, then, upon the arrival of the goods at Mt. Carmel, the defendants were not bound to receive them. If you find that the plaintiffs failed to deliver the goods to the railroad in Chicago, then, on their arrival at Mt. Carmel, the defendants would not be bound to receive them, if Pratt & Co. had not fulfilled their contract." It is objected, first, to this charge that there is no provision in the contract that the goods were to be delivered in Chicago. We cannot regard this as prejudicial error. It is true the goods were shipped from Iowa City, Iowa; but the court for the moment was doubtless under the impression that the goods were shipped from Chicago, as that was plaintiffs' address and place of business, as shown by letter heads and letters in evidence. There was no dispute as to whether

the goods were shipped from the proper place; but the dispute was as to whether the goods were delivered to the designated railroad within a reasonable time, as contemplated by the parties. Such a harmless inadvertence should constitute no ground for reversal.

3. In objection to said charge, it is further contended that defendants were bound to accept and pay for as many of the goods as were shipped in accordance with the contract, and that they could not reject the entire shipment, even if the showcase was incomplete or missing. In the twelfth, thirteenth, and fourteenth exceptions the same objection is urged against other portions of the charge. In connection with said charge, the court further charged the jury "that if the jury find from the testimony that the goods shipped did not contain a showcase in which to display the goods, and that a showcase was essential for the proper display of said goods, then the defendants had a right to reject the shipment, and the jury must find for the defendants." We think the charge is correct. The contract was an entire contract. By its terms plaintiffs' agreement to guaranty to the defendants gross profits of 33⅓ per cent. of the amount of the order was "conditioned on the purchaser keeping the goods tastefully displayed in his store in the showcase furnished by us [Pratt & Co.] for that purpose." If no such showcase was shipped in a reasonable time, in accordance with the contract, it was a failure in a vital, essential part, affecting the whole consideration and the value of every article embraced in the contract under the scheme or plan agreed upon by the parties. This would warrant defendants in refusing to accept a partial shipment. In Benjamin on Sales, § 631, the rule is laid down that "where the failure of consideration is only partial, a buyer's right to rescind will depend on the question whether the contract is entire or not. Where the contract is entire and the buyer is not willing to accept a partial performance, he may reject in toto." 6 Ency. of Law, 790. A failure of consideration in an entire contract, although it may seem to be partial, is in reality a total failure of consideration, and will entitle the buyer to decline to accept partial performance and to rescind. If, however, the buyer accepts or enjoys a partial performance, he may lose his right to rescind, and must resort to whatever remedy he may have for abatement in price or damages for the seller's breach of contract. This case is wholly unlike Kauffman v. Stuckey, 37 S. C. 7, 16 S. E. 192, cited by appellants; for in that case the flour had been received by the defendant and some of it disposed of, so that there was, and could be, no rescission of the contract by tender back of the property, and there was no proof of total failure of consideration, but the proof only went to show that a part of flour received did not come up to the sample.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(72 S. C. 375)

BOTTUM v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. CARRIERS—LOSS OF FREIGHT—DAMAGES.
Where a box of pictures was shipped with a lot of household effects and billed as glass, in the absence of actual fraud, the carrier is only liable for the value of a box of household glass.

2. SAME.
Where pictures are shipped in a box marked "Glass," the carrier is not required to inquire into the nature and value of the contents of the box.

3. SAME—EVIDENCE.
In an action against a carrier for the loss of a box of goods, evidence as to its contents is admissible.

Appeal from Common Pleas Circuit Court of Greenville County; Gage, Judge.

Action by Bertha C. Bottum against the Charleston & Western Carolina Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

S. J. Simpson and M. F. Ansel, for appellant. W. G. Sinnie, for respondent.

WOODS, J. On May 16, 1903, the plaintiff, Mrs. Bertha C. Bottum, had a lot of her household goods packed by H. B. Graves, a large dealer in furniture and pictures, and shipped by him from Rochester, N. Y., to Greenwood, S. C. One box containing a pastel portrait of Mrs. Bottum's deceased husband and a valuable landscape painting was lost on defendant's road, and this action was brought to recover the value, $377.50. Mrs Bottum's agent, in making the shipment, marked the box containing these pictures "Glass, with Care." The bill of lading was for "household goods," but the kind of goods in each package, except "three trunks crated," was specified. The box of pictures was included in the description, "3 box glass"; the other two boxes really containing glass. The defendant's freight charge on glass was 1½ times first class. On pictures the charge was three times first class, the value being over $50 and not exceeding $200, and a special contract was required when the value was over $200. These rates and requirements, it seems, had been approved by the Interstate Commerce Commission. The packers testified they had always received from consignors pictures marked as glass, and always so marked them in shipping; but there was no evidence that the defendant or any other railroad ever acquiesced in this misdescription. The defendant denied liability for the value of pictures shipped in a box represented by the marks on the box as glass, for which it charged and received a lower rate of freight.

1. The circuit judge charged: "The railroad company does not contend that Mrs. Bottum made any fraudulent concealment of the contents of the box. Now, if Mrs. Bottum was not guilty of any improper concealment of the contents of the box shipped, or the value thereof, it was the right and duty of the railroad company to inquire about the nature

and value of the contents of the box; and, if it failed to do so, and the box has been lost, then the railroad company is liable for the full amount of the loss." In accordance with this instruction, the verdict was in favor of the plaintiff for the value of the pictures. There are a number of exceptions, but the case turns on the soundness of the proposition just quoted from the charge. It is manifest from the context that, when the circuit judge said, "The railroad company does not contend that Mrs. Bottum made any fraudulent concealment of the contents of the box," he meant there was no intention to defraud by concealment; for the defendant's claim of exemption rested entirely on the ground that it had been deceived as to the contents of the box by the untrue representation of the plaintiff's agent as to a fact recognized by the law as of great importance to the contract of carriage. More definitely, then, the question at issue is, was the circuit judge right in charging, as a matter of law, that in the absence of actual intentional fraud the carrier was liable for the value of pictures, marked "Glass" on the box and billed as "glass," because it was the duty of the railroad company to make further inquiry about the nature of the contents, and, having failed to do so, it could not avail itself of the misdescription?

It is quite true that, when a railroad company receives a package marked "Glass," and makes no inquiry as to its kind or value, it is responsible for any article received coming under the general description of glass; but by no possible stretch could a pastel portrait or landscape painting be classed as glass. They may, as in this instance, have glass over them; but the glass cover, like the frame, is incidental, and usually of insignificant value compared to the picture. In marking the box the shipper expressly represented the box to contain glass, and it was, therefore, not the duty of the carrier to ask for a repetition of the statement, nor to disbelieve it and open the box to see for itself. It is known to all that for purposes of transportation goods are classified, and that several factors enter into the consideration, such as weight, bulk, value, and the risk of loss or injury. The carrier has a clear right to know the contents of packages offered for shipment, in order that he may fix his compensation and know his risk. The statement of the shipper as to the character of an article not open to inspection is a representation as to a material factor of the contract, upon which the carrier may rely; and, if the value or character of the article actually shipped so varies from the contents of the package as represented as to materially affect the compensation of the carrier or the risk or expense of transportation, the carrier is not liable for the article of greater value received under a misapprehension caused by the shipper's untrue statement. This is merely the application of the familiar principle that a party to a contract is held only to that liability which falls fairly within the terms of the contract, and it makes no difference if an item which the other party wished to cover was omitted by his fraud or by his negligence.

It is said in Hutchinson on Carriers, § 213: "Fraud may be as effectually practiced upon the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package and the nature of the contents, if there be anything in its form, dimensions, or other outward appearance which is calculated to throw the carrier off his guard, whether so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled. For by such deception the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it had he known its actual value." 6 Cyc. 380; 2 Kent, *603; Angell on Carriers, § 261; 5 Am. & Eng. Ency. Law, 345; Relf v. Rapp (Pa.) 37 Am. Dec. 528; Orange County Bank v. Brown (N. Y.) 24 Am. Dec. 129; Pardee v. Drew, 25 Wend. 458; Dunlap v. International Steamboat Company, 98 Mass. 371; Shaacht v. Illinois Central R. Co. (Tenn.) 80 S. W. 742, 28 L. R. A. 176; Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587; Southern Express Company v. Everett, 37 Ga. 688; Id., 46 Ga. 307; Railroad Co. v. Thompson, 19 Ill. 578; Railroad Co. v. Shea, 66 Ill. 471; Railway Co. v. Collins (Ga.) 3 S. E. 416, 4 Am. St. Rep. 87; Railway Co. v. Moore (Ga.) 5 S. E. 769. These authorities, especially the leading case of Relf v. Rapp, are opposed to the instruction given by the circuit judge to the effect that marking and billing the box "Glass" was not a representation that its contents were to be classed as glass, and not as pictures.

The case of Rathbone v. Railroad Co. (N. Y.) 35 N. E. 418, relied on by respondent, is not applicable. There the bill of lading simply described the property as two boxes of marble, contents and value unknown, and contained a stipulation to the effect that no statuary would be carried by defendant, for the loss of which it would be liable, unless a memorandum was delivered, stating the character and kind of articles and their value, unless a proper extra price for the carriage and responsibility was paid. Shippers' agents informed defendant at the time of the shipment that the box contained marble statuary, and this was marked upon the box; also the words "Handle with Care." The statuary was found to be broken on delivery to the consignee, and it was held: "A nonsuit was error; that if defendant was

fully and truly informed as to the character of the property, and accepted it without requiring a written memorandum or extra compensation, it might be deemed to have waived other and further observance of the conditions; and that plaintiff was entitled to a submission to the jury of the questions of waiver, of fraudulent concealment, and of defendant's negligence." There was, therefore, actual notice to the carrier of the contents of the box, which, as the court held, was obviously evidence of waiver of the conditions of the bill of lading. Here we perceive nothing to put the carrier on notice that the mark on the box did not truly state the nature of the contents; but, even if there was such evidence, it was the right of the defendant to have the question of waiver submitted to the jury.

The defendant offered evidence tending to show that the misrepresentation as to the contents of the package materially affected the burden and the consideration of the contract of carriage, and no evidence to the contrary was offered by the plaintiff. On principle, supported by the authorities above cited, the plaintiff was entitled under the evidence offered to recover as for the loss of a package of glass used for household purposes, the reasonable value to be fixed by the jury; and it was, therefore, error for the circuit judge to charge, as in effect he did, that the verdict should be for the plaintiff for the value of the pictures.

2. There was no error in admitting testimony as to the contents of the box. Without it the case could not be intelligibly tried.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

(72 S. C. 384)

RICE v. BAMBERG.

(Supreme Court of South Carolina. Oct. 7, 1905.)

SUBROGATION — PURCHASE OF DECEDENT'S LAND.

Where land of a decedent is sold by decree of court in aid of assets, a purchaser, to be subrogated to the rights of creditors as against a devisee in remainder not a party to the proceedings, must show, beyond an order for payment of the claims made, that such claims existed as a charge on the land.

Appeal from Common Pleas Circuit Court of Bamberg County; Dantzler, Judge.

Action by Eugenia M. Rice against F. M. Bamberg. Decree for plaintiff, and defendant appeals. Affirmed.

John R. Bellinger, for appellant. H. F. & B. T. Rice, for respondent.

WOODS, J. In this action for the recovery of real estate the plaintiff claimed as devisee in remainder under the will of John M. Whetstone. The defendant set up title under a sale made by order of the court in an action instituted by the executrix of the will of Whetstone to marshal the assets of the estate and sell the real estate in aid of personalty for the payment of debts. By reference to former appeals in the cause, reported in 59 S. C. 498, 38 S. E. 209, and 68 S. C. 184, 46 S. E. 1009, it will be seen the title of defendant failed because the plaintiff, who was at the time a minor, was not personally served with a copy of the summons, and was, therefore, not a party to the suit in which the order of sale was made. By amended answer the defendant now claims the right to be subrogated to the demands of those who received the proceeds of the sale of the land to the extent of the amount bid and paid for the tract now held by him. It appears from the record that the sheriff was ordered to turn over the proceeds of the sale of the lands to the clerk, who was directed to apply them to the costs of the case and then to the debts of the estate of John M. Whetstone. There is no positive proof that the sheriff and the clerk carried out the order of the court; but, in the absence of proof to the contrary, the presumption is that these officers performed the duties required of them and that the proceeds of sale were applied to claims adjudged by the court in that cause to be valid debts of the estate of the testator. 22 A. & E. Ency. Law (2d Ed.) 1267; Dawkins v. Smith, 1 Hill, Eq. 369; Douglass v. Owens, 5 Rich. Law, 534; Woody v. Dean, 24 S. C. 503.

But the defendant's difficulty is that, the plaintiff here not being a party to the suit in which the debts were proved, the finding by the court that they were valid did not establish them as charges against her interest in the land. The plaintiff does admit the validity of the claims to which the proceeds of the sale of the land were applied, but puts the defendant to his proof that such claims ever existed as a charge upon her land. The defendant offers nothing in response except an order for payment of the claims made in a cause to which the plaintiff was not a party. No debt having been established as a charge on plaintiff's land, there is nothing to which the principle of subrogation could apply. It would make no difference if the proceeds of the sale were consumed by the costs of the case, for the costs could properly have been incurred only in marshaling the assets of the estate and procuring a sale of the land to pay debts, and until the debts are established so as to bind the plaintiff as to her, the necessity for incurring costs does not appear. Besides, before the plaintiff's land could be liable for costs incurred in an action brought by the executrix to procure a sale of plaintiff's land for payment of the debts of the testator, she was entitled to be brought into the cause as a devisee and have an opportunity to pay the debts and save the costs.

The judgment of this court is that the judgment of the circuit court be affirmed.

(72 S. C. 386)

RICE v. BISHOP.

(Supreme Court of South Carolina. Oct. 7, 1905.)

Appeal from Common Pleas Circuit Court of Bamberg County; Dantzler, Judge.

Action by Eugenia M. Rice against J. C. Bishop. Decree for plaintiff, and defendant appeals. Affirmed.

John R. Bellinger, for appellant. H. F. & B. T. Rice, for respondent.

WOODS, J. This appeal involves the claim of defendants to subrogation under the same state of facts as was presented in the case of Eugenia M. Rice against F. M. Bamberg, 51 S. E. 987; and the decision in that case is conclusive of this.

The judgment of this court is that the judgment of the circuit court be affirmed.

(72 S. C. 388)

RICE v. BEARD.

(Supreme Court of South Carolina. Oct. 7, 1905.)

Appeal from Common Pleas Circuit Court of Bamberg County; Dantzler, Judge.

Action by Eugenia M. Rice against G. W. Beard. Judgment for plaintiff, and defendant appeals. Affirmed.

Jno. R. Bellinger, for appellant. H. F. & B. T. Rice, for respondent.

WOODS, J. This appeal involves the claim of defendants to subrogation under the same state of facts as was presented in the case of Eugenia M. Rice against F. M. Bamberg (S. C.) 51 S. E. 987; and the decision in that case is conclusive of this.

The judgment of this court is that the judgment of the circuit court be affirmed.

(72 S. C. 389)

BAMBERG et al. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. RAILROADS—ACCIDENT AT CROSSING—PLEADING.

In an action for injuries received at a railway crossing, plaintiff need not allege that he did not hear or see the approaching train.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 186, 188; vol. 41, Cent. Dig. Railroads, § 1112.]

2. SAME—QUESTION FOR JURY.

Ordinarily it is for the jury to say whether an attempt to cross a railroad track without stopping to look and listen is negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1169–1178.]

3. SAME.

Where there is evidence tending to show that signals were not given at a railroad crossing by a train passing over an interlocking switch, though according to the rules of the company it would not be opened except for such signals, the court will not hold as matter of law that signals were given.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1169–1178.]

4. TRIAL—FAILURE TO INSTRUCT.

A failure to charge that signaling statutes had no application to plaintiff because he was not injured at a traveled place is not error, where no such request was made.

5. RAILROADS—SIGNALS AT CROSSING.

Where a prudent railroad company would give warning of an approach of a train to a public place, it is negligence to fail to do so.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 972–980.]

Appeal from Common Pleas Circuit Court of Barnwell County; Klugh, Judge.

Action by Mary A. Bamberg and her husband, C. T. Bamberg, against the Atlantic Coast Line Railroad Company. From judgment for plaintiffs, defendant appeals. Affirmed.

J. T. Barron and Robt. Aldrich, for appellant. Bates & Simms, for respondents.

WOODS, J. The plaintiff, in going from her home in the town of Denmark to the defendant's passenger station, undertook to cross the railroad track at a point very near the station, and was struck by the locomotive of the train she intended to take as a passenger. For the injuries resulting she recovered judgment.

1. The first exception charges error in the refusal of the circuit court to sustain the demurrer interposed, on the ground that the complaint failed to state facts sufficient to constitute a cause of action, because, as defendant insists, "the facts as stated in the complaint show that the plaintiff's injuries were due to her own negligence in attempting to cross the railroad track in front of a moving train, and in such close proximity thereto as to render it impossible for her to do so without being struck by the engine." It is alleged in the second paragraph of the complaint that the plaintiff, intending to become a passenger, was approaching the station from her home in "the only way provided by said railroad for passengers in her neighborhood to reach the said depot, and which way was that adopted by the public by the consent or acquiescence of the defendant for passengers in approaching defendant's depot from said neighborhood." In the third paragraph the complaint continues: "That after walking a short while said plaintiff reached the point where the defendant's side track, commonly known as the 'House Track,' ran into the main track, and the plaintiff, as usual with passengers, undertook to cross the main track from the thoroughfare and traveled place upon which she had been walking as aforesaid, in order to reach the other thoroughfare and traveled place between the main track and said 'House Track,' and the only way provided by the said defendant for passengers as aforesaid to reach the depot, when to plaintiff's surprise and horror, and without warning on the part of the defendant, and without the ringing of the bell or the blowing of the whistle, the locomotive of defendant's said passenger train, under the con-

trol of defendant's agents and servants, willfully, negligently, recklessly, and wantonly struck her," etc. The distinct point made by defendant is that, while negligence is alleged against those in charge of the train, there is no allegation that the plaintiff did not see or hear the train, and, being in the possession of her senses, it must be presumed as a matter of law the plaintiff did hear and see it, and will be held guilty of contributory negligence in attempting to cross the track in front of it. This position is untenable. If the courts could presume that one about to cross a railroad track would always be aware by sight or hearing of the approach of a train without the blowing of a whistle or the ringing of a bell, it would be quite unnecessary to require these signals. The plaintiff having set out negligent acts of the defendant, which she alleged caused the injury, it was not necessary for her to anticipate the affirmative defense of contributory negligence by denying that she heard or saw the approaching train. Donahue v. Railroad Co., 32 S. C. 299, 11 S. E. 95, 17 Am. St. Rep. 854.

2. The defendant next insists the motion for nonsuit should have been granted, because contributory negligence was conclusively shown by the failure of the plaintiff to look and listen before attempting to cross the track. No doubt the failure to look and listen immediately before going on a railroad track, under some circumstances, would be held to admit of no other inference than that the person injured was guilty of contributory negligence, and in such cases the court would grant a nonsuit on the principle announced in Jarrell v. Railway Co., 58 S. C. 491, 36 S. E. 910. But support is not to be found in principle or authority for the proposition that it is contributory negligence, under all circumstances, not to look and listen before attempting to cross a railroad track. The view taken in this state is that it is ordinarily for the jury to say whether the attempt without taking these precautions was negligence. Zeigler v. Railroad Co., 5 S. C. 221; Edwards v. Railway Co., 63 S. C. 271, 41 S. E. 458. The true principle to be deduced from the authorities is well expressed in the following extract from 7 A. & E. Ency. Law (2d Ed.) 433, note: "There is no doubt that, where it appears beyond controversy that a failure to stop, look, and listen was a proximate cause of an injury, the courts will hold such failure contributory negligence as a matter of law. Schofield v. Chicago, etc., R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Hixson v. St. Louis, etc., R. Co., 80 Mo. 335. But this is a very different matter from holding a failure to stop, look, or listen negligence per se, sufficient to bar a recovery. In the one line of cases it is properly held that a failure to stop, look, or listen was negligence, as a matter of law, upon the disputed facts, because ordinary care required the precaution, and the failure to take it was a proximate cause of the injury that followed. In other words, there is a difference between negligence per se, without regard to the surrounding circumstances, and negligence as a matter of law, in view of all the circumstances. And it will be noticed that in most, if not all, the cases, including those in Pennsylvania, where the doctrine that it is negligence per se not to stop, look, and listen is enunciated, the facts were such that the court would have been justified in holding that there had been contributory negligence as matter of law, because the failure to stop, look, or listen had been a proximate cause of the injury, which would have been avoided by ordinary care." Under this statement of the law, the circumstances here do not warrant the court in saying that the failure of the plaintiff to look and listen immediately before going on the track conclusively proved negligence on her part contributing to her injury as a proximate cause. Intending to become a passenger, she was using a way of approach to the defendant's station much used by the public. And in addition there was sufficient testimony to go to the jury as to whether the defendant so acquiesced in the use of this way as to invite its use by the public as an approach to the railway station, and so charge the railroad company with the care due to those who enter under its invitation, under the principles stated in Jones v. Railway Co., 61 S. C. 560, 39 S. E. 758; Matthews v. Railway Co., 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286. The plaintiff testified she had already crossed the track 30 or 40 yards from the place where she was injured; had there looked for the train, but did not see it; walked rapidly on, and, hearing no whistle or bell, undertook to cross the second time without looking again. Under this proof it was for the jury to say whether the plaintiff's failure to look and listen constituted contributory negligence.

3. The defendant insists, however, that the only charge of negligence on the part of the defendant was the failure to give signals of the approach of the train, and the court must hold, as a matter of law, that the signals were given, because according to the rules of the railroad the interlocking switch which the train had to pass was not to be opened, except upon the signal of four blasts of the whistle. This device and regulation of the railroad company may make it extremely probable that the whistle was sounded, yet it is possible that on this occasion the operator of the interlocking switch opened it without the signals. There was some direct testimony to the effect that the signals were not given, and it would therefore have been error to have taken the question from the jury.

4. There was no request made to the circuit judge to charge there was no evidence that the plaintiff was injured at the crossing of a highway, street, or traveled place, and hence sections 2132 and 2139 of the

Civil Code had no application. The failure, therefore, to pass on that question cannot now be imputed as reversible error.

5. After telling the jury, in effect, if the injury was not received at a crossing, the statute had no application to the case, the circuit judge said: "If a prudent railroad company, in approaching by its train a place like that, would give warning of the approach of its train, not because the statute requires it to do it, but simply as an act of ordinary prudence and care, so as to warn people of the approach of its train in order that they may get out of the way of the danger, then, if any railroad company fails to do that which a railroad company of ordinary prudence would do, that is negligence—not negligence per se, under the statute, but negligence simply because of the failure to exercise the care which an ordinarily prudent railroad would exercise." The complaint having stated a cause of action at common law for negligence resulting in injury, in the foregoing charge the circuit judge clearly stated the degree of care required of the defendant at common law, regardless of the statute.

The judgment of this court is that the judgment of the circuit court be affirmed.

(139 N. C. 468)

LINDSAY et al. v. AUSTIN.

(Supreme Court of North Carolina. Nov. 7, 1905.)

1. ADVERSE POSSESSION — EXCLUSIVENESS OF POSSESSION.

Where defendant entered into possession of land in 1889, and remained in possession until 1902, having received a grant in 1890, but a co-tenant of plaintiff was until 1896 in possession of a part of the land, so that defendant's possession did not become exclusive until then, defendant's possession had not in 1902 ripened into title.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 136–143.]

2. BOUNDARIES — LOCATION — REVERSAL OF CALLS.

The general rule is that, in order to locate a boundary, the lines should be run with the calls in regular order from a known beginning, and the test of reversing in the progress of the survey should be resorted to only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 52, 65, 75.]

3. SAME.

Where the first two corners of a boundary could not be found or located, but the third and fourth, the latter of which was a large rock, permanent and immovable, were found, it was permissible for the surveyor to reverse the calls from the fourth corner, and to run from thence back, in order to ascertain the place of beginning.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 52.]

4. PROPERTY — POSSESSION — DEPENDENCE ON LEGAL TITLE.

In the absence of actual possession of land, the possession follows the legal title.

5. LIMITATION OF ACTIONS—COMPUTATION OF PERIOD — ACCRUAL OF RIGHT — TITLE TO REAL PROPERTY.

Under Code, § 141, requiring the owner of land in the adverse possession of another, who claims under color of title, to sue for the possession of the land within seven years after his right or title shall have descended or accrued, limitations do not begin to run against one who acquires title by grant from the state until the date of his grant; and his right of action is not barred until the expiration of seven years from that date, although the person claiming adversely was in possession prior to the date of the grant.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 223, 224.]

Appeal from Superior Court, Union County; W. H. Neal, Judge.

Action by R. E. Lindsay and others against John M. Austin. From a judgment for plaintiffs, defendant appeals. Reversed in part.

This is an action of ejectment to recover two tracts of land. The court submitted the following issues: "(1) Are the plaintiffs the owners and entitled to the possession of the lands described in the complaint? Ans. Yes. (2) Was the defendant in the possession of the lands at the time this action was brought? Ans. Yes." From the judgment rendered upon the verdict the defendant appealed.

Redwine & Stack, for appellant. Adams, Jerome & Armfield, for appellees.

BROWN, J. The plaintiffs claim two tracts of land, containing 5½ and 35 acres; the former under certain deeds, and the latter under a grant to William Mullis, dated 1822, and through mesne conveyances to themselves. The defendant claimed under an entry made in 1889 and a grant issued in 1890, and undertook to show continuous adverse possession from February, 1889, to the time of trial. The record in the case presents 35 exceptions, to which we have given consideration, notwithstanding a large number of them seem to have been abandoned or not noticed by the defendant in his brief.

The defendant's principal exception is to his honor's refusal to nonsuit the plaintiffs upon the evidence. This exception cannot be sustained as to the 35-acre tract. As to that tract, plaintiffs showed a grant in 1822 to William Mullis, registered between 1819 and 1824; a deed from Lindsay, executor, to Mary J. Lindsay, registered April 20, 1881; a deed from Griffing, commissioner, to J. F. Austin, registered December 21, 1885; and mesne conveyances to the plaintiffs. The title being out of the state, the plaintiffs showed evidence of possession in 1866 and 1867, and again from 1889 to 1896. The defendant entered this land in 1889, and a grant was issued to him in 1890, and he remained in possession of a part thereof until the time of the trial; but S. C. Criscoe, a co-tenant with the plaintiffs, was in possession of a part of the land from 1889 to 1896, and the defendant's possession did not become exclusive until after Cris-

coe left in 1896, and he was in possession under color from 1896 until the time this action was brought in 1902, which was not sufficient to ripen his title.

Of the other exceptions insisted upon by the defendant, we deem it proper to consider the tenth and eleventh, which relate to the location of the William Mullis grant, upon the locating of which plaintiffs' title to the 35-acre tract depends. The court instructed the jury as follows: "If the jury find from the greater weight of evidence that the large rock pointed out on the plat at C is one of the natural objects in the line of the boundaries of the grant to William Mullis, then the plaintiffs had the right to reverse the calls in the grant and run from said rock to find the beginning corner." This instruction was given at the request of the plaintiffs and the defendant excepted. The calls of the William Mullis grant are: "Beginning at a red oak, John Mullis' corner, about 60 links from said branch, and runs north, 53 degrees east, 2 chains and 42 links, to a post oak, Jenkins' corner; then north, 73 degrees east, 20 chains, to a pine, Jenkins' other corner; then north, 47 degrees west, 10 chains, to a large rock; then north, 9 degrees east, 18 chains and 50 links, to Pinion's corner stake, one post oak, and pine pointers; then, with Pinion's line, south, 51 degrees west, 22 chains and 50 links, to Weatherford's branch; then down the various courses of said branch to the beginning." The surveyor testified, in substance, that he failed to find any evidence to locate the red oak, John Mullis' corner, 60 links from Weatherford's branch, which is the beginning corner of the William Mullis grant; that he also failed to find any evidence of the post oak at the end of the course north, 53 degrees east, 2 chains and 42 links, to a post oak, Jenkins' corner, and failed to locate by evidence Jenkins' corner. The surveyor further testified that he did find the pine stump on the course reading north, 73 degrees east, 20 chains, to a pine, and that there was a solid line to the pine stump, "Jenkins' other corner." The next call is north, 47 degrees west, 10 chains, to a large rock, etc. The surveyor testified that he found this rock; that it was three feet out of the ground, permanent and immovable; and that, in order to locate the beginning, he started at this rock and reversed the call, and went to the pine stump, "Jenkins' other corner." He further testified as follows: "We then put on the variation and started for that corner on the branch. We reversed the call, and it led us to that corner, marked 'No corner found,' 2 chains and 50 links from the beginning corner. That is where our distance gave out. We then reversed the first call and adjusted bearing, and that carried us to the beginning corner; there to the red oak." He was asked, "What distance was that as marked on the plat?" and answered: "I have it marked 252. I believe one grant has it marked 242 and another 252. As best I remember it, the deeds differ 10 links." He was also asked: "Mr. Mullis, you found the pine at Jenkins' corner at B, and went back to the beginning by reversing the corner to Jenkins' corner, to the pine stump, then to the beginning corner, and reversed the run from the large rock?" He answered, "Yes, sir; with the adjusted bearing."

The defendant contends that under the evidence it was not permissible to locate the beginning corner by reversing the courses from the large rock, as was done by the surveyor, and that therefore the plaintiffs have failed entirely to locate the William Mullis grant. The general rule is that, in order to locate a boundary, the lines should be run with the calls in the regular order from a known beginning, and the test of reversing in the progress of the survey should be resorted to only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line. There are exceptional instances in which it is manifest that reversing a line is a certain means of ascertaining the location of a prior line. In Duncan v. Hall, 117 N. C. 446, 23 S. E. 362, it is said by Justice Avery "that the general rule is an established law of evidence, adopted as best calculated to ascertain what was intended to be conveyed, and it is incumbent on a party asking the court to depart from it to show facts which bring the particular case within the exception to the rule." It appears from the evidence of the surveyor that there is no evidence to locate the red oak called for as the beginning, or the post oak called for as the second corner. Plaintiffs contend that the pine, Jenkins' other corner, and the large rock called for, have been located and ascertained, and that in the absence of any evidence as to the first and second corners, to wit, the red oak and the post oak, Jenkins' corner, the grant can be located only by the method adopted by the surveyor, and that such method furnishes a certain means of locating it with accuracy.

Under these circumstances we think the authorities support the charge given by the court. In this case the evidence tends to prove that the large rock called for is a permanent and immovable object, three feet above ground, and that it is the rock called for in the William Mullis grant. The evidence also tends to establish the location of the pine, "Jenkins' other corner." Reversing the course and distance from the rock brought the surveyor to this corner, and by following thence the reversed course, properly adjusting the bearing by allowing the variation, the surveyor states he was enabled to locate the beginning. In Dobson v. Finley, 53 N. C. 498, Chief Justice Pearson says: "Supposing the pine to be established as the second corner; could the first, a beginning corner, be located by reversing the course and measuring the distance called for from the pine back—that is, on the reversed

course? His honor ruled that the beginning corner could be fixed in this way. We agree with him. If the second corner is fixed, it is clear, to mathematical certainty, that, by reversing the course and measuring the distance, you reach the first corner, so there is no question about overruling either course or distance by measuring the line, and the object is to find the corner by observing both course and distance." In Harry v. Graham, 18 N. C. 77, 27 Am. Dec. 226, Chief Justice Ruffin says: "For example, if this deed had said that the line from the corner chestnut and red oak ran to a black oak near the patentee's other line, and gave neither course nor distance, or only one, and thence north, 45 degrees east, 220 poles to a post oak, his own and Beard's corner, the line might be reversed from the post oak to ascertain the corner of that and the next preceding line, because that affords the only evidence (the black oak not being found, or its locality otherwise identified) of the point at which the one line terminated and the other began." We think his honor's charge is justified by the eminent authorities we have cited. If the large rock, and the pine, "Jenkins' other corner," are located to the satisfaction of the jury, we see no reason why the method pursued by the surveyor in following the reversed course, with proper adjustment, should not establish the beginning corner with reasonable certainty. We see nothing in Norwood v. Crawford, 114 N. C. 518, 19 S. E. 349, which militates against the position that this is a proper method of determining the beginning corner of this grant. There is testimony upon the part of the surveyor tending to prove that there was a solid line to the pine stump, being "Jenkins' other corner"; that he found the pine stump there. When he found the large rock and reversed his course, with proper adjustment, it carried him back to "Jenkins' other corner," and by continuing the reversed course it should bring him back to the beginning. The conditions seem to be present in this evidence which would make this case one of the exceptions mentioned in Duncan v. Hall, supra. There is an entire absence of any proof of a red oak about 60 links from the branch, or of John Mullis' corner. There is also no proof of the location of a post oak, being Jenkins' corner, but there is proof of the location of the pine at "Jenkins' other corner," and there is evidence locating the large rock mentioned in the grant as the terminus of the third line. These conditions, we think, justified the surveyor in reversing his line from the large rock back to Jenkins' other corner," and then continuing the reversed line and thereby locating the beginning. We think, therefore, his honor properly refused the fourteenth and fifteenth instructions tendered by the defendant, which were practically requests to instruct that the grant had not been located.

We think his honor erred in respect to the title to the 5½-acre tract. The plaintiffs showed no grant to themselves, or to any one under whom they claimed, for that tract. The plaintiffs offered evidence of possession of this tract during the years of 1866 and 1867, and from that time until 1889 there is no evidence of actual possession. Consequently the possession followed the legal title, which was in the state. Plaintiffs also offered evidence of possession from 1889 to the fall of 1896, and, for the purpose of showing title out of the state, relied upon the grant from the state to John M. Austin, dated December 19, 1890. The right of the defendant to this 5½-acre tract did not accrue until the date his grant was issued. At that time the title was in the state; the plaintiffs having failed to show title out of the state, either by possession or grant. Inasmuch as the right of the defendant to sue did not accrue until December 19, 1890, and as his grantor, the state, was not barred, the seven-year statute (section 141 of the Code) did not begin to run until the date of his grant. Therefore the plaintiffs have failed to show seven years' possession under color of title since the date of that grant. Hamilton v. Icard, 114 N. C. 542, 19 S. E. 607.

The judgment of the superior court in respect to the 35-acre tract is affirmed. As to the 5½-acre tract, the judgment is reversed, and a new trial is awarded. Let the costs of this court and the appeal be divided equally between the plaintiffs and defendant.

Partial new trial.

(139 N. C. 219)

DANIELS v. HOMER.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. FISH—RIGHTS OF PUBLIC—REGULATION.

The right to fish in the inland waters of the state and extending for a marine league out to sea is absolutely subject to the regulations of the Legislature, and is not an individual or property right.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fish, §§ 3, 16.]

2. CONSTITUTIONAL LAW—SEIZURE AND SALE OF ILLEGAL FISH NETS—DUE PROCESS OF LAW.

Acts Gen. Assem. 1905, c. 292, regulates fishing in Albemarle and Pamlico Sounds and waters connected therewith, and creates a close season. Section 8 (page 330) declares that a person violating the act shall be guilty of a misdemeanor, and on conviction may be fined and imprisoned; and section 9 (page 331) makes it the duty of certain officers, on an informant's affidavit that nets are being maintained in violation of the act, to investigate the same and seize and remove the goods or other appliances used in violation of the act, and sell the same and apply the proceeds to the payment of costs and expenses of removal, and pay any balance remaining to the school fund of the county nearest to where the offense is committed. *Held* that, as a person whose nets are seized for alleged violation of the act is entitled to contest such question, either in replevin to recover the nets, by an injunction to prevent a sale, or by an action to recover the proceeds of the sale and damages, section 9 was not unconstitutional, as depriving him of his property without due process of law.

Connor and Walker, JJ., dissenting.

Appeal from Superior Court, Dare County; Ward, Judge.

Replevin by B. T. Daniels against J. Q. Homer. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

B. G. Crisp, Aydlett & Ehringhaus, and Gilliam & Gilliam, for appellant. W. M. Bond, for appellee.

CLARK, C. J. The General Assembly of 1905 enacted chapter 292 "to regulate fishing in Albemarle and Pamlico Sounds and waters connected with them." The first five sections of that chapter define and regulate the manner of fishing in various sections of the sounds. Section 6 (marked 5 in the printed act) is as follows: "That it shall be unlawful for any person to set or fish any net or appliance of any kind for catching fish within one mile on north or south side of a line five miles long, running west from center of New Inlet or Oregon Inlet, or on north or south side of a line five miles long, running northwest from center of Hatteras Inlet." Section 7 makes the act operative only from January 15th to May 15th in each year—a "close" season of four months. We were told on the argument, and it was not controverted, besides it is matter of common knowledge, that no small part of the sustenance and business interest of the people living adjacent to Albemarle and Pamlico Sounds and the waters connected therewith are dependent upon catching fish, whose supply has so greatly decreased that the United States government has established and is operating at large expense a fish hatchery at Edenton for the purpose of putting into the waters of Albemarle Sound millions of young shad and other fish each year to replenish the diminishing supply, and that the habit of the fish is to go out to sea, and at the end of three years they return to the waters where they were liberated for the purpose of spawning, and that, if nets are set across the inlets through which they return, the fish are either caught or detained beyond the spawning season and the supply of fish in Albemarle and Pamlico Sounds and connecting waters will be thereby almost entirely destroyed, and the government hatchery at Edenton will become a useless expense, and will doubtless be abandoned.

With a view of protecting the rights of the public against the cupidity of those who for their own profit would "kill the goose that lays the golden egg" for the benefit of a whole section of the state, whose people are so largely interested in the fish industry, the General Assembly of 1905 enacted the above-named chapter, creating a close season of four months, during which the fish may freely return to our waters to lay their eggs, and for the purpose of enforcing its execution, when the profits arising from its violation would be a great temptation thereto, deemed it necessary to enact sections 8 and 9 of said act as follows: "Sec. 8. That any person who shall violate any section or provision of this act shall be guilty of a misdemeanor and upon conviction in any county opposite the place at which said act is done shall be fined or imprisoned at the discretion of the court." And inasmuch as, pending trial and conviction, the destruction of the fish would go on, to the great profit of the violators and to the irreparable injury of the public, the General Assembly thought proper to add to the abatement of the nuisance the penalty of the loss of the nets, the means by which the law was violated, by the following: "Sec. 9. That it shall be the duty of the oyster commissioner or assistant oyster commissioner, whenever an affidavit is delivered to him, stating that affiant is informed and believes that said act is being violated at any particular place, to go himself or send a deputy to such place, investigate the same and they shall seize and remove all nets or other appliances setting or being used in violation of this act, sell the same at public auction and apply proceeds of sale to payment of cost and expenses of such removal, and pay any balance remaining to the school fund of county nearest to where offense is committed."

An affidavit by 14 citizens having been made March 25, 1905, that B. T. Daniels was violating the aforesaid act by setting two nets in the waters of Pamlico Sound at the end of Croatan Sound, and also east of Roanoke Marshes Lighthouse, where the fish, returning to the sound through Hatteras Inlet, would be caught during the "close" season provided by law, the defendant, the assistant oyster commissioner, notified said Daniels that he would seize said nets on May 1st, which nets were in water where the aforesaid law prohibited the setting or fishing said nets, as the plaintiff admits, and against the protest of said Daniels did take said nets out of the water and placed them on shore under guard, whereupon this proceeding for claim and delivery for the nets was instituted. The defendant avowed his purpose to sell the said nets and apply the proceeds to the cost of seizing and removing the same, and applying the surplus of the proceeds, if any, to the school fund of the county as provided by said act.

There is no individual or property right to fishery in the waters mentioned in the act. The right of fishery, as well as hunting, rests in the state, and is subject absolutely to such regulations as the General Assembly may prescribe, and can be exercised only at such times and by such methods as it may see fit to permit (Hettrick v. Page, 82 N. C. 65; Rea v. Hampton, 101 N. C. 51, 7 S. E. 649; State v. Gallop, 126 N. C. 979, 983, 35 S. E. 180, and cases there cited); and this right may be exercised a marine league out to sea (Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159), and citizens of other states may be excluded (McCready v. Virginia, 94 U. S.

391, 24 L. Ed. 248). As the plaintiff admits his nets were set in waters forbidden by the act, his counsel admitted that the seizure was legal, but denied the right of the defendant to sell the nets as provided in the statute. But the state was sole judge of the penalty it should impose for a violation of its laws. It thought proper here to make the loss of the instruments used in such violation a part of the penalty, possibly to prevent a repetition of the offense, or as a surer deterrent of its commission.

The plaintiff contends that, though his property is admitted by him to have been used in violation of law at the time of seizure, the statute imposing as a penalty the loss of such property is unconstitutional, in that there was no previous notice and trial. But, as the General Assembly could prescribe the loss of the nets as a penalty and the offense is admitted, there is nothing to try. As was said in Rea v. Hampton, 101 N. C., at page 55, 7 S. E., at page 651, 9 Am. St. Rep. 21: "As the Legislature had the undoubted right to regulate the manner in which the right of fishing in Albemarle Sound should be exercised, the plaintiffs had no right to fish in its waters in any mode not allowed by law. The facts found show that they were fishing in violation of law, and it would be singular if they could ask the law to protect them in its violation." In Rose v. Hardie, 98 N. C. 44, 4 S. E. 41, a town ordinance was held valid which authorized all hogs running at large to be impounded and sold for the costs and penalty. Here the state made the penalty the forfeiture of the article used in violation of the act. In Mowery v. Salisbury, 82 N. C. 175, a town ordinance was sustained which made the penalty for failure to pay the tax on a dog the right to kill the dog. At common law any personal chattel that, even accidentally, caused the death of a rational being was forfeited to the sovereign and sold, and the proceeds distributed to the poor, as a cart that ran over a person, a weapon, and the like. They were styled "deodands." 1 Blk. Com. 300. And no trial or conviction of any person was necessary.

But the plaintiff contends that he might not have been using his nets in forbidden water, and, if so, he was entitled to have that question determined by a jury trial before his nets were sold. As the plaintiff admits that his nets were so being used on this occasion, the proposition becomes a mere academic question in this case. In view, however, of the importance of the matter being settled, and in accordance with the wishes of the parties, we pass upon the point. It was not seriously controverted, and could not be, that an abatement of a nuisance must be summary, and that a seizure can take place before any adjudication by legal process; the party having his remedy by proper proceedings for an illegal seizure. In Hettrick v. Page, 82 N. C. 65, Smith, C. J., held that fishing in waters, when prohibited by law, was a public nuisance, and even a private individual, if injured thereby, or, indeed, any one else, may remove the impediment.

But the plaintiff insists that before his nets are sold he is entitled to have the fact determined by a court whether he has incurred the penalty by doing the illegal act. So he has; but it can be asserted in this very action to recover the nets before sale, or after sale by an action to recover the proceeds of sale or damages, or upon advertisement of sale by an injunction to prevent the sale. He has his full remedy, but it does not include a continuance of the nuisance to his individual profit and the public detriment, while the question of violation of the statute is being determined. The identical point has been determined, and by courts of the highest authority. By a statute in New York, very similar to ours, passed in 1880, fishing at certain places was prohibited and made punishable as a misdemeanor. This not proving sufficiently effective, an amendment in 1883 authorized any person to "abate and summarily destroy," and it was made the duty of any game constable to "seize, and remove and forthwith destroy," any "net, pound or other means or device for taking or capturing fish" in violation of any law, then or thereafter enacted, for the protection of fish. In the Court of Appeals of New York (Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813) the act was held constitutional, affirming the court at General Term. Upon writ of error to the United States Supreme Court this was again affirmed (Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385); the court holding that the authority to summarily destroy nets used in violation of the law for the protection of fish "is a lawful exercise of the police power of the state, and does not deprive the citizen of his property without due process of law." After stating the absolute power of the Legislature to regulate fishing and to provide for the protection of fish, the court says: "Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey in a similar case (Am. Print Works v. Lawrence, 21 N. J. Law, 248, 259): 'The party is not, in point of fact, deprived of a trial by jury. The evidence necessary to sustain the defense is changed. Even if the party were deprived of a trial by jury, the statute is not, therefore, necessarily unconstitutional.' Indeed, it is scarcely possible that any actual

injustice could be done in the practical administration of the act." This decision by the court, charged as the final tribunal with the construction and enforcement of the fourteenth amendment, should be conclusive. The United States Supreme Court (152 U. S. 142, 14 Sup. Ct. 503, 38 L. Ed. 385) further says: "It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This, however, is by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law, and may be summarily destroyed. * * * The power of the Legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452), and in such case the Legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance." If further cites to same purport Weller v. Snover, 42 N. J. Law, 341, and Williams v. Blackwell, 2 H. & C. 33, which sustained acts for the summary destruction of fish baskets and traps used to catch fish contrary to law. Lawton v. Steele has since been cited for this proposition as authority by a unanimous court. Sentell v. Railroad, 166 U. S. 705, 17 Sup. Ct. 693, 41 L. Ed. 1169.

Code, §§ 1049, 1051, 1052, authorize any police officer, constable, sheriff, or justice of the peace to summarily destroy any gaming table, etc., and the seizure of any money staked (which is not a nuisance per se, any more than the fishing net), one half to belong to the person seizing it and the other half to the poor of the county. This is cited by Dick, J., in North Carolina v. Vanderford (C.C.) 35 Fed. 286, in sustaining the summary seizure and destruction of a barrel of "blockade" whisky. And a similar statute was held constitutional in Garland v. State, 71 Ark. 138, 71 S. W. 258. Certainly gambling in the back room of some village hotel, or private house, or stable loft is not as injurious as the destruction of the fishing industry, upon which depends to a large extent the prosperity of twenty counties, and whose importance has attracted the attention of the federal government and caused a large expenditure to restore the depleted stock of fish—an expenditure which would be in vain if the General Assembly is powerless to authorize the prompt abatement of fishing nets at the inlets during the months when the fish return to lay their eggs, or to authorize such penalities, including the forfeiture of the nets illegally used, as the representatives of the people may deem necessary to suppress the nuisance.

The same ruling as in Lawton v. Steele, supra, was made in Wisconsin, in a very able opinion by Cassoday, C. J. (1896) Bittenhaus v. Johnston (1896) 66 N. W. 805, 32 L. R. A. 380. Lawton v. Steele has been recently quoted and followed. Burroughs v. Eastman, 101 Mich. 426, 59 N. W. 817, 24 L. R. A. 859, 45 Am. St. Rep. 419; Osborn v. Charlevoix, 114 Mich. 655, 72 N. W. 982. The plaintiff relies on Colon v. Lisk, 158 N. Y. 188, 42 N. E. 302, 60 Am. St. Rep. 609, but that case fully recognizes and follows Lawton v. Steele, originally decided by the same court, and merely holds that an extension of the same summary power to the seizure and sale of vessels was not necessitated by the same urgency as was requisite as to nets in the water, and that there should be condemnation proceedings before sale. Presumably it were better, as to articles of that value and nature, that the right to sell should be adjudicated before sale.

As to the nets, the plaintiff, had he not admitted his violation of law, could have contested the nets having been set within the forbidden limits, or that they had been so used with his consent, or set up any other defense, without detriment to his rights by this proceeding of claim and delivery, or by an injunction to prevent a sale, or by action to recover the proceeds of sale and damages. On the other hand, the General Assembly had the power to authorize prompt abatement of the nuisance by seizure and sale of the nets, subject to the right of their owner to contest the fact of his violation of the law, by this or any other of the remedies just enumerated. As against the person actually creating the nuisance, it may be abated without notice. Jones v. Williams, 11 M. & W. 176; Garrett on Nuisances, 314. Such is the law, recognized even as far as India. Ratanlal & Dharajlal, Eng. & Indian Law of Torts, 403. Besides, in this case, notice was actually given before removing the nets, and the plaintiff neither removed nor offered to remove his nets from the forbidden waters, though given the opportunity to do so by the notice given him by the defendant. The plaintiff has had his day in court by this very proceeding in claim and delivery, and the nets are not yet sold. It is no deprivation of any right that he is the actor, the plaintiff, since (as the United States Supreme Court said in Lawton v. Steele, supra) the burden is on the defendant to justify the seizure. It is not a question of right, but merely as to the form of legal procedure, whether the violator of the statute shall be plaintiff or defendant in the action, and as to that surely the Legislature is the judge. As was said in State v. Lytle, 138 N. C. 741, 51 S. E. 68, "a statute will never be held unconstitutional if there is any reasonable doubt"; citing Sutton v. Phillips, 116 N. C. 504, 21 S. E. 698. Can we say that an act is unconstitutional "beyond a reasonable doubt," when such legislation has been held constitutional by the Supreme Court of

the United States and by the highest courts of New York, New Jersey, and Wisconsin? If the nets cannot be forfeited, then, by having two sets of nets, the plaintiff can replace his nets as fast as the officer carries the other off, and then, in turn, put in the first net when the second is seized. Thus the attempt to abate the nuisance would become a mere farcical race between the violator and the officer of the law. There is no analogy between the prompt seizure of property, when required by reasons of public policy, when the rightfulness of such seizure can be afterwards litigated, and, if wrongfully taken, the article can be recovered or damages therefor, and the taking of human life, which cannot be restored.

In the exercise of the police power the General Assembly is not restricted to indictment, but may proceed by the summary process of abatement of the nuisance and imposing as a penalty the forfeiture or destruction, as it may deem best, of the article illegally used. An act of the Legislature, which speaks for the people in making its laws, is "the law of the land," unless there is a provision of the Constitution which forbids it to enact such law. We look in vain in that instrument for any provision which forbids legislation in furtherance of the police power, authorizing summary process of seizure of nets and their forfeiture when used in open violation of law. The right of seizure and destruction of the nets is not seriously denied. For a stronger reason, then, the alleged violator of the law cannot complain of the "sale at public auction," as that presupposes advertisement and delay, during which time he can, as was done in this case, bring claim and delivery and recover the nets, if not used illegally, whereas, if summarily destroyed, his sole remedy is an action for damages. He is in better case than if the nets were destroyed. In either event, if he is proven to have used the nets illegally, he loses the nets, and it can make no difference to him whether they are destroyed or sold. The state is not compelled to commit an act of vandalism to be constitutional. It has found the criminal law an inefficient protection, and that deprivation of the nets is necessary to prevent the violation of the law. The owner of the nets has his day in court to contest the fact of violation by an action for damages, if nets are summarily destroyed, and the additional remedy of claim and delivery, if to be sold at public auction. He has nothing to complain of. Our steady increase in population renders imperatively necessary the strict enforcement of all measures intended to protect or prevent interference with the sources of food supply for our people. The sovereign people of the state are in a bad case if they cannot protect the great fishing industry by providing that those who would destroy it by nets set at forbidden and vital places, during the four months prescribed, shall forfeit their nets. The General Assembly has found, and so says by its statute, that this remedy is necessary to enforce the execution of the law. Unless this is done, the state is in fact utterly powerless to protect that large part of its people who are engaged in or dependent upon the great fish industry in its sounds and along its rivers, and the lawless element who disregard the law forbidding setting of nets is exempt from control. The Constitution not having forbidden the Legislature to provide for the destruction, or forfeiture and sale, as it may deem best, of nets illegally used, and the owner of the nets having his day in court, either by an action of damages or claim and delivery, this court has no supervisory power to hold that either the destruction of the nets or their forfeiture and sale is the remedy which the Legislature must provide. That is a matter for its judgment. It may prescribe either remedy or both and change it by subsequent enactment. The owner, if violating the law, has suffered a just punishment. If not violating it, he has his full remedy in court to recover the nets or damages as he may elect.

In the same way the state takes property under the right of eminent domain and turns it over to a railroad corporation, which pays for it afterwards. And this is for the same reason that, if litigation must be had and terminated before the taking, it would seriously impair the benefit intended by the exercise of the powers of the state for the greatest good to the greatest number. For the same reason, the United States statutes for the enforcement of the internal revenues (sections 3455, 3457 [U. S. Comp. St. 1901, pp. 2279, 2280]) forfeit articles not lawfully stamped, or stills, etc., illegally used, and direct them to be sold and the proceeds paid into the federal treasury, unless before sale the owner shall proceed, as here, by action to recover the articles on the allegation that there was no illegal user. There are other United States and state statutes imposing forfeitures. Section 3460, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2282], provides that, where the value of the property seized is less than $500, the property shall be advertised and sold and the proceeds paid into the treasury, unless the owner, as in this case, comes in and by action asserts his rights. Conway v. Stannard, 84 U. S. 404, 21 L. Ed. 649; Pilcher v. Faircloth, 135 Ala. 314, 33 South. 545. Where the amount is over $500, the government, after seizure, begins regular condemnation proceedings (21 Am. & Eng. Enc. [2d Ed.] 931, note 12); but the authorities all hold that this is only necessary because the statute requires it, and that, when the condemnation is decreed, it relates back to the date of the offense (The Mary Celeste, 2 Lowell, 354, Fed. Cas. No. 9,202; Henderson's Case, 81 U. S. 44, 20 L. Ed. 815; North Carolina v. Vanderford, supra), as the forfeiture accrued then, and the title passed to the government at that instant.

Such laws are not to be construed strictly, but reasonably, so as to carry out the intention of the Legislature. U. S. v. Stowell, 133 U. S. 12, 10 Sup. Ct. 1044, 33 L. Ed. 555. As is pointed out in U. S. v. 56 Barrels of Whisky, 25 Fed. Cas. 1075, Fed. Cas. No. 15,095, there is a clear distinction between forfeiture of goods at common law in cases of treason and felony, which could take place only after conviction, and a statutory forfeiture of property because of its use for illegal purposes. In the latter case the offender is not on trial nor before the court, unless he voluntarily comes in as a plaintiff to recover the goods. The statute, says the court, does not make the forfeiture the consequence of his conviction, but of his offense, which is inquired into by a seizure of the property while being illegally used, and proceedings of condemnation, if required by statute, and, if not, then by its destruction or sale, unless the owner seeks an inquiry by claim and delivery or action for damages. As was well said in Weimer v. Bunbury, 30 Mich. 211, there is nothing in the Constitution "that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress." Then, after instancing the arrest of a felon, flagrante delicto, without warrant (4 Blk. Com. 292), and a traveler passing over the adjacent field when a public road becomes impassable, it is further said: "Our laws for the exercise of the right of eminent domain protect parties in going upon private grounds for the preliminary examinations and surveys. It may be said that in none of these cases is the deprivation final or permanent; but that is immaterial. The Constitution is as clearly violated when the citizen is unlawfully deprived of his liberty or property for a single hour as when it is taken away altogether. Estrays were at the common law taken up and disposed of without judicial proceedings. 1 Blk. Com. 297." Then, after mentioning statutes to the same effect, by which "the owner of stray beasts might be deprived of his ownership by ex parte proceedings not of a judicial character," and the abatement of nuisances by any one injured, who thus becomes "his own avenger or ministers redress to himself (3 Blk. Com. 5)," and distress without warranty (3 Blk. Com. 6), and levy and sale for taxes without judicial decree, it is said that the destruction of a nuisance by a private party "is as lawful as if it had been preceded by a judgment of a competent court, the only difference being that the party, when called upon to justify the act, must in the one case prove the facts warranting it, while in the other he would be protected by the judgment." This applies in the present case, where the violator of the law is deprived of his net, flagrante delicto, but has his remedy in this action against the officer for the property, if unlawfully taken. The Supreme Court of the United States (U. S. v. 1,960 Bags of Coffee, 12 U. S. [8 Cranch] 404, 3 L. Ed. 602) says in this connection: "In the eternal struggle that exists between the avarice, enterprise, and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the Legislature. To them belongs the right to decide on what event a divesture of right shall take place, whether on the commission of the offense, the seizure, or the condemnation. In this instance we think that the commission of the offense makes the point of time on which the statutory transfer of right takes place."

No error.

HOKE, J. (concurring). I concur in the decision of this case, and am of opinion that the act in question is a constitutional exercise of legislative power. It is conceded that fishing in the waters of our sounds is the subject of legislative regulation, and that the Legislature may prescribe the time and method of taking fish, establish closed seasons, prohibit the placing of nets and traps within certain localities, declare such placing a criminal nuisance, and direct its summary abatement. When such legislation, however, involves the destruction of private property, it must be limited to the reasonable necessities of the case which calls it forth, and may, under given circumstances, become the subject of judicial scrutiny and control. The extreme necessity for this legislation and its beneficent purpose have been clearly and forcibly stated in the principal opinion, and the act, after making the placing of nets in prohibited territory a criminal nuisance, proceeds to direct a sale and forfeiture of the nets when placed in violation of its provisions. This last feature of the act in question is not usually or properly considered a part of the punishment, but as done in abatement of the nuisance, and, unless clearly unreasonable or utterly foreign to the purpose designed, will be upheld by the courts.

Mr. Bishop, in his new work on Criminal Law (volume 1), says of such forfeitures: "Destruction by abatement is a phrase denoting one form of the transmutation to be brought to view in this chapter. It occurs when one permits a thing to become a nuisance which another abates without appeal to the courts. * * * If a man so uses his property that it becomes a nuisance, the nuisance is liable to be abated, to the destruction, if necessary, of the property. * * * Abat-

able nuisances afford a further illustration. Whenever the subject of property, whether through its owner's fault or not, is in a situation to be a nuisance, it is not strictly forfeited; but the nuisance may be abated, to the destruction, if necessary, of the property. Even where a nuisance is created by the commission of a crime, its abatement without judicial proceedings is not punishment, which can follow only the conviction of an offender. On such conviction, the court, perhaps usually, not always, orders the abatement, yet even this is not properly a part of the punishment. * * *" Again, to meet a dictum that such forfeitures were violations of constitutional guaranties, for trial by jury and that no one should be deprived of his property, but by the law of the land, he says: "The better view is pretty plainly antagonistic to this dictum. It is competent, on general principles, for the lawmaking power to declare what shall be a public nuisance and to provide for the forfeiture of the thing which shall become such. The forfeiture may be as well without judicial proceedings as with, and the case is entirely outside such constitutional provisions as those referred to by the learned judge. * * * In principle and in conclusion we appear to have something like the following: Whenever the law, statutory or common, creates a forfeiture of property by reason of particular circumstances attending it, or of its being dangerous to the community, or of any form or position which it assumes, this forfeiture is not to be deemed a punishment inflicted on its owner in the criminal law sense. It is not, therefore, within constitutional guaranties protecting persons accused of crime." This author further says: "There is a difference between what is on its face a nuisance or otherwise dangerous, and therefore to be at sight and in pais forfeited or abated, like a dog, or hog wrongly at large, or a thing laid to obstruct a public way, and an article not in itself harmful, yet made so by the evil purpose of its owner. In this latter case the owner should have notice," etc. The case before us is declared a nuisance by reason of its placing, regardless of the intent of the owner, and may be likened to the instance given of the physical obstruction of a highway. I believe, in case of a hog running at large in violation of an ordinance, our own courts have held that some kind of notice or opportunity to redeem should be given. This, however, can be easily distinguished, on the ground that the forfeiture of the hog is clearly not necessary to the purpose of the ordinance; and this, I apprehend, is the true principle on which forfeitures of this character can be sustained—whether it is done in abatement of the nuisance and is required by the reasonable necessity of the case.

After much reflection I have come to the conclusion that the act in question is neither unreasonable nor oppressive, and may well be upheld as a lawful and proper forfeiture of the offending property. This is by no means because of the small value of the property seized, but rather because of the vast extent and importance of the industry involved, the large number of people affected, the great difficulty of affording protection by reason of the exposed nature of the place, the impossibility of keeping effective watch, and the ease with which such property can be withdrawn, concealed, or replaced by offenders in the prohibited ground. Under all the facts and circumstances of this case, the court would not be justified in declaring that the forfeiture directed in the effort to abate this nuisance is unreasonable and in excess of legislative power. In some of the decisions it is suggested that the same constitutional provisions which guaranty the enjoyment of a citizen's property protect also his life and liberty, and, if property can be lawfully forfeited or destroyed by legislative or executive action, the life and liberty of the citizen can be dealt with in like manner. But not so. Such legislation affecting life or liberty would be so clearly excessive, and so entirely foreign to the object and purpose of abating a nuisance, that it would at once become the proper occasion for judicial interference. It cannot be likened to the forfeiture of offending property seized "in flagrante delicto" and directed in the necessary and reasonable effort to abate a criminal nuisance. The suggestion, I respectfully submit, affords no aid to the proper construction of the statute before us. I concur in the decision of the court.

CONNOR, J. (dissenting). It is conceded that no person has a several right of fishery in the public navigable waters of the state. Collins v. Benbury, 25 N. C. 277, 38 Am. Dec. 722; Skinner v. Hettrick, 73 N. C. 53. The Legislature has the right to prescribe regulations regarding the time, manner, and means of fishing, etc., in such waters, including the power to prohibit the placing of nets, traps, etc., in such portion thereof as it may deem proper for the protection of the rights of the public. It may declare such nets, etc., as are prohibited, or all nets at certain places or fixed periods, public nuisances and provide for the summary abatement, by removal thereof. Hettrick v. Page, 82 N. C. 63. It is needless to discuss the limitations upon this power, because the plaintiff does not question the validity of those provisions of the statute by which it is asserted. I fully concur in the opinion of the Chief Justice in this respect. I also concur in his approval of the policy upon which the statute is based and the end sought to be attained. I dissent from the conclusion that section 9, conferring upon the oyster commissioner the power to seize the nets and sell the same at public auction without notice to the owner, either personal or constructive, or any judgment of condemnation

by any judicial tribunal after a hearing or any opportunity to the owner to be heard, and the disposition of the proceeds as directed, is valid. The right to pass acts of this character is derived from the police power, which is an essential attribute of all government. Without undertaking to define this somewhat elastic term or fix its somewhat elusive limits, it is sufficient, for the purpose of this discussion, to say that it must be exercised within, and subject to, the constitutional limitations by which the life, liberty, and property of the citizen is secured. In a government deriving its powers from the consent of the governed, moving within and bounded by the clearly expressed grants of a written constitution, no germ of arbitrary power is to be found or can have any existence. Each department of the government must find its power to act in the charter by which it is created, and by which all powers not delegated are reserved to the people. The argument that the act is valid, because no provision is found in the Constitution prohibiting its passage is, I submit with great deference, but equal confidence, based upon a misconception of the nature of our government and the fundamental principle upon which it is founded. Reade, J., in Nichols v. McKee, 68 N. C. 430, says: "The theory of our state government is that all political power is vested in and derived from the people. The Constitution is their grant of powers, and it is the only grant which they have made. 'And all powers not therein delegated remain with the people.' Article 1, § 37. This last clause will not be found in the former Constitution of the state. * * * It follows that it is not true, as contended for upon the argument, that the Legislature is supreme, except in so far as it is expressly restrained. However that may be in other governments, or however it may have heretofore been in this state, it is plain that since the adoption of our present Constitution the Legislature, just like each of the other departments, acts under a grant of power, and cannot exceed them." While the legislative authority is vested in the General Assembly, no judicial power is there granted. On the contrary, it is expressly prohibited to that department and vested in the judicial department. This is fundamental, and never for a moment or upon any consideration to be lost sight of.

Among the clearly expressed limitations upon each department of the government, we find it declared "that no person ought to be taken, imprisoned or disseised of his freehold, liberties or privileges, or outlawed or exiled or in any manner deprived of his life, liberty or property but by the law of the land." Const. art. 1, § 17. These words, in substance, come to us from Magna Charta. Of them Blackstone says: "They protected every individual in the nation in the full enjoyment of his life, his liberty, and his property, unless declared forfeited by the judgment of his peers or the law of the land." Bl. Com. vol. 4, p. 424. Creasy says: "The ultimate effect of this chapter was to give and to guaranty full protection for person and property to every human being that breathes English air." Eng. Const. 151. The latest commentator on Magna Charta says: "Three aspects of this prohibition may be emphasized: (1) Judgment must precede execution," etc. McKechnie, Magna Charta, 438. Many definitions of the term "law of the land" have been formulated. Judge Cooley is of the opinion that none are more accurate or more often quoted than that of Mr. Webster in his great argument in the Dartsmouth College Case. "By the law of the land is most clearly intended the general law, which hears before it condemns, which proceeds upon inquiry, and reaches judgment only after trial." This court has adopted, with approval, this definition. Parish v. Cedar Co., 133 N. C. 478, 45 S. E. 478, 98 Am. St. Rep. 718. Mr. Justice Douglas in that case notes that Mr. Webster, in enumerating legislative acts which fall within the condemnation of this provision, includes "acts of confiscation" and "legislative forfeitures" among the intolerable evils to be avoided. The term has been construed to be synonymous with "due process of law," of which it is said "the essential elements are notice and opportunity to defend." Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165. While conceding these elementary principles, there appears to have been made, upon some minds, an impression that in the exercise of the police power, especially when applied to the abatement of nuisances, the Legislature is not to be controlled by them. They appear to hold that in respect to this essential, and yet easily abused, power, the public welfare is paramount to the security of the citizen, which must be sacrificed upon the slightest suggestion that the public welfare demands it. It is undoubtedly true that the public welfare or "the good of the whole" is paramount, but experience has brought men to see the truth that the public welfare is preserved only when limitations are placed upon the government and those who make, declare, and execute the law. The public welfare demands the punishment of crime as a means of prevention, but the same public welfare demands that trial by due process of law and conviction shall precede punishment. When such limitations are not imposed, it is found that "the grim tradition" is true:

> "I oft have heard of Lydford law,
> How in the morn they hang and draw
> And sit in judgment after."

I cannot assent to the validity of any legislative enactment depriving the citizen of his life, liberty, or property which will not stand the test of the standard fixed by the Constitution. Discussing the limitations upon the police power, the author of the latest work on the subject says: "There has never been a civilized government which has not

recognized and practically acted upon the existence of limitations of the nature here indicated. For all governments profess to apply or make law, and the nature of law implies the idea of restraint according to intelligible principles of reason. The peculiarity of American jurisprudence and government lies in the possibility of subjecting legislation to judicial control with a view of enforcing these principles and limitations." Freund on Police Power, p. 15.

It will be observed that the value of the plaintiff's net is $60. It is a matter of which we may take notice that a large number of the people in the section of the state in which the plaintiff lives are dependent upon fishing for the support of themselves and their families. There is no suggestion that the net is in its construction or use, otherwise than is prohibited by the statute, vicious or unlawful. It is difficult to see in what respect it is more offensive to the law or injurious to the public welfare than the mule of a farmer which is tied to a shade tree, or driven in a manner or at a speed prohibited by some town ordinance. While in such case the owner should not use his property in a manner prohibited by law, it is equally true that he should not for doing so be deprived of it otherwise than by the law of the land. The power of the Legislature to prescribe regulations for the use of the public waters is in no respect different from its power to regulate the use of the public highway. The power in both cases comes from the same source and is subject to the same limitations. I would deem it sufficient to state the proposition and be content to rest my opinion in respect to its validity, but for the fact that a majority of my learned associates differ from me. A respectful regard for their opinion, expressed with his usual clearness and force by the Chief Justice, imposes upon me the duty of examining the reasons upon which the conclusion is based and the authorities cited to sustain them. I prefer to rest my opinion upon the provisions of the state Constitution rather than the fourteenth amendment. As early as 1787, and among the earliest opinions ever filed by our judges, it was held in Bayard v. Singleton, 1 N. C. 5, "that by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial jury; for that, if the Legislature could take away this right and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without the formality of any trial at all." In Hamilton v. Adams, 6 N. C. 161, Hall, J., says: "It is a principle never to be lost sight of that no person should be deprived of his property or rights without notice and an opportunity of defending them. This right is guarantied by the Constitution. Hence it is that no court will give judgment against any person, unless such person have opportunity of showing cause against it. A judgment entered up otherwise would be a nullity." Daniel, J., in Robinson v. Barfield, 6 N. C. 391, 420, says: "The transfer of property of one individual, who is the owner, to another individual, is a judicial, and not a legislative, act. When the Legislature presumes to touch private property for any other than public purposes, and then only in case of necessity and rendering full compensation, it will behoove the judiciary to check its eccentric course by refusing to give any effect to such acts. * * * Our oath forbids us to execute them, as they infringe the principles of the Constitution." Ruffin, C. J., in Hoke v. Henderson, 15 N. C. 15, 25 Am. Dec. 677, said: "But to inflict punishments after finding the default is to adjudge; and to do it without default is equally so, and still more indefensible. The Legislature cannot act in that character, and therefore, although this act has the forms of law, it is not one of those laws of the land by which alone a freeman can be deprived of his property. Those terms 'law of the land' do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. * * * In reference to the infliction of punishments and divesting of the rights of property, it has been repeatedly held in this state, and it is believed in every other of the Union, that there are limitations upon the legislative power, notwithstanding those words, and that the clause itself means that such legislative acts as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals and a decision of the matter of right, as determined by the laws under which it is vested according to the course made and usages of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes."

While the opinions filed do not seriously controvert these elementary principles, they hold that the plaintiff has no right to invoke them in this case, and can claim no protection by virtue of them; that as to him they are pure abstractions, for that he and his nets are outlawed by legislative enactment. This holding is based upon the following propositions: (1) That the Legislature in the exercise of the police power may authorize the summary abatement of a public nuisance, and, if necessary to that end, direct the destruction of the offending property. (2) That the right to destroy includes the right to condemn and sell by summary action, without notice, or judgment of forfeiture and condemnation. (3) That such summary forfeiture and condemnation may be enforced by a ministerial officer, because it is directed to and operates upon the property, and not as a punishment or penalty imposed upon the owner for violating the law. (4) That if the owner is entitled to a hearing and judicial determination of his rights he may obtain it by resorting to the courts in any appropriate

action, and that he is not entitled to demand that due process be provided in the statute. I propose to discuss these propositions in the order in which they are stated. Before proceeding to do so it will be well to state some elementary principles which always control courts in passing upon the constitutionality of statutes. "We can declare an act of the assembly void when it violates the Constitution clearly, palpably, and plainly, and in such manner as to leave no doubt or hesitation on our minds." Sharpless v. Mayor, 21 Pa. 147, 59 Am. Dec. 759. "The words of the Constitution furnish the only test to determine the validity of the statute, and all arguments based on general principles outside the Constitution must be addressed to the people and not to us." Id. While courts may not declare an act void because in their opinions it is unwise, so, on the contrary, they may not strain the words of the grant to sustain an act because they deem it wise. While we are to keep a watchful eye, clear mind, and firm hand upon every threatened invasion of the constitutional guaranties of the citizen, we are to accord to the several departments of the government and those who may administer to them the same jealous regard in that respect which we ourselves exercise. State v. Barrett, 138 N. C. 630, 50 S. E. 506. When an unusual or extraordinary power is asserted by the government, or unusual and extraordinary methods, contrary to the procedure and course of the common law, are prescribed by which the right of the citizen, either in respect to his person or property, is invaded, every reasonable doubt must be construed against the asserted power and mode of procedure, and in favor of the right of the citizen to demand that he be tried by due course of law. As in England, all language in grants is to be construed most strongly in favor of the King, so in North Carolina all such language must be construed most strongly in favor of the people—the sovereigns. With these rules for guidance, I proceed to discuss the propositions, and ascertain how far they may be sustained and applied to the facts in this record.

The right to abate a private nuisance or a public nuisance, when specially injurious to a private person, is, of course, conceded. The extent to which a person may go in doing so is fixed by the necessity of the occasion, taking into consideration the character of the nuisance, the means by which it is created or maintained, the imminence of the danger, the character and extent of the injury, etc. This right a person has in a state of nature, entirely independent of municipal law; and when he enters into the social or political state this right is not surrendered, but recognized and regulated by the principles of the common law. The Legislature may, upon the same principle, authorize ministerial officers to abate public nuisances, and may authorize the destruction of the offending property, when necessary for the public welfare or safety. The power is based upon the same reason and controlled by the same limitations—necessity. It is difficult, and not necessary in this discussion, to define or attempt to mark the limits of this power. It is sufficient to say that it it not arbitrary, but is within judicial control. The latest work on the Police Power thus states the law: "When the condition of a thing is such that it is imminently dangerous to the safety or offensive to the morals of the community, and is incapable of being put to any lawful use by the owner, it may be treated as a nuisance per se. Actual physical destruction is in such cases not only legitimate, but sometimes the only legitimate course to be pursued. Rotten or decayed food or meat, infected bedding or clothing, mad dogs, animals affected with contagious diseases, obscene publications, counterfeit coin, and imminently dangerous structures are the most conspicuous instances of nuisances per se." Freund on Police Power, § 520. There are many cases in our Reports restricting this power not necessary to be noticed here, for the double reason that the statute under discussion does not direct the destruction of the nets, nor does it declare them to be public nuisances, either per se or when used in violation of its provisions. There is not the slightest suggestion that the nets are, either of themselves or when put into the prohibited waters, public nuisances. I attach no great importance to this fact, except to show, as I shall undertake to do, that in the cases relied upon to sustain the opinion of the court the property was by its illegal use declared by the statute to be a public nuisance.

The right to direct the removal of nets used in violation of law is sustained in Hettrick v. Page, 82 N. C. 65, in which Smith, C. J., says that no unnecessary damages must be done to the property removed. Rea v. Hampton, 101 N. C. 51, 7 S. E. 649, 9 Am. St. Rep. 21. No case can be found in our Reports authorizing the destruction of nets. I might safely concede the right of the Legislature to direct their destruction by way of abating the nuisance, but I do not find any evidence in the record that such destruction was reasonably necessary. It is claimed that the right to destroy has been settled by the courts, and from this right the power to sell without due process of law is said to follow. In Weller v. Snover, 42 N. J. Law, 341, it was held that a statute authorizing the destruction of a fish basket placed in a stream prohibited by law was valid. In the statute it was expressly required that the fish warden shall first give notice in two newspapers, and the owner is given 10 days within which to remove the baskets which are declared to be common nuisances. In Am. Print Works v. Lawrence, 21 N. J. Law, 248, cited in the opinion, no question of police power or of nuisance was involved or passed upon. The plaintiff sued the defendant mayor of New York, char-

ging that he caused its storehouse and the goods therein to be blown up with gunpowder and destroyed. The defendant justified, by alleging that a fire was raging and it became necessary to destroy plaintiff's property to prevent its spreading, etc. The court after defining the right of eminent domain, said: "But the right to destroy property to prevent the spread of a conflagration rests upon other and very different grounds. It appertains to individuals, not to the state. It has no necessary connection with or dependence upon the sovereign power. It is a natural right, existing independent of civil government." The weight to be given this case as an authority is lessened by the fact that the decision was reversed by the Court of Errors and Appeals. 21 N. J. Law, 714, 47 Am. Dec. 190. There were several cases growing out of a disastrous fire in New York. It will be found that the judgment of reversal was in Hale v. Lawrence. See reporter's note, page 716, 21 N. J. Law. Without going into the facts and the able discussion of the law by the court upon the very interesting question presented, it is sufficient to say that the case does not involve or decide the principles presented in our case. In Bittenhaus v. Johnston (Wis.) 66 N. W. 805, 32 L. R. A. 380, the statute declared the nets in prohibited waters a public nuisance and directed their destruction. The act was upheld, relying upon Lawton v. Steele, which will be noticed later. Burroughs v. Eastman, 101 Mich. 428, 59 N. W. 817, 24 L. R. A. 859, 45 Am. St. Rep. 419, was an action for an assault committed in the arrest of the plaintiff, and has no bearing upon this case. The cases cited, with the exception of Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813, are the only ones in which the right to destroy fish nets has been sustained. In that case nets found in the public waters are declared to be public nuisances, and their destruction authorized. Andrews, J., says: "We regard the case as very near the border line, but we think the legislation may be fairly sustained on the ground that the destruction of the nets so placed is a reasonable incident of the power of the abatement of the nuisance. The owner of the nets is deprived of his property * * * as incident to the abatement of the nuisance. * * * But the general rule undoubtedly is that the abatement must be limited by necessity, and no wanton or unnecessary injury must be committed. 3 Bl. Com. 6. It is conceivable that nets illegally set could, with the use of care, be removed without destroying them. But, in view of their position, the difficulty attending their removal, the liability to injury in the process, and their comparatively small value, we think the Legislature could adjudge their destruction as a reasonable means of abating the nuisance." There is here a clear recognition of the only principle upon which the right can be sustained —necessity incident to the abatement of the nuisance. This case was carried by writ of error to the Supreme Court of the United States, and is reported in 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385.

It is claimed that the question raised by the plaintiff is settled by that decision. It is also said that plaintiff's contention is based upon the fourteenth amendment, and that the construction put upon its language by the Supreme Court of the United States controls this court. If the premise be correct, I admit the conclusion. I am at a loss to see why it is necessary for a citizen of this state to resort to the federal Constitution to protect him in the right to demand that his property be taken from him only by the law of the land or due process of law. I am not willing to make such concession. This right is guarantied him as a citizen of the state, and it is in respect to his status as such and right secured to him by the Constitution of the state that he prosecutes this action. Certainly any decision of the Supreme Court of the United States construing language found in both the state and federal Constitutions is entitled to the most weighty consideration. The Supreme Court of Ohio, in Edson v. Crangle, did not hesitate to follow its own conclusion upon this identical question, although Lawton v. Steele was pressed upon their attention. The value, therefore, of that case as an authority is dependent upon the reasoning of the opinion and the unanimity of the judges. After laying down the general principles applying to such cases, the court proceeds to say that many articles, such as dice, cards, and other articles used for gambling purposes, may become nuisances by being put to illegal purposes, concluding: "It is true that this rule does not always follow from the illegal use of a harmless article." After further discussion it is said: "It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value." A careful reading of the opinion impresses my mind with the conviction that the decision is to a very large extent based upon the last suggestion—the value of the property. The nets were worth $15 each. The Chief Justice wrote a strong dissenting opinion, in which Justices Brewer and Field concurred. He said: "Fishing nets are in themselves articles of property entitled to the protection of the law, and I am unwilling to concede to the Legislature of a state the power to declare them public nuisances, even when put to a use in a manner forbidden by the statute, and on that ground to justify their abatement by seizure and destruction without process, notice, or the observance of any judicial form. * * * It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and, as the li-

legal use of fishing nets would be terminated by their withdrawal from the water and the public be fully protected by their detention, the lack of necessity for the arbitrary proceedings prescribed seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their removal, the liability to injury in the process, and their comparatively small value, ordinarily affect the principle or tend to show their summary destruction to be reasonably essential to the suppression of their illegal use. Indeed, I think the argument is to be depreciated as weakening the importance of the preservation, without impairment in ever so slight a degree, of constitutional guaranties." Mr. Freund well says: "The principles which govern the forfeiture of property were departed from in the decision of the New York Court of Appeals and the Supreme Court of the United States in the case of Lawton v. Steele. * * * The chief argument relied upon, which was the trifling value of the property taken and the disproportionate cost of condemnation proceeding, is an inadmissible argument when constitutional rights are involved."

Without conceding that the value of the property should be considered in the decision of the case, I should not hesitate to say that, if considered, it would not weigh against the plaintiff. To a fisherman on our coast a net worth $60 is not of so inconsiderable value that a court should dismiss his controversy as beneath its dignity. We know from observation that thousands of our people are dependent upon the use of property of no more value for their support. The value of the average mule is but little, if any, larger, and that of the tools and implements of many mechanics, with which they earn the support of their families, is much below $60. It is proper to say that no such suggestion found any favor with any member of this court. I notice it only because I concur with Mr. Freund that it was the "chief argument relied upon," and with the Chief Justice that it weakens the preservation of constitutional guaranties. In a very able brief filed in Edson v. Crangle (Ohio) 56 N. E. 647, the decision is referred to as "remarkable," and as "absolutely inconsistent with earlier decisions rendered by former judges of that court." When I say that neither the reasoning nor the authorities cited in this case are convincing to my mind, I am sustained by the strongly expressed dissent of the Chief Justice and two of his associates. The right to abate nuisances by summary destruction of the offending property is founded upon necessity, and is confined either to those things which are nuisances per se, or in the continued existence of which the danger to the public is imminent, or which endangers public morals, and is limited, as said by Chief Justice Fuller, "to the necessity of the occasion." When destroyed pursuant to law, it is an assertion and exercise by the state of a right which the citizen has by the law of self-protection. The language quoted by Mr. Justice Hoke from 1 Bishop, Crim. Law, applies solely to abatement by destruction. He says: "If a man so uses his property that it becomes a nuisance, the nuisance is liable to be abated, to the destruction, if necessary, of the property." This is consonant with the authorities. There is not a word or suggestion to be found in the statute tending to show that, in the opinion of the Legislature, destruction of the nets was necessary as an incident to the abatement of a nuisance. The contrary is manifest from the direction to the officer to sell them. This removes them far beyond the domain upon which alone their destruction could be justified. Certainly, if I am correct in saying that they may not be destroyed, it will be conceded that there is no possible justification for selling them without due process of law. I earnestly contend that, if they come within the power of the officer to destroy, it would not follow that they could be sold as directed by the statute.

I will discuss the second and third propositions together. The right to declare the property used in violation of law forfeited and to sell the same is based upon an entirely different principle from the right to destroy. Mr. Freund says: "The power of summary abatement does not extend to property in itself harmless, but which is put to unlawful use or is otherwise kept in a condition contrary to law. * * * The unlawful use may, however, be punished, and the punishment may include a forfeiture of the property used to commit the unlawful act. While in many cases this would be an extreme measure, it is subject to no express constitutional restraint, except where the Constitution provides that every penalty must be proportionate to the offense. * * * Such forfeiture is not an exercise of the police power, but of the judicial power; i. e., the taking of the property does not strictly subserve the public welfare, but is intended as a punishment for an unlawful act. Hence forfeiture requires judicial proceedings—either personal notice to the owner or at least a proceeding in rem, with notice by publication." Sections 525, 526. Mr. Tiedeman (State & Fed. Con. 825) says that forfeiture may be declared "as a penalty for the infraction of the law. * * * But in all of these cases the seizure and the destruction must rest upon a judgment of forfeiture procured at the close of the ordinary trial, in which the owner of the property has had full opportunity to be heard in defense of his property." In Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609, discussing a statute having a provision somewhat similar to ours, the court said: "That the forfeiture used in violation of this statute is in effect a penalty we have no doubt." The power to declare a forfeiture and sell property used in violation of a stat-

ute, without notice or an opportunity to be heard or judgment of condemnation, was denied by this court as early as 1816. In Shaw v. Kennedy, 4 N. C. 591, an ordinance of the town of Fayetteville authorizing the town constable to "take up and sell all hogs found running at large in any of the streets of the town and paying one half of the proceeds to the town treasurer and the other half to apply to his own use" was held unconstitutional. The court, by Seawell, J., said: "The law of the land * * * allows to every person the opportunity of defending his property before it is condemned, and in no case leaves it to the mercy of a mere ministerial officer to seize it at will, which seizure is to be lawful or not according to his own will and pleasure. The ordinance was therefore, on that account, unauthorized and consequently void." That was an action of trespass against the town constable for taking up the plaintiff's hogs. Judgment was for the plaintiff, although it appeared that the hogs were running at large in violation of the ordinance. In Hellen v. Noe, 25 N. C. 493, the case is cited, approved, and distinguished; Daniel, J., saying: "But in this case the ordinance does not attempt to deprive the owner of his property, provides for his having notice, and secures to him every right which he can claim, not inconsistent with the object of the ordinance, the prevention of mischief to the community." In that case the officer was required to give public notice and the owner was entitled to come forward and take his property and pay the officer's charges only, or, if a sale took place, the purchase money, after deducting the costs, was to be held for the owner. The same ordinance was before the court in Whitfield v. Longest, 28 N. C. 268; the only question then decided being that it applied to nonresident owners of hogs. In Rose v. Hardie, 98 N. C. 44, 4 S. E. 41, cited by the court, the ordinance required notice to be given by the constable "at the courthouse door, in the best manner he can," giving the earmarks, or other distinguishing marks, and, if the owner called for the same within three days, prove his or her property, pay for each hog or goat the sum of one dollar as a penalty for suffering it to run at large, and also fifty cents for the marshal's fee for impounding and ten cents a day for keeping, he shall have his property, etc. In Broadfoot v. Fayetteville, 121 N. C. 421, S. E. 515, 39 L. R. A. 245, 61 Am. St. Rep. 668, the same ordinance was before the court upon the question of its application to nonresident owners. Sections 2811, 2815, 2817, of the Code, provide that, where the stock law prevails, it shall be unlawful for any person to permit any live stock to run at large; that any person may take up and impound any live stock running at large, etc., and demand the amount fixed by the statute for impounding and keeping such stock. Before any sales shall be made, if the owner of said stock be known to such impounder, he shall immediately inform such owner where his stock is impounded, and he shall have 2 days within which to redeem his property, and upon failure to do so such impounder shall give 20 days' notice of sale, and shall from the proceeds pay the expense, and the balance he shall turn over to the owner, if known, and, if not known, to the school fund, in which case the owner shall have 6 months within which to call for the money.

With a single exception I have been unable to find any statute in our Code which confers the power upon a ministerial officer to destroy the property of the citizen without due process. Sections 1049, 1050. Section 2500 of the Code, authorizing the killing of dogs that kill sheep, provides that the owner shall have notice and satisfactory evidence of the charge be produced before a justice of the peace. It is true that statutes and town ordinances have been sustained empowering the destruction of dogs without a collar and upon which the tax has not been paid. These cases are put upon the ground that they are a menace to the public safety. Some of the judges have also sustained the power because they were not property. The tax imposed is not a property tax, but a license for the privilege of keeping them. Sentell v. N. O. R. R., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169; Mowery v. Salisbury, 82 N. C. 175. We held, in Parish v. Cedar Co., 133 N. C. 438, 45 S. E. 768, 98 Am. St. Rep. 718, that an act which provided that, when the owner of swamp land failed to pay the taxes assessed thereon, such land should be forfeited to and vested in the state without any judicial proceeding, was unconstitutional. Mr. Justice Douglas said that the decision was based exclusively upon the provisions of the state Constitution. Bill of Rights, § 17. This case was approved in Lumber Co. v. Lumber Co., 135 N. C. 742, 47 S. E. 757. I am at a loss to see how the decision of this case can be reconciled with Shaw v. Kennedy, supra. An exhaustive examination of the decisions of other courts fails to disclose a single case in which the power of the Legislature to declare a forfeiture and direct a sale of property without due process is sustained. On the contrary, the decisions are uniform in the denial of any such right or power. Time and space permit the notice of only a few of the many cases in which the power is denied. In Ieck v. Anderson, 57 Cal. 251, 40 Am. Dec. 115, McKee, J., said: "But the statute under consideration contained no provision whatever for determining whether the property was liable to condemnation for the forfeiture denounced against it for the criminal acts of those who had it in their possession. It merely authorized a peace officer to seize the property without warrant or process, to condemn it without proof or the observance of any judicial forms and to destroy it with-

out notice of any kind or sell it upon notice posted anywhere in the county for five days. Such an enactment cannot be harmonized with those constitutional guaranties which are supposed to secure every one within the state in his rights of liberty and property." After citing authorities, he concludes: "It follows that so much of the statute under consideration as authorized defendant to arbitrarily seize and destroy or sell the property of the plaintiff for alleged forfeiture, without judicial proceeding for its condemnation or monition or notice actual or constructive to its owner, * * * was unconstitutional and void." State v. Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 433. In Edson v. Crangle, 62 Ohio St. 49, 56 N. E. 647, a statute prohibiting the placing of nets in certain public waters was under discussion. In regard to a section substantially like section 9 of our act, Burkett, J., for the court, said: "While the seizure may be made in the first instance by an officer of the law, doing no unnecessary damage, the confiscation must be made by the judgment of a court having jurisdiction of the subject-matter. This section gives the right of confiscation, but fails to provide a legal proceeding by which the confiscation may be adjudged; and, there being no other statute providing in like cases, it attempts to take and sell private property and place the proceeds in the public treasury without any process of law." The statute was held unconstitutional; the opinion concluding: "Proper legal proceedings are always necessary to adjudge a forfeiture or confiscation, and to permit officers to seize, sell, and appropriate private property without legal proceedings under a claim of confiscation, would be inconsistent with the principles of constitutional government, and would soon lead to fraud, corruption, oppression, and extortion." This case is strikingly like the one before us. The action was by the owner for the possession of his net detained by the officer. The court held that he was entitled to recover. The case was argued upon full briefs by the Attorney General and other eminent counsel. The Supreme Court of Maine in Dunn v. Burleigh, 62 Me. 24, in passing upon a statute prohibiting trespassing upon public lands and empowering a land agent to seize the team of the trespasser and sell the same by giving notice in newspapers, etc., said: "Will any one contend that it is competent for the Legislature to pass an act authorizing the land agent to seize the person of a trespasser upon the public lands and hang him, or imprison him for life, without any other trial of his guilt than the ex parte determination of the land agent himself, and no other authority than his own personal command? Of course not. No more is it competent for the Legislature to pass an act authorizing the land agent to deprive a person of his property in such a summary mode; for what is due process of law in the one case must be equally so in the other. In the Constitution life, liberty, and property are all grouped together, and the same protection which is secured to one is secured to all." Lowery v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420; King v. Hayes, 80 Me. 206, 13 Atl. 882. Osborn v. Charlevoix, 114 Mich. 655, 72 N. W. 982, cited in the opinion, fully sustains my view and notes the very distinction for which I am contending. Montgomery, J., on page 663 of 114 Mich., and page 985 of 72 N. W., says: "It is clear that this act permits the seizure of nets and apparatus, but only when the same are found in actual use. It is also plain that the warden has no right to destroy the same until ordered by the court before whom the offense is tried, and by this we understand is meant the court before whom the person offending is tried for the unlawful use for which the apparatus is seized; and it is implied that the disposition of the property is to be determined in that proceeding, to which the offender is a necessary party and in which he has a right to be heard." The entire opinion is based upon this distinction: The officer may seize and remove the net, but he cannot destroy or sell until some judicial proceeding is had, or at least an opportunity be given the owner of the property to be heard. The question involved underwent an exhaustive examination by the Supreme Court of Massachusetts in Fisher v. McGirr, 1 Gray (67 Mass.) 1, 61 Am. Dec. 381, in which Rufus Choate, then Attorney General, was of counsel, and Chief Justice Shaw wrote the opinion for a unanimous court of exceptional ability. Certainly from this source we may draw sound doctrine. The Legislature, for the purpose of suppressing the liquor traffic, enacted a statute containing provisions similar to, but not so barren of protection to the citizen as, ours. The right to regulate or to prohibit the traffic was fully conceded. The only question involved was the mode of procedure leading to condemnation of property. It is thus stated by the chief justice: "The question is whether the measures directed and authorized by the statute in question are so far inconsistent with the principles of justice and the established maxims of jurisprudence intended for the security of public and private rights, and so repugnant to the provisions of the Declaration of Rights and Constitution of the commonwealth, that it was not within the power of the Legislature to give them the force of law, and that they must therefore be held unconstitutional and void; and the courts are all of the opinion that they are." After noting other objections to the statute, he says. "Then the property may be confiscated and destroyed without any opportunity given the true owner to be heard. But, suppose the officer happens to be right, and the owner has notice. The notice is to

appear forthwith. No day in court is given; no allowance made for the contingency of the owner's absence or sickness or engagements. * * * These measures seem wholly inconsistent with the right of defending one's property and of finding a safe remedy in the laws. * * * Now, we can perceive no provision for the trial and proof of this offense of keeping liquors with illegal intent in any sense in which a judicial trial is understood, in which a party charged with an offense, for which his property may be taken from him and confiscated, may stand on his defense and have the presumption of innocence until proofs are adduced against him to establish the crime or misdemeanor with which he is charged. Such a trial alone can satisfy the express provisions of the Declaration of Rights, which declare that no subject shall be, * * * but by the judgment of his peers or the law of the land. These expressions have been understood from Magna Charta to the present time to mean a trial by jury in a regular course of legal and judicial proceeding." In Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 208, an ordinance authorizing the marshal of a town to seize all hogs running at large and sell them was held void, for that no provision was made for giving notice to the owner; the court saying: "This is the general rule, and it is only in extreme cases, where the preservation and repose of society or the preservation of the property rights of a large class of the community absolutely require a departure, that the courts recognize any exception. The exception can only be sustained upon "an overruling necessity." The same was held in Donovan v. Mayor, etc., 29 Miss. 247, 64 Am. Dec. 143. In Heise v. Town Council, 6 Rich. Law (S. C.) 404, it is said: "A man's property cannot be seized except for violation of law, and whether he has been guilty of such violation cannot be left to police officers or constables to determine." In Bradstreet v. Neptune Ins. Co., 3 Sumn. 601, Fed. Cas. No. 1,793, Judge Story, referring to a proceeding in rem in which no notice is given, says: "It amounts to little more in common sense and common honesty than the sentence of the tribunal which first punishes and then hears the party." In Poppen v. Holmes, 44 Ill. 360, 92 Am. Dec. 186, the plaintiff's horse had been seized while running at large in the town in violation of the ordinance authorizing a sale by the poundmaster thereof, if the costs, etc., were not paid. Plaintiff brought replevin. Defendant justified under the ordinance. The ordinance was declared void because no provision was made for hearing. In McConnell v. McKillip (Neb.) 65 L. R. A. 610 (1904), the statute prohibited hunting or fishing without a permit, and declared that all guns, etc., in actual use by any person hunting or fishing without such permit, should be forfeited to the state. The commissioner appointed to enforce the statute was authorized to seize and sell such gun, etc., and pay the proceeds into the school fund. The plaintiff being engaged in hunting without a license, his gun was seized by the officer. He brought an action to recover possession of his property, alleging that the statute, in so far as it authorized the seizure and sale of his property without a hearing, was void. The court, by an opinion concurred in unanimously, sustained his contention, assigning the same grounds upon which this dissenting opinion is based, and concluding: "There is a clear and marked distinction between that species of property which can only be used for an illegal purpose, and which may, therefore, be declared a nuisance and summarily abated, and that which is innocent in its ordinary and proper use, and which only becomes illegal when used for an unlawful purpose. We know of no principle of law which justifies the seizure, if innocent in itself, its forfeiture, and the transfer of the right of property in the same from one person to another as a punishment for crime, without the right to a hearing upon the guilt or innocence of the person charged before the forfeiture takes effect. If the property seized by a game keeper or warden were a public nuisance, such as provided for in section 1, he had the right under the duties of his office at common law to abate the same without judicial process or proceedings, and the great weight of authorities is to the effect that such common law rights have not been abrogated or set aside by the provisions of the Constitution; but if the property is of such a nature that, though innocent in itself and susceptible of a beneficial use, it has been perverted to an unlawful use and is subject to forfeiture to the state as a penalty, no person has the right to deprive the owner of his property summarily without affording opportunity for a hearing, and without due process of law. The usual course of proceeding in such case has been either as in admiralty or revenue proceedings, to seize the property, libel the same in a course of competent jurisdiction, and have it condemned by that court, or, as in criminal matters, to arrest the offender and to provide that upon his conviction the forfeiture of the property to which the offender's guilt has been imputed, and to which the penalty attaches, should take place. These have been the methods of procedure for centuries." This is the latest discussion and decision of the question involved. See, also, Boggs v. Comm., 76 Va. 989; Colon v. Lisk, supra. Walker, J., in Dorman v. State, 34 Ala. 216, said: "If life, liberty, and property could be taken away by the direct operation of a statute, the enjoyment of these rights would depend upon the will and caprice of the Legislature, and the provision would be a mere nullity. Thus construed, the Constitution would read: 'No person

shall be deprived of his life, liberty or property, unless the Legislature pass a law to do so.'" The doctrine is well stated by Judge Cooley (Const. Lim. [7th Ed.] 518): "Nor can a party by his conduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of right and property cannot be adjudged by Legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law." The authorities, in addition to those cited, are uniform and abundant to sustain these propositions: (1) That the right to destroy property which is a public nuisance, either per se, or made so by statute, or becoming so by the manner of its use, is restricted to the necessity of the occasion or as an incident to the abatement. (2) That the power to declare property forfeited and subject it to sale by reason of its illegal use is judicial, and not legislative. That it can only be exercised as a penalty or punishment imposed upon the owner for violating the law, and, as a necessary conclusion, the forfeiture and condemnation can only be declared and enforced after a hearing or an opportunity to the owner to be heard.

I have not found it possible, without further extending this opinion, already too long, to comment upon references in the opinion to internal revenue laws. They are not, at the best, a favorite field for the investigator of authorities to sustain personal or property rights. From the third proposition asserted by the court I dissent. It is said: Why permit the plaintiff to raise the question of the validity of the statute? He admits that he has violated its provisions. What difference does it make to him whether his net is sold according to law or in violation of law?

Assuming that the act is unconstitutional, as I have undertaken to show, the argument proves too much, and destroys the right of the citizen in any case to demand that his life, liberty, or property be taken only by "the law of the land." It is said, if he has not violated the law, he may show it; if he has, it is a matter of no concern to him that he is punished without due process of law. It is sometimes well to test the strength of a proposition by putting an extreme case. The Legislature fixes the punishment of murder. The Constitution provides that no man shall be put upon his trial for murder except by indictment by a grand jury, or convicted but by the unanimous verdict of a jury. The Legislature, deeming it a useless and expensive proceeding, involving delay, etc., authorizes any sheriff or constable, upon being satisfied that a person has committed murder, to forthwith arrest and hang him. The citizen commits the crime, information is duly given, the sheriff proceeds to execute the legislative will, and application is made to a judge for a writ of habeas corpus, in which guilt is admitted. The sheriff finds that this court has decided that by admitting guilt the petitioner waives or forfeits his right to be hanged according to the expensive requirements of the law of the land, and so avers in his return to the writ. To the suggestion that the plaintiff may in this action litigate his constitutional rights, it is sufficient to say that the question is not whether in some other way, but whether in the act itself or by some general law applicable to all such cases, provision is made for hearing before confiscation. In Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289, the same suggestion was made in regard to a revenue law, a statute empowering a board of assessors to assess property for local improvements without notice to the owner. Application was made for an injunction restraining the enforcement of an assessment upon the ground that no notice was required by the statute. The defendant answered that, conceding plaintiff's contention, he was not in a position to insist upon his rights, because in fact the assessment was fair. Earle, J., said: "The constitutional validity of law is to be tested, not by what has been done under it, but by what may by its authority be done."

It is said in the opinion in chief, in response to the contention of the plaintiff that before his nets are sold he is entitled to have the fact determined by a court whether he has incurred the penalty: "So he has; but it can be asserted in this very action. * * * He has his full remedy, but it does not include a continuance of the nuisance," etc. I am not quite sure that I comprehend the import of this language. The opinion maintains that he has no right to demand a hearing as a condition precedent to the sale of his nets; but it seems by the language quoted that such is not the conclusion reached by the court. Again, it is assumed that the right of the Legislature to authorize "the prompt abatement of fishing nets at the inlets" is denied. On the contrary, I concede the right. I concede that the nets may be removed, and, if necessarily incident to the removal, they may be destroyed. Severe penalties by way of fine and punishment by way of imprisonment may be imposed. The only restriction on the power of the Legislature is that such punishment shall not be cruel and unusual. I concede, further, that as a part of the punishment the nets may be sold, etc. The right to do any and all of these things, otherwise than by the law of the land, due process of law, I deny. With all possible deference, I must be permitted to say that my convictions in respect to the right of the citizen of this state under the Constitution are not shaken by referring to "the law as recognized even as far as India." I have no doubt that in Turkey, Russia, and many other jurisdictions, in which the rights of the people come ex gratia from sovereigns ruling by some supposed divine right, life, liberty, and property may

be taken without any process, other than the edict of the sovereign. In the light of the uniform judicial expression to the contrary in this country, I must dissent from the proposition that, "in the exercise of the police power, the General Assembly is not restricted to indictment, but may proceed by summary process of abatement of the nuisance and imposing as a penalty the forfeiture or destruction, as it may deem best, of the article illegally used." If this is the law, and, as the majority of this court so hold it, must be the law of this state, I am at a loss to see where the limitations upon the power of the Legislature have any place or virtue. If I am correct in this opinion, this case marks an epoch in our jurisprudence, and stands forth as a departure from the ancient landmarks made by the fathers for the protection of life, liberty, and property. The decision reverses, not only adjudged cases in this court, but the entire conception of our system of government and rules of construction of our Constitution. I write with the utmost respect and deference, but with earnest convictions. The question here is not whether the plaintiff shall be permitted to violate the law, or whether the state has the power to prevent by punishing him; nor is it whether a valuable resource of the state for feeding the people shall be sacrificed, but whether the plaintiff or any other citizen shall be deprived of his property, otherwise than by the law of the land. Without regard to the value of his nets or the character of his offense, this question is paramount to all others. If the plaintiff may be deprived of his property without due process of law, what guaranty is left that any and all other citizens may not suffer in like manner? It was only at the last term of this court that we found a corporation claiming sovereign power to destroy valuable property to meet a supposed public necessity. Brown v. Electric Co., 138 N. C. 533, 51 S. E. 62. At each term we are called upon to stay the hand of power "in its eccentric course" and protect the citizen in his rights. We may not safely listen to the suggestion that public necessity demands that we sustain doubtful power in either department of the government. It is not necessary to go beyond our own time or country, or the records of this court, to find painful reminders that, except for the protection of these safeguards, men would have been done to death, or imprisoned by executive and ministerial officers, in defiance of the law of the land. Sure, swift, and cheap methods of punishment appeal very strongly to a sometimes dominant sentiment. The protection of the shad fisheries of the Albemarle should be secured, and the plaintiff should be compelled to obey the law; but it is neither necessary nor wise to accomplish these desirable results by "weakening the importance of the preservation, in ever so slight a degree, of constitutional guaranties."

WALKER, J. (concurring in dissenting opinion). It seemed to me at first that the plaintiff must fail in his action, as the seizure of the nets for the purpose of removing the obstruction to the free passage of fish, and thereby abating a nuisance, was lawful, and, the cost and expense of making the removal being, therefore, a just charge against him, the officer could hold and sell the property and apply the proceeds to their payment, even though he could not retain the surplus for the purpose of being turned into the school fund, as directed by Acts 1905, p. 331, c. 292, § 9; the Legislature not having provided for a judicial determination of the fact of forfeiture. This would be so, and I would still be of the same opinion, if the defendant had offered to surrender the nets to the plaintiff upon his paying the reasonable cost and expenses of removing them. Hellen v. Noe, 25 N. C. 493. The record shows, however, that this he did not do; but, on the contrary, when the plaintiff demanded possession of the nets, he refused to give them up, and insisted on his right to hold and sell them, not only for the necessary cost and expense of their removal from the water, but also in order to apply the surplus to the purpose indicated in the statute. Plaintiff did not tender the costs and charges of such removal, it is true; but the defendant's refusal to comply with his demand for the reason he gave, and his virtual denial that plaintiff had any right whatever in the property because it had been forfeited, dispensed with the necessity of any formal tender by the latter of the amount of the cost and expense incurred by the officer in seizing and removing the nets. 28 Am. & Eng. Enc. (2d Ed.) p. 7. The question is then presented whether the officer had the right to refuse compliance with the plaintiff's demand, for the reason that he was justified by the statute in holding the nets and selling the same, not only to pay the cost and expense of seizure, but to apply the surplus to the school fund. If he claimed too much, his plea of justification cannot be sustained. After the most careful consideration of the question thus raised, and an examination of the authorities, my opinion is that the Legislature could not decree a forfeiture of the nets by virtue of its own enactment, nor without some kind of procedure to determine the guilt of the plaintiff or the liability of his property to forfeiture. There must be some inquiry, having at least the form or semblance of judicial investigation. I therefore concur in the dissenting opinion of Justice CONNOR to this extent, and in the conclusion he has reached that we cannot hold the act of 1905 to be valid throughout without denying to the plaintiff the right to be heard in defense of his property, which is clearly guarantied by the Constitution, and without

depriving him of that property contrary to the law of the land. Const. art. 1, § 17. Forfeitures of rights and property cannot be adjudged by legislative acts, and confiscation without judicial hearing after due notice is void, as not being due process of law. Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420. Broad as is the police power, it is, like every other, subject to the restrictions of the organic law, state and federal. It is paramount when the particular case falls within its scope; but the Legislature cannot conclusively establish that such is the nature of the case, and the decision of that body may, where there is a plain excess or usurpation, be reversed by the judiciary, or, rather, nullified. This results from the constitutional provision that no man shall be deprived of his life, liberty, or property without due process of law, which would be an idle declaration of right and nugatory if a bald recital in an act of assembly could oust the jurisdiction of the courts. 2 Hare's Am. Const. Law, 772. It is the plain duty of the courts to see that the Legislature, in the exercise of its police power, keeps within established constitutional limitations. Tiedeman, Law of Police Power, § 135. Its power over subjects of police regulation is not unlimited or arbitrary, and it should go no farther in the destruction or confiscation of the rights and property of the citizen, while exercising this power, than is required for the attainment of the end in view. An unnecessary invasion of the rights of the citizen in such a case is an excessive exercise of the power, and is unwarranted.

The question is not merely whether the nets were placed in the prohibited waters in violation of the statute, but whether the method by which the title of the plaintiff to his property was attempted to be divested and transferred to another was without constitutional sanction. Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 208. It seems clear to me that the solution of the question we have in hand cannot be made to depend upon the bare necessity or exigency of the case, arising out of the peculiar nature of the property and the facility with which it can be returned to the place in the water from which it was taken, if it should be restored to the possession of the owner. This argument could be applied to most any species of movable property, and would practically nullify the provisions of the Constitution which afford protection to the citizen in the possession, use, and enjoyment of his property. Besides, the premise upon which the argument is based ignores the fact that the plaintiff, if so minded, could procure other property of a like kind and continue the obstruction of the stream; but, on the contrary, it is assumed that the confiscation of the nets and their sale will effectually abate the alleged nuisance. The sale of the nets does not necessarily put them beyond the owner's reach. The reasoning will, as well and with as much force, apply to other kinds of property as to fish nets. They cannot be replaced in the water and again be employed in their unlawful use with any more ease or any less secrecy than can the master return his vessel, which has been used in unlawfully taking oysters from their beds, to the place of its former depredations and continue in his illegal business; and it must be conceded that the vessel cannot be destroyed or forfeited, unless absolutely necessary to suppress the wrong. Boggs v. Com., 76 Va. 989; Colon v. Fisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609. The vessel is a larger object and can be better seen at its work; but, if the nets are used for catching fish, which must at stated periods be taken from them, the publicity is just as great in the one case as in the other. The argument is founded upon a principle of preventive, rather than upon one of retributive or punitive, justice. But, if the nuisance can be abated, or the obstruction, which constitutes the nuisance, can be removed from the waters, has the state any more power to take property to prevent a repetition of the offense, without due process of law, than it has to punish the offender for the act already done? Whatever view we take of the matter, we are constantly confronted by this limitation on the power of the state: that it can exercise none which deprives the owner of his property, except to protect or promote the public interests, and then only after due process, unless there is urgent necessity for the immediate destruction of the property. This necessity is not presented when the state merely seeks to prevent the repetition of an offense, except in very rare and exceptional cases not embracing this one, or when she undertakes to declare a forfeiture for the same purpose and with the same intent as she imposes a penalty or inflicts punishment. It is to be doubted, if it should not be strenuously denied, that the Legislature can even go to the extent of authorizing the destruction of the nets, in which case the argument would be stronger and more effective, without giving the owner an opportunity to be heard as to the unlawful use of his property, where the necessity to destroy it does not exist. I take it that the right to summarily destroy the property of the citizen for the purpose of abating a nuisance, or in the exercise of any other police power, is confined to cases where the destruction is necessary to effect the abatement or to the full exercise of the police power, and that it does not exist when, for instance, the nuisance can be thoroughly abated and at the same time the property unlawfully used to create it be restored to the citizen; the right itself being one which arises out of and is commensurate with the necessity, and is limited by its demands.

I do not deny that the forfeiture or the destruction of property may not be declared as a penalty or as punishment annexed to the commission of the unlawful act which constitutes the nuisance; but in such a case it must be admitted that the citizen has a clear and unquestionable right to notice and an opportunity to be heard in his defense. This proposition is too plain for argument, and does not call for the citation of authorities, though the latter are abundant. Referring to this question in Fisher v. McGirr, 1 Gray, 36, 61 Am. Dec. 381, Shaw, C. J. says: "Such being the character of the prosecution, in a high degree penal in its operation and consequences, it should be surrounded with all the safeguards necessary to the security of the innocent. The party should have notice of the charge of guilty purpose upon which his property is declared to be unlawfully held and in danger of being forfeited, and a time and opportunity to meet the witnesses against him face to face." The same doctrine is strongly stated by Judge Story in Bradstreet v. Insurance Co., 3 Sumn. 601, Fed. Cas. No. 1,793. "It is a rule," says he, "founded on the first principles of justice, that a party shall have an opportunity of being heard in his defense before his property is condemned, and that charges on which the condemnation is sought shall be specific, determinate, and clear." In Windsor v. McVeigh, 93 U. S. 279, 23 L. Ed. 914, the court says: "The jurisdiction acquired by the seizure of the property is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or a publication in some other form. The manner of the notification is immaterial, but the notification is indispensable." In McVeigh v. U. S., 78 U. S. 259, 20 L. Ed. 80, it was said that the right to declare a forfeiture of property must be exercised only in such way as to give the owner an opportunity to appear and defend, and that this right to be heard existed even in favor of a person then within the Confederate lines, whose property was sought to be condemned in a court of the United States. "It was alleged," says Swayne, J., for the court, "that he was in the position of an alien enemy, and hence could have no locus standi in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

The property of the citizen cannot be seized, except for a violation of the law, and whether he has been guilty of such violation cannot be left to police officers or oyster inspectors to determine. Darst v. People, 51 Ill. 286, 2 Am. Rep. 301. There is no more legislative power to authorize ministerial officers to perform judicial acts of this character than there is to authorize them, at their discretion, to assess a fine upon a citizen and seize his property for its payment, without inquiry before a court or an opportunity of being heard in his own defense. 51 Ill. 287, 2 Am. Rep. 301. The right of the citizen in this respect is strikingly illustrated by the case of Boggs v. Commissioners, 76 Va. 989, in which is the following clear statement of the principle: "It is said that the proceedings under the liquor law may be so conducted, consistently with its provisions, as to secure to the person whose property is seized all his constitutional rights. If this is possible, that is not enough. The law must afford to the accused the means of demanding and enforcing his constitutional rights; and, if it authorized a course of procedure which would deprive him of this, it is void. It is not to be left to the discretion of prosecutor or magistrates to adopt a course of procedure which may or may not be in conformity with the requisitions of the Constitution as they may elect." It may be conceded that, when the necessity of the case, by reason of the situation of the property and the peculiar circumstances, requires its destruction in order to abate a nuisance, the property may be destroyed, and yet it would not justify this defendant; for no such necessity existed here, as the nuisance was fully and completely abated by the removal of the nets from the water, and the sale or other disposition of them afterwards by the officer could not, therefore, make its abatement more effectual or complete. The property of the citizen, then, was taken from him without notice or hearing, in a case where there was no necessity for doing so in order to accomplish the main purpose of the legislative act. In this connection the language of the court in Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 208, with reference to a kindred question, is peculiarly appropriate: "The right to forfeit without citation and without hearing can only exist from necessity. That right in this instance should not be extended beyond impounding the hogs. When that is done, the necessity for summary and precipitate action ceases, and judicial proceedings looking to forfeiture may then properly begin. If the ordinance had been violated, appellant may be compelled to pay the fees for impounding and keeping the hogs, but their payment cannot be enforced by forfeiture without judicial determination." The police power, therefore, should be exercised with due regard for private rights, and the constitutional safeguards thrown around the rights of property are not to be demolished for any less reason than that the public interests imperatively demand it and no time or opportunity is

afforded for their due observance. It is desirable that a way should be left open for the free passage of fish in the sounds, but the benefits to be derived therefrom must be regarded as inconsiderable in comparison with the value of the guaranties of the Constitution, which secure to the citizen his liberty and his property. A full recognition of the right of the state to adopt and vigorously enforce measures for the suppression of nuisances does not ordinarily require any sacrifice of the rights or property of the citizen, and they should, when possible, be made to harmonize with constitutional provisions, and inconsiderate legislation which disregards them should not be upheld. Summary and extreme measures should not be resorted to, if, without serious detriment to the public interests, the purpose can otherwise be accomplished. Lowry v. Rainwater, supra.

This court was among the first to assert the right of the citizen to be protected in the use and enjoyment of his property, and not to be unreasonably deprived thereof. Bayard v. Singleton, 1 N. C. 5. And this case was followed in quick succession by others equally as pronounced in their assertion and vindication of the right of property to protection under the Constitution against forfeiture or any sort of condemnation contrary to the law of the land, or, what is the same thing, without due process of law. Hamilton v. Adams, 6 N. C. 161; Robinson v. Barfield, 6 N. C. 391; Hoke v. Henderson, 15 N. C. 15, 25 Am. Dec. 677. In Shaw v. Kennedy, 4 N. C. 591, discussing the identical question we are now considering, the court, by Seawell, J. (in words which cannot be too often repeated), says: "The laws of the land, or, in other words, those laws which do operate over the whole country without being directed to any place or particular individual, allow to every person the opportunity of defending his property before it is condemned; and in no case leave it to the mercy of a mere ministerial officer to seize it at will, which seizure is to be lawful or not according to his own will and pleasure. The ordinance, therefore, on that account was unauthorized, and consequently void." This case has been cited with approval. Hellen v. Noe, 25 N. C. 493. I am unable to perceive any substantial difference between Shaw v. Kennedy and the case now under review. In the former case a migratory hog had strayed into a town, and was seized and held as forfeited, under the provision of an ordinance condemning him as a nuisance to be sold and directing the proceeds to be applied to the payment of the cost of impounding him and the balance to the joint use of the constable and the town, without giving the owner any opportunity to be heard. This was held to be a clear violation of his constitutional right. There was no reason in that case why the hog should not have been forfeited which does not with equal force apply to the facts of this case. One was an animate and the other is an inanimate thing, but both are property, and under the protection of the same law against wrongful invasion. If the value of the property can be considered in determining whether there is due process of law in the particular case, it should not have any weight with us in the decision of this case, as it does not appear that the value of the nets is less than the cost and expense of removal. Indeed, the inference, if it can be drawn from what does appear, should be that it is not. But I do not think the value of the property has anything to do with the question, or that it should affect the application of the principle in the least. The right of the owner is to have it judicially determined that his property has been forfeited, and this determination must necessarily precede condemnation for any purpose. It can be destroyed to abate the nuisance, when the exigency of the situation requires it, because of the paramount right of the state to do so in promotion of the public good, and the interest of the individual will not be permitted to stand in the way. "Privatum incommodum publico bono pensatur." This is upon the ground of public policy, based upon the maxim that regard be had to the public welfare as the highest law; there being an implied assent on the part of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community, and that his property shall under certain circumstances be placed in jeopardy or even sacrificed for the public good. Broom's Legal Maxims (8th Ed.) 1. But the emergency must exist before the right can accrue to the state, and if it does not exist the owner is not required to submit to the destruction of his property, and it cannot be condemned for any purpose without a hearing. The right of the state depends upon the existence of the necessity for destruction or other summary proceeding, and not upon the value of the property; and surely the state cannot merely condemn the property by forfeiture to its own use or to any public use without a hearing, as there is no necessity for such action. The fisherman's net may be of little intrinsic value; but, if it is forfeited, the loss to the owner may be far beyond its inherent worth. Whether of great or little value, it is his, and cannot be taken from him, even by the most powerful, or by sovereignty itself, except in accordance with the law of the land. That is the shield of the humblest, as well as of the most exalted, citizen. What is said by the court in Coleman v. Railroad, 138 N. C. 357, 50 S. E. 690, aptly and forcibly expresses this thought: "The plaintiff may be an humble individual, and the damages may or may not turn out to be slight. But in the history of English law many important rights have been declared in similar instances of obscure complainants, and where the wrong was not of great note by reason of its effect in that particular case."

(139 N. C. 574)

STATE v. SUTTON.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. FISH—STATUTES—CONSTRUCTION.

Laws 1905, p. 1022, c. 824, provides that it shall be unlawful for any person to hedge or fish with traps in the waters of a certain creek between the mouth of the creek and the "J. mill seat in L. county." *Held*, that the word "mill seat," as so used, was synonymous with "mill site," and included the mill house, dam, and appurtenances used for operating the mill by water power and the ground on which they stood.

2. SAME—VIOLATION.

Under Laws 1905, p. 1022, c. 824, providing that it shall be unlawful for any person to hedge or fish with traps in the waters of a certain creek between the mouth of the creek and the "J. mill seat in L. county," a person, though entitled to maintain wire fences or hedges on the sheeting of the mill under the roof of the mill house to catch fish coming out of the pond, was not entitled to maintain such hedges or fences in ditches below the mill house and on both sides of the mill race, by which fish coming up from the mouth of the creek would be stopped before reaching the dam and mill seat; and this, though the owner of the mill house also owned the land for 75 yards below the mill.

3. SAME—RIGHT TO FISH—LEGISLATIVE CONTROL.

A citizen has no inherent right to fish in the creeks of the state, but such right may be permitted or denied at the will of the Legislature.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fish, §§ 8, 16.]

Connor and Hoke, JJ., dissenting.

Appeal from Superior Court, Lenoir County; Councill, Judge.

A. R. Sutton was convicted of maintaining certain fish traps in violation of Laws 1905, p. 1022, c. 824, and he appeals. Affirmed.

Y. T. Ormond and Aycock & Daniels, for appellant. The Attorney General, for the State.

CLARK, C. J. This action was begun before a justice of the peace, and on appeal the defendant was again convicted in the superior court, for a violation of chapter 824, p. 1022, Laws 1905, which provides: "It shall be unlawful for any person to hedge, or fish with traps in the waters of Bear creek between the mouth of said creek where it empties into Neuse river and the Joyner mill seat in Lenoir county."

The word "mill seat" is synonymous with "mill site," and means "where the mill sits." Miller v. Insurance Co. (C. C.) 7 Fed. 651. In Curtiss v. Smith, 35 Conn. 158, it is said: "A mill site comprehends not only the site of the mill building, but also the water power connected therewith for milling purposes." The grant of a mill site conveys by implication the water power and the right to maintain a dam for the beneficial appropriation of the water. Stackpole v. Curtis, 32 Me. 383; Ring v. Walker, 87 Me. 550, 33 Atl. 174. In Occum Co. v. Manufacturing Co., 35 Conn. 512, it is said: "A mill site is the same as a mill privilege, which in Gould v. Duck Co., 13 Gray (Mass.) 442, was said 'to embrace the right which the law gives the owner to erect a mill thereon and to hold up or let out the water at the will of the occupant for the purpose of operating the same in a reasonable manner.'" 20 A. & E. Ency. (2d Ed.) 675; Crosby v. Bradbury, 20 Me. 55; Burr v. Mills, 21 Wend. 294. A "mill seat" means the mill house, dam, and appurtenances used for operating the mill by water power and the ground upon which they stand. The evident purpose of the General Assembly in this statute was to keep the waters of Bear creek free from hedges or traps, so that fish might run up the same as far as the obstruction caused by the dam and water power at Joyner's mill, beyond which they could not go. The right to regulate fisheries, even on private property is settled beyond controversy. 2 Farnham on Waters, §§ 381, 382; Collins v. Benbury, 25 N. C. 277, 38 Am. Dec. 722; State v. Gallop, 126 N. C. 983, 35 S. E. 180, and cases there cited, and in 13 A. & E. Ency. (2d Ed.) 573, 576, 579, and notes; People v. Bridges, 142 Ill. 41, 31 N. E. 115, 16 L. R. A. 684; State v. Roberts, 59 N. H. 484; Howes v. Grush, 131 Mass. 207.

This case turns upon the meaning of the term "mill seat," which is to be taken in its ordinary and usual signification, which is necessarily the same in both criminal and civil proceedings. The rule that criminal statutes are to be strictly construed applies when the scope of the act is doubtful, and does not mean that a word is to be given a different meaning in a criminal action from that which would be given it in a civil proceeding. Words are used by the lawmaking power to express, not to conceal, its meaning, and hence are to be taken as ordinarily understood, alike in criminal and civil actions. It is stated in the case on appeal that "many years ago the original conveyance of this mill property conveyed about 20 acres of land for a mill seat, and that the property conveyed to the defendant includes about 20 acres of land, and extends about 75 yards below the mouths of the ditches," which were "15 or 20 yards below the mill house," and on both sides of the mill race. In these ditches, and also on the sheeting of the mill, under the roof of the mill house, the defendant set wire fences or hedges and caught fish. The latter were on the mill seat or site, as we understand and define the word, and defendant was authorized so to do. He is not prohibited to catch in this manner fish coming out of the pond, but he cannot interfere by such hedge with those which could come up from the mouth of Bear creek till stopped at the dam and mill seat.

It is further contended, however, by the defendant, that the hedges set "15 or 20 yards below the mill house" were lawful, because the owner of the mill house also

owned the land for 75 yards below the mill. Suppose he had owned a tract of 2,000 acres, or 20,000, around the mill; would his privileges under this act have been any greater than those of a man who owned only the mill seat itself? He had no inherent right in fishing in Bear creek. That was a sovereign right of the state, to be permitted or denied at the will of the sovereign, speaking, in the only way in which it could make known its will, through the lawmaking power. In forbidding the monoply of fishing by hedges and traps, and leaving fishing free to all, on Bear creek from its mouth to Joyner's mill seat, the Legislature was thinking of the unobstructed part of the creek up to Joyner's mill house and dam, and was regardless of the extent of dry land along the creek between those points which might be owned by the owner of the mill seat. By "mill seat" it intended to designate a well-defined landmark, which all men may know—the dam and mill—and not the extent of the mill owner's territorial possessions in the vicinity. The original deed seems merely to have conveyed 20 acres, that a mill seat might be located somewhere upon it. The deed to the present owner does not seem, from the case on appeal, to contain even that provision. But if the deed to the defendant had conveyed 20 acres, or 20,000 acres, and described such tract as a "mill seat," this provision in a deed would not change the meaning of a word of common usage and well-defined significance when used in a statute. It would not make a whole body of land a mill site, or seat, because there was a mill run by water power somewhere within its boundaries.

The setting of the wire fences or traps and taking fish therefrom "15 or 20 yards below the mill house" being "between the mouth of Bear creek" and the mill seat, the court properly adjudged the defendant guilty upon the special verdict. Though these ditches are filled with water, and hence have fish only in overflows from the pond, the waters are part of "the waters of Bear creek," and when they go back into the main run the fish in them are not to be restrained and caught by forbidden hedges and nets. The owner of the mill has no rights over either the water or the fish therein after they have gone by the wheel or dam. "The mill will not grind again with the water that has passed."

From the amount of the fine imposed—$5—we presume that this was merely a test case to decide upon the defendant's right of catching fish by hedges or traps, which right under the statute does not extend lower down than catching them in that mode on the sheeting or at any other spot on the mill site, as they come down out of the pond, through the forebay or over the dam. Below that the waters of Bear creek are free from such inventions, and "may roll unvexed to the sea."

Affirmed.

CONNOR, J. (dissenting). I cannot concur in the reasoning or the conclusion reached by the court in this case. I do not question the power of the Legislature to regulate the time, manner, and place of fishing in public waters. I do not think that the right to do so in private waters is so absolute as the language of the opinion would seem to indicate. The question was so fully and satisfactorily discussed and settled by this court in State v. Glen, 52 N. C. 321, and Cornelius v. Glen, 52 N. C. 512, that I could not hope to add to it anything of value or interest. It is quite clear that the court did not recognize any power to interfere with the right of the owner of the bed of the stream to the use of it, except in the exercise of the right of eminent domain, with its limitations. In State v. Pool, 74 N. C. 402, the question of the power of the state to make the obstruction of nonnavigable streams by the owner of the bed indictable was fully considered and denied. Mr. Justice Bynum cites with approval the language used by the court in the Glen Cases, concluding with the words: "Whether the state can enforce against the owner of the land and bed of an unnavigable creek an act of the Legislature forbidding its obstruction to the passage of fish is a question not raised upon this indictment and verdict, and need not be discussed." Mr. Justice Rodman was joined by Mr. Justice Reade in a strong dissenting opinion, reported in 75 N. C. 597. The doctrine upon which the decision of Glen's Cases was decided was denied in the dissenting opinion. I do not think the question is raised in State v. Gallop, 126 N. C. 983, 35 S. E. 180. That case is well decided; but there was no point presented in regard to the rights of the owners of the bed of the stream. I do not wish to do more than notice the question and say that I think the power to enforce statutes of this kind has its limitations. I note that at the same session at which the act in question was passed similar statutes prohibiting fishing by nets, etc., in mill ponds, without any regard to their connection with navigable streams, were enacted. I cannot think that the power extends to the owners of private fish ponds, or even public mill ponds, having no outlet into navigable waters.

The extent to which the owner of property may be interfered with in its use without compensation to serve a public interest is a serious question, to be approached and dealt with carefully. I do not care to be committed to any general statement of the law without the most careful consideration. My dissent in this case is based upon my objection to the construction of the statute. This is a public statute of local application, and should be construed in the light of the local conditions. Some force must be given to the term "the Joyner mill seat." If the draftsman had intended to prohibit the putting of traps below the mill, using the term as meaning the mill house or the dam, he would have said so. Statutes of this kind

are usually drawn by those interested in extending the prohibition as far as possible, and should be so construed that the private right of the citizen be interfered with no further than the unmistakable language demands. It is to be noted that the prohibition is between "the Joyner mill seat," etc. This indicates that the land covered by the water of the Joyner mill seat was known to the draftsman. Can there be any question that, if the owner were to convey or devise the Joyner mill seat, the description would carry the land originally conveyed for the mill seat, and not be restricted to the spot upon which the dam or the house was situate? "The grant of a mill site conveys a water power, together with the right to maintain a dam whenever such dam would be suitable for the convenient and beneficial appropriation of the water power." Stackpole v. Curtis, 32 Me. 383. "A grant of land bounding on or near a pond and stream, reserving the mill and water privilege, is a reservation of the right of flowing the land so far as necessary or convenient, or so far as it has been usual to flow it, for that purpose." Pettee v. Hawes, 30 Mass. 323. "A mill site comprehends, not only the site of the mill building, but also the water power connected therewith for milling purposes." Curtiss v. Smith, 35 Conn. 156; Tabor v. Bradley, 18 N. Y. 109, 72 Am. Dec. 498. "By a devise of a mill, with the appurtenances, it has been held that a right, not only to the building and use of the water, but also to the land which was used with the mill, passed." Blaine v. Chambers, 1 Serg. & R. 169; Angel on Water Courses, 274. It is a matter of common knowledge that the value of a mill site is dependent upon the right to carry the water away as essentially as the right to hold it back. The "mill tail" is as much a part of the "site" as the "mill pond."

The suggestion that a man might claim one or more thousand acres as his mill site does not impress me as shedding much light upon the question. A man will hardly buy and pay for a large quantity of land for which he has no possible use and which can serve no valuable purpose. In the decision of causes, we must deal with the facts as found by the jury. Here the person who erected this mill understood what quantity of land, with the privilege incident to its ownership, was necessary to enable him to establish and maintain his mill. He purchased such quantity for a mill seat, and the Legislature recognized the existence of this boundary and adopted it as one of the points between which and the mouth of the creek nets should not be set. To fail to give force and effect to this language is, in my opinion, to strike out "mill seat" and to write into the statute the word "mill dam" or "mill house." This would not be allowable, if we were construing a will or deed. Barnes v. Simms, 40 N. C. 392, 49 Am. Dec. 435. Certainly it cannot be so to restrict the right of the citizen and make criminal an act otherwise lawful. To my mind it is a violation and dangerous innovation of the elementary rules for construing criminal statutes. If the description of the prohibited points is too indefinite, the statute would for that reason be void. Is it possible that the owner is to be made a criminal, and, under our decisions, subject to be put to work upon the public roads, for putting his nets in the water upon his own land an inch beyond the eaves of his mill house or over his dam? If the mill house be adopted as the test, and it be enlarged or diminished in size, the standard is changed. If the dam be adopted, and it be lowered or raised, by which its top is drawn up or projected down stream so much as an inch, the same result follows. The deed conveying the land for the mill seat is certain, fixed, and unchangeable. The state certainly owes to the citizen the duty, when it makes the exercise of a purely private right upon his own property a crime, to inform him with reasonable certainty of the limits within which he may enjoy his right for which he has paid his money. If there be more than one standard suggested, that which is certain, fixed, and recognized should be adopted, rather than that which is uncertain and subject to change.

I, of course, concur in the opinion that the defendant has not violated the statute in placing his nets under his mill house. In the light of the finding by the special verdict that "many years ago the original conveyance of this mill property conveyed about 20 acres of land for a mill seat," I think that the term "the Joyner mill seat," used in the statute, should be so construed that the prohibition be limited to the lower line of the mill seat. It will be noted that the indictment does not charge, nor does the special verdict find, that the defendant ever caught or obstructed the passage of any fish in his ditches. It is simply found that some 20 yards below the mill house are some ditches on plaintiff's land, one of which was cut to drain a swamp into the mill tail. The other was cut while the mill was being built to turn the water to prevent its interference with the work. When the water is turned into them, "fish can and sometimes do get into said ditches and are prevented from escaping by a wire hedge put by defendant across the ditch." The ditches are in no sense a part of Bear creek. It does not appear how far they run up into defendant's land. I do not think they are within the words of the statute, nor do I think it competent for the Legislature to prohibit the owner from placing nets or hedges across his own ditch, unless doing so constitutes a public nuisance. State v. Pool, supra. This is an unwarranted and unreasonable interference with the use of private property. I cannot but think that it will be a startling discovery to the owners of land in the eastern section of the state

that every ditch cut upon or through their land into the bordering swamps or creeks are a part thereof, and that they are criminally liable for putting a wire net or driving stakes into them. I cannot see why an act prohibiting the obstruction of the highway may not, by the same liberal canon of construction, be held to include private paths connecting with the highway. We may soon find, upon the adjournment of some session of the Legislature, that a man may not with safety walk over his own land or gather flowers which grow upon the side of his path or the banks of his ditches, without liability to be put upon the public roads as a criminal. While the policy of the state in protecting the propagation of fish should be sustained, the right to the use of private property should not be sacrificed. We are in danger of surrounding our people with a multitude of criminal statutes, many of which are invasions of personal liberty and the use of property which will, if not checked, convert the people of the whole state into either conscious or unconscious violators of the law. No man may safely do or omit to do such a multitude of acts that the law will become a labyrinth in which he may not walk in safety.

HOKE, J., dissents.

(139 N. C. 347)

JACKSON v. AMERICAN TELEPHONE & TELEGRAPH CO.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. EVIDENCE—ACTS OF THIRD PERSON — NECESSITY OF SHOWING AGENCY.

The acts and declarations of a third person are not evidence against a party, unless such third person is first shown, prima facie, at least, to be the agent of the party.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 887, 1006.]

2. PRINCIPAL AND AGENT—PROOF OF AGENCY—DECLARATIONS OF AGENT.

Agency must be shown otherwise than by the acts and declarations of the agent.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1006; vol. 40, Cent. Dig. Principal and Agent, § 40.]

3. TRIAL — INSTRUCTIONS — ADMISSIONS BY AGENT.

On the issue of agency, a charge that the jury must not consider declarations of the alleged agent upon the question of agency, but must first find from the evidence, excluding such declarations, that the alleged agent was defendant's agent, before any of his acts could become competent evidence against defendant, and that in passing on the question of agency the jury might consider any of the acts of the alleged agent in connection with defendant's work and whether such alleged agent was in charge of defendant's work with authority, was not subject to the objection of leaving to the jury the bare acts of the alleged agent as evidence of his agency.

4. MASTER AND SERVANT—ESTABLISHMENT OF RELATION—EMPLOYMENT BY FOREMAN.

The fact that an assistant foreman was employed directly by defendant's foreman did not render the assistant foreman any the less defendant's servant.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 5, 1242.]

5. SAME—TORTS OF SERVANT—LIABILITY OF MASTER.

Where a servant does a wrong to a third person, the master must answer therefor, if it was committed in the course and scope of the servant's employment and in furtherance of the master's business, although the servant acted willfully and deliberately in the commission of the same.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1230–1234.]

6. SAME.

The act of a servant of a telephone company in causing a landowner to be unlawfully arrested for the purpose of putting him out of the way, so that the company's agents and servants might erect poles on his land, is an act done in the course of the company's employment and in furtherance of its business, for which the company is responsible.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1217–1224.]

7. SAME—QUESTIONS FOR JURY.

Whether a defendant's servant, in arresting plaintiff, was performing his master's business or was engaged in some pursuit of his own, *held*, under the evidence, which was conflicting as to the circumstances of the arrest, a question for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1275.]

8. FALSE IMPRISONMENT — EXEMPLARY DAMAGES.

Punitive damages may be allowed for a wrongful arrest, made solely in order to put plaintiff temporarily out of the way, so as to prevent his resistance to an entry on his land.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Imprisonment, § 112.]

9. PROCESS—ABUSE OF PROCESS — ELEMENTS OF ACTION.

In an action for malicious abuse of process, it is immaterial whether there was probable cause for issuing the process or not.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 257.]

10. SAME.

It is not necessary, in order to entitle a party to maintain an action for malicious abuse of process, that the original proceedings should have terminated.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 257.]

11. SAME—DEFENSES.

A warrant valid on its face is no defense to an action for malicious abuse of process.

12. TRIAL—SUBMISSION OF ISSUES—REFUSAL.

It is not error to refuse to submit issues tendered by a party, where such issues are embraced in those which are submitted.

13. APPEAL—HARMLESS ERROR — SUBMISSION OF EVIDENTIARY ISSUES.

While issues embodying evidentiary facts, instead of the ultimate facts to be found by the jury, are not to be approved of, yet the submission of issues in that form is harmless, where the facts necessary to support the judgment sufficiently appear.

Appeal from Superior Court, Cumberland County; Ferguson, Judge.

Action by L. C. Jackson against the American Telephone & Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff brought this action to recover damages for false imprisonment. He alleged that one McManus caused a warrant to be issued by a magistrate for his arrest upon the charge of an assault with a gun, and that he was taken into custody by the sheriff and confined in jail for about a day. There was evidence tending to prove the false arrest and imprisonment, and the case turns upon the question whether McManus acted for and in behalf of the defendant, as its agent, in suing out the warrant. The issues submitted, with the answers thereto, were as follows: "(1) Was J. C. McManus the agent of the defendant company and in charge of the work? Ans. Yes. (2) Did J. C. McManus procure the plaintiff to be arrested, for the purpose of getting him out of the way, in order to put up the telephone and telegraph poles across the plaintiff's land while he (the plaintiff) was under arrest? Ans. Yes. (3) Was such arrest without probable cause, and for the purpose of enabling the defendant's agents and servants to put up the telephone and telegraph poles over said land claimed by the plaintiff? Ans. Yes. (4) Did the defendant company by its agents and servants put up telephone and telegraph poles across the land claimed by the plaintiff while the plaintiff was under arrest, and still continue to keep said poles and continue to use them? Ans. Yes. (5) What damage, if any, is the plaintiff entitled to recover? Ans. $900."

There was evidence tending to show that the American Telephone & Telegraph Company was extending its line into Cumberland county, and that McManus was in charge of a squad of hands who were putting up and stringing wires on them near the plaintiff's home. Plaintiff testified that "McManus was having the poles put up, the wire strung, and telling the hands where to go and what to do. There were 35 or 40 hands, and McManus was in entire control." Another witness, John C. Ratley, testified: "I saw McManus in charge of a crowd of hands, pushing them on—hurrying them up. I stayed with him awhile, and then came back home. He had about 50 hands." There was also evidence tending to show that plaintiff had forbidden McManus from erecting poles on his land, and that the arrest was made in order to put him out of the way until the work could be done; McManus having threatened beforehand to put plaintiff out of the way until the hands could do the work. The poles were put up and the wire strung while the plaintiff was under arrest or in jail. McManus called at the home of the officer and told him he wanted the arrest made, and that it must be done that evening. He hired a team, and an officer went with him to the plaintiff's house and made the arrest. McManus then went to the place where the hands were working, and said that he wanted the wire put up and that he would pay double wages for the work done after night. They commenced work about a half hour after sundown and continued into the night, and the poles were put up and the wire strung. When plaintiff refused to permit them to construct the line upon his land and ordered them to leave, McManus replied: "I will put you out of the way, or I will have the poles up before sundown." When the case was called for trial before the justice, McManus failed to appear, and the plaintiff was discharged. The justice found that the prosecution was frivolous and malicious, and taxed McManus with the costs. Defendant introduced testimony tending to show that it had two departments engaged in the building of its line, the right of way and the construction departments, and that Fred Linson was foreman of the construction department, and McManus was assistant foreman and employed by Linson, the latter having been appointed by Campbell, the superintendent of construction; that Jackson assaulted McManus with his gun, and that the arrest had nothing to do with the work of the company and was not authorized by the company or any of its agents; that Jackson signed a "voucher" in the regular form, giving defendant the right to build, operate, and maintain its line on the land, stating that it was his wife's property, and afterwards claimed the land as his own and refused to carry out the agreement, and that the work was done by Linson's force in the belief that defendant had secured the right to use it, and without any reference to plaintiff's arrest; that none of the agents or servants of defendant was authorized to arrest the plaintiff; and that McManus was not with the force when the arrest was made. These are substantially the facts which the testimony tended to establish on either side, and which are necessary to be stated for an understanding of the case. The defendant's counsel asked that certain instructions be given to the jury, which will be hereafter noticed. After a motion for a new trial, which was refused, judgment was entered upon the verdict. Defendant excepted and appealed.

N. A. Sinclair, for appellant. Thos. H. Sutton, for appellee.

WALKER, J. (after stating the case). The principal questions discussed in this court related to the competency of the acts of McManus as proof of his agency for the defendant and to the liability of the defendant for his conduct in unlawfully causing the plaintiff's arrest. The defendant's counsel contended that no authority to bind the defendant had been shown, and that his acts were not competent to show any such authority, but that it must be established, if at all, by evidence independent of his acts and declarations. It is common learning that acts and declarations of a third person are not evidence against a party, unless such third person be his agent; and it is equally

well settled that the agency must be first shown otherwise than by such acts and declarations, before they are admissible. The court must be satisfied that the agency has been shown, at least prima facie, before anything that the alleged agent has said or done can be submitted to the jury as evidence. Williams v. Williamson, 28 N. C. 281, 45 Am. Dec. 494; Grandy v. Ferebee, 68 N. C. 356; Francis v. Edwards, 77 N. C. 271; Gilbert v. James, 86 N. C. 244; Daniel v. Railroad, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455. But this elementary rule has not been violated in this case, and the reason upon which it is founded does not apply to the evidence supposed to fall under its condemnation. The court expressly charged the jury that they must not consider any declarations of McManus upon the question of his agency, but that they must first find upon the evidence, excluding his declarations, that he was the agent of the defendant in charge of its work and authorized to act in its behalf in constructing the telegraph line, before any of his acts done or declarations made in the prosecution of the agency could become competent against the defendant. In passing upon the question of agency, the court did permit the jury to consider "any evidence of the acts of McManus in connection with the work of the defendant, and whether the defendant was putting up the poles on the land claimed by the plaintiff, and whether McManus was in charge of the construction work with authority, and whether he was in control of the labor and material and gave directions" as to how the work should be done. But what we understand the court to mean by this instruction is that if McManus, by and with authority of the company, was doing the work described, he was in law the agent of the company to the extent of charging it with liability for his acts so done in furtherance of the principal's business, and we think the jury must have so understood it. Thus construed the charge did not leave to the jury the bare acts of McManus as evidence of his agency, which would clearly have been error; but the jury were required to consider all the evidence, for the purpose of finding whether he had the authority to act as he did; and the particular acts of McManus were mentioned, so that the jury might intelligently apply the evidence and ascertain whether he possessed authority to do those particular acts. It must be remembered that the defendant's witness, Fred Linson, testified that he was foreman of construction and McManus was his assistant. There was evidence of his authority, for it makes no difference that he was employed directly by Linson. By virtue of his employment he became the servant of the defendant. He was not, perhaps, in the strict and technical sense its agent, but its servant. In either relation, the principal or the master, as the case may be, is chargeable with liability for his acts done in the course of his employment and in furtherance of the business he had in charge.

This brings us to the consideration of the other question, as to the liability of the defendant for the act of McManus in arresting the plaintiff. Whoever commits a wrong is liable for it, and it is immaterial whether it be done by him in person or by another acting by his authority, express or implied. "Qui facit per alium, facit per se." Upon this maxim of the law is founded the doctrine that the principal is liable for the tort of his agent, and the master for the tort of his servant. If the wrongful act is done by express command of the master, or even if he has afterwards made it his own by adoption, there is no difficulty in applying the rule; but it is otherwise when the liability must proceed only from an implied authority. Where the servant does a wrong to a third person, the rule of respondeat superior applies, and the master must answer for the tort, if it was committed in the course and scope of the servant's employment and in furtherance of the master's business. "A servant is acting in the course of his employment, when he is engaged in that which he was employed to do and is at the time about his master's business. He is not acting in the course of his employment, if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility; but, if there is a total departure from the course of the master's business, the master is no longer answerable for the servant's conduct." Tiffany on Agency, p. 270. We see, therefore, that the master is liable, even if the act is willful and deliberate, provided it was committed in the course of the employment and for the master's purposes, and not merely for the servant's private ends. Tiffany on Agency, p. 273; Pierce v. Railroad, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 816; Cook v. Railroad, 128 N. C. 333, 38 S. E. 925. In this case the jury have found that the defendant, by its servant, caused the plaintiff to be unlawfully arrested for the purpose of putting him out of the way, so that its agents and servants might erect telephone and telegraph poles on his land. If this is not an act done in the course of the employment and in furtherance of the master's business, for his benefit and advantage, it would be hard to conceive of one which would come under that class. The case is in principle like that of Railroad v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146, which has, at least twice, been approved by this court. Hussey v. Railroad, 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312; Redditt v. Manufacturing Co., 124 N. C. 100, 32 S. E. 392. In Harris' Case the defendant's servants committed, it is true, a direct and violent trespass upon lands in order to carry on their master's work, and in doing so shot and injured the plaintiff,

but is there any difference in law between the two cases? It is not the quality of the act that determines a master's liability, but the fact that it is done by his implied authority and is within the scope of the servant's authority, in the course of his employment, and in furtherance of his master's interests. Daniel v. Railroad, supra; Daniel v. Railroad, 117 N. C. 592, 23 S. E. 327; Kelly v. Traction Co., 132 N. C. 368, 43 S. E. 923; Lovick v. Railroad, 129 N. C. 427, 40 S. E. 191; Williams v. Gill, 122 N. C. 967, 29 S. E. 879; Pierce v. Railroad and Cook v. Railroad, supra. It was in this case a question for the jury, under proper instructions from the court, whether McManus, in arresting the plaintiff, was performing his master's business or was engaged in some pursuit of his own. Hussey v. Railroad and Daniel v. Railroad, supra; Tiffany on Agency, 271. The court charged fully and correctly in respect to this matter. The cases of Redditt v. Mfg. Co., supra, Willis v. Railroad, 120 N. C. 508, 26 S. E. 784, Moore v. Cohen, 128 N. C. 345, 38 S. E. 919, and Daniel v. Railroad, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, cited by the defendant's counsel, do not militate against our conclusion in this case. In those cases the wrongful act of the agent, attempted to be imputed to his principal, was clearly not within the course of the agent's employment or within the scope of his authority; while in this case there is evidence that the tort was committed directly in furtherance of the master's business, which was then being performed by his servant. This distinction is recognized in the cases cited, especially in Willis v. Railroad, supra, and in Daniel v. Railroad, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455.

We will now consider the defendant's prayers for instructions. The first, as to the declarations of McManus, was given. The second, third, and fourth, to the effect that there was no evidence of his agency or of his authority to do the particular act, were properly refused, as we have shown. The fifth prayer, that the acts of the agent, to bind the principal, must be within the scope of his authority, was not germane to the issues as framed; but it was substantially given by the court in charging upon the issues as submitted to the jury, or the defendant, at least, got the full benefit of the instruction requested, though not in the form it was asked to be given. The seventh prayer as to punitive damages was properly refused. The court charged correctly when it permitted the jury to award punitive damages. If McManus, as the jury found, arrested the plaintiff, not because the latter had assaulted him, but to put him out of the way and thereby prevent his resistance to an entry upon the land, it was a case where vindictive damages might well be allowed by the jury in addition to compensation for the wrong. The court in its charge made the question of probable cause turn upon whether the plaintiff had or had not assaulted McManus, and, they having decided that there was no probable cause, it follows that they found there was no assault, and that the arrest was wholly unjustifiable, and a wanton, highhanded, and oppressive act, for which punitive damages may be allowed. Remington v. Kirby, 120 N. C. 320, 26 S. E. 917. The verdict was moderate in view of the circumstances, and the jury do not seem to have allowed much, if anything, in the way of exemplary damages. "The doctrine is well settled that the jury, in addition to compensatory damages, may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly or with criminal indifference to civil obligations" (Railroad v. Prentice, 147 U. S. 106, 13 Sup. Ct. 261, 37 L. Ed. 97), or the defendant has been guilty of an intentional and willful violation of the plaintiff's rights (Railroad v. Arms, 91 U. S. 489, 23 L. Ed. 374; Hansley v. Railroad, 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600). In the sixth prayer for instructions the defendant requested the court to charge that, if the plaintiff assaulted McManus with his gun, the latter had the right to have him arrested and the defendant would not then be liable, which was given with the following qualification: "Unless the jury further find that McManus did not have the plaintiff arrested for the assault, but in order to get rid of him, so that the defendant's work could go on." The cause of action in the complaint is for false imprisonment, while the issues as framed by the court mainly presented a case of malicious abuse of process. In the latter, it makes no difference whether there was probable cause for issuing the process or not. It differs from malicious prosecution in two respects: First, in that want of probable cause is not an essential element; and, second, in that it is not necessary that the original proceedings should have terminated. And it differs from false imprisonment in that, among other things, a warrant valid on its face is no defense, if in any respect there has been an abuse of the process. 1 Jaggard on Torts, pp. 632–634. "An action for damages," says Jaggard, "lies for the malicious abuse of lawful process, civil or criminal, even if such process has been issued for a just cause and is valid in form, and the proceeding thereon was justified and proper in its inception, but injury arises in consequence of abuse in subsequent proceedings." In view of the principles stated and supported by the authorities cited, we cannot see any error in the amendment by the court of the instruction asked in the sixth prayer. The jury found that there was no assault by the plaintiff and that there was a clear abuse of the process of the court.

We think his honor submitted to the jury all the questions involved with the utmost fairness, and explained fully the principles of law applicable to the case. The charge

was as favorable to the defendant as it was entitled to expect under the evidence. There was no error in refusing to submit the two issues tendered by the defendant. It had the full benefit of them, as they were embraced by those which were submitted, and this is all that is required. Warehouse Co. v. Ozment, 132 N. C. 839, 44 S. E. 681; Deaver v. Deaver, 137 N. C. 240, 49 S. E. 113. We do not approve of issues which, as in this case, embody evidentiary facts, instead of the ultimate facts to be found by the jury, and which are therefore the only issuable facts. Grant v. Bell, 87 N. C. 34; Patton v. Railroad, 96 N. C. 455, 1 S. E. 863. But we cannot see that any harm has come to the defendant by reason of this defect in the issues, as the facts necessary to support the judgment sufficiently appear. Patterson v. Mills, 121 N. C. 253, 28 S. E. 368; Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963.

We find no reversible error in the proceedings of the court below, and it must be so certified.

No error.

(139 N. C. 361)

COXE v. SINGLETON et al.

(Supreme Court of North Carolina. Oct. 24, 1905.)

1. TRIAL—ISSUES—PREPARATION.

Where there were no written pleadings in the case, it was the duty of the court to frame the issues from the evidence, so as to develop the whole case and present to the jury the disputed issues of fact.

2. SALES — CONTRACT—BREACH—ACTIONS—ISSUES.

Where, in an action for breach of a contract to purchase certain lumber at a stipulated price, there were no written pleadings, but plaintiff alleged and offered evidence that he sold to defendant certain lumber at a price stipulated, but that defendant refused to take and pay for the same, while defendant denied the contract and that plaintiff had performed it, alleging that the lumber tendered was worthless, issues submitted to the jury as to whether defendant contracted with plaintiff to purchase lumber as alleged, and, if so, whether plaintiff complied with the contract and the terms thereof, and calling for a finding as to the value of the lumber tendered for delivery under the contract, were sufficient to cover the entire controversy.

3. WITNESSES—CHARACTER—EVIDENCE.

Where a witness had testified on cross-examination to the good character of one of the defendants, plaintiff was not entitled to ask the witness on redirect examination if he had not heard that such defendant "padded his pay roll" at a certain mill and also had raped a negro girl.

4. TRIAL — VERDICT — IMPEACHMENT — AFFIDAVIT OF JURORS.

A verdict cannot be impeached by written statements of several jurors that they did not fully understand the issues and the legal effect of their findings.

5. SAME—SPECIAL FINDINGS—EFFECT.

Where, in an action for breach of contract, the jury, in response to issues, found that defendant had contracted to purchase lumber from plaintiff as alleged, but that plaintiff had failed to comply with his part of the contract, the fact that the jury also unnecessarily answered a further issue that the lumber hauled by plaintiff for delivery under the contract was of the value of $5 only, the contract price being $20, was conclusive that the jury intended to find that plaintiff had not performed his part of the contract.

Appeal from Superior Court, Anson County; Long, Judge.

Action by Thomas C. Coxe against Robert Singleton and others. A judgment was entered dismissing the action on appeal from a justice of the peace, and plaintiff appeals. Affirmed.

The plaintiff alleged that he sold the defendants certain walnut lumber at a stipulated price, $20, and that the defendants refused to take and pay for the same. The defendants denied the contract, and also that the plaintiff had performed it, alleging that the lumber tendered was worthless. The court submitted the following issues: "(1) Did defendants contract with plaintiff to purchase lumber from him, as alleged by plaintiff? A. Yes. (2) If so, did plaintiff comply with his part of the contract and the terms thereof, as alleged? A. No. (3) What was the value of the lumber hauled by plaintiff to defendants for delivery under the alleged contract? A. $5. Upon the finding of the jury the court dismissed the action, and the plaintiff appealed.

Fred J. Coxe, for appellant.

BROWN, J. 1. The plaintiff excepted to the issues submitted. They plainly cover the controversy between the parties as disclosed by the evidence. The issues were sufficient to enable the jury to intelligently find the facts in dispute and to enable the plaintiff to present every view of the evidence contended for by him. It is true the issues arise upon the pleadings, and not upon evidential facts; but where there are no written pleadings, as in this case, it is the duty of the court to so frame the issues after hearing the evidence as to develop the whole case and to present to the jury the real issues of fact in dispute. His honor did that in this case.

2. The witness Marshall testified to the good character of the plaintiff, and also, on cross-examination, to the good character of Robert Singleton, one of the defendants. Upon redirect examination, the plaintiff's counsel asked the witness: "Have you not heard that the defendant Robert Singleton committed rape upon a negro girl?" Also: "Have you not heard that Robert Singleton padded his pay roll at the mill?" These questions were excluded, and the plaintiff excepted. We think the ruling of the court was fully sustained by the decisions of this court, wherein the rule of practice is fully discussed. State v. Bullard, 100 N. C. 488, 6 S. E. 191; State v. Boswell, 13 N. C. 209; Barton v. Morphes, Id. 520. It is to be noted, however, that the plaintiff had full benefit

of the evidence upon cross-examination of Robert Singleton, who admitted that he had been accused of padding his pay roll at the mill, and had been charged with and acquitted of the crime of rape.

3. The plaintiff presented to the court a paper writing signed by the several jurors who tried the case, to the effect that they did not fully understand the issues and the legal effect of their findings, and moved to set aside the verdict. The court declined, and the plaintiff excepted. It is familiar learning that jurors cannot be heard to impeach their verdict. If that were allowed, lawsuits would seldom be determined. The legal effect of their findings is to put an end to this case. The fact that the jury unnecessarily answered the third issue is conclusive that they intended to find that the plaintiff did not perform the contract on his part; for, if the lumber tendered was worth only $5, it fell far short of the required quality, according to the plaintiff's own version of the contract.

We think there was no error committed, and the judgment is affirmed.

(139 N. C. 299)

SHERWOOD HIGGS & CO. v. SPERRY & HUTCHINSON CO.

(Supreme Court of North Carolina. Oct. 17, 1905.)

1. APPEAL—DISMISSAL—MOTIONS.

The complaint is not properly before the Supreme Court for consideration on appeal from a judgment granting a motion to dismiss for want of service.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3467, 3468.]

2. DISMISSAL—FINDINGS OF COURT—DUTY TO MAKE.

The court, in entering a judgment of dismissal for want of service, should find the facts on which its action is based, and not merely that all the facts set out in the several affidavits are true.

3. CORPORATIONS—ACTIONS—PROCESS—AGENTS FOR SERVICE.

Under Code, § 217, authorizing service of summons to be made upon a corporation by delivering a copy thereof to the president, secretary, etc., "or local agent thereof," and providing that any person receiving or collecting moneys within the state for any domestic or foreign corporation shall be deemed a local agent for the purpose of service of summons, a traveling auditor of a foreign corporation, which has ceased to do any business in the state, who is not authorized to collect or receive money for the corporation, is not a "local agent," on whom service may be made.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1983–1990, 2610–2615.]

Appeal from Superior Court, Wake County; Moore, Judge.

Action by Sherwood Higgs & Co. against the Sperry & Hutchinson Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

In this action summons was issued March 21, 1905, and returned, with the following indorsement thereon: "Received March 22, 1905. Served March 22, 1905, by leaving a copy with E. E. Anthony, auditor of Sperry & Hutchinson Co."—signed by the sheriff of Guilford county. At the April term, 1905, of the court, the plaintiffs filed their complaint. At the same term counsel for defendant entered a special appearance and moved (1) to set aside the service of summons on E. E. Anthony, and (2) to dismiss the action for want of service. The motion was made and heard upon the summons and return thereon and affidavits. Thomas E. Sperry made an affidavit, in which he stated that he was president of the defendant corporation, organized and existing under the laws of the state of New Jersey, having its principal office in New York City; that prior to the 20th day of February, 1905, the company had sold and closed out all of its business in North Carolina, and had not since that day carried on any business therein; that prior to said day said company discharged all of its employés in said state and closed up its business, with the exception of the sum of $175 due to said company from plaintiff; that on the 22d day of March, 1905, said Anthony was transiently in the state of North Carolina; that prior to said day said Anthony had been engaged in inspecting, adjusting, and closing the accounts and books of said company in said state, and prior to said date he had completed said work and reported the conclusion thereof to said company, and been ordered to proceed to Baltimore to make an inspection of the books of said company at that point; that said Anthony is one of the traveling auditors of said company, and his only duties are to inspect and report to the home office the condition of the books, etc., in the various towns in which said company does business; that it is no part of said Anthony's general duty to collect moneys or to enter into contracts on behalf of said company. E. E. Anthony filed an affidavit, substantially of the same import as that of Sperry. He admitted sending a bill to the plaintiffs, containing a statement of their account, asking a remittance of the amount due thereon to him at Greensboro, but denied that he had any authority to collect the same. Plaintiff Sherwood Higgs filed an affidavit, setting forth the receipt of the bill of defendant company on March 19, 1905, with the request that the amount thereof be remitted to said Anthony at Greensboro; that some communication was had with said Anthony over the phone, etc. The complaint was also offered as an affidavit. His honor upon the hearing found that the facts set forth in the affidavits of Sperry, Anthony, and Higgs were true. He did not consider the complaint. The motion was granted, and plaintiff duly excepted and appealed.

Robert C. Strong and C. B. Denson, for appellants. Shepherd & Shepherd and W. H. Pace, for appellees.

CONNOR, J. (after stating the facts). In this court plaintiffs' counsel insisted that his honor should have considered the complaint upon the motion. While we do not think that the complaint upon motion to dismiss for want of service is properly before this court, we have examined it, and find nothing affecting the merit of the motion to dismiss. It is also insisted that the affidavits of Sperry and Anthony are conflicting. It will be noted that his honor does not find the facts upon which his judgment dismissing the action is based. He simply finds that all of the facts set out in the several affidavits are true. We are of the opinion that he should have found the facts, which would have been conclusive. If we discovered any substantial contradiction between the several affidavits, it would be our duty to remand the case to the superior court for the purpose of finding the facts, so that upon appeal we would simply pass upon the question of law presented. While the criticism of plaintiffs' counsel is ingenious, we do not think that, in so far as the two vital questions—whether the defendant was on the 22d of March, 1905, doing business in this state, or whether Anthony was such an officer or agent of the corporation as contemplated by the statute for the service of summons—are concerned, there is any substantial variance. The criticism that they are not worthy of credit or disingenuous is not open to us.

The statute (Code, § 217) provides that service of summons may be made upon a corporation by delivering a copy thereof to the president, or other head of the corporation, secretary, cashier, treasurer, or director, managing or local agent thereof: Provided, that any person receiving or collecting moneys within this state for or on behalf of any corporation in this or any other government shall be deemed a local agent for the purpose of service of summons. In respect to a foreign corporation, service can be made only when it has property within this state or the cause of action arose therein, or when the plaintiff resides in this state, or when such service can be made within the state personally upon the president, treasurer, or secretary thereof. As the defendant company, a foreign corporation, had ceased to do any business in this state on the 22d day of March, 1905, it would seem clear that service could be made only upon the officers named in the statute. We do not think a traveling auditor, such as Anthony was found to be, is such an officer. If he was to be considered as a local agent, he expressly denies that he received, or was authorized to collect or receive, money for the corporation; and his honor has found this to be true. It is said that, if the service be upon any person connected with the corporation who would probably apprise the managing officers of such service, it is sufficient. This suggestion would appeal to the Legislature in providing for service on corporations, but cannot justify us in straining the language of the statute beyond its natural and proper meaning. It is sometimes difficult to define the terms "managing or local agent" as applied to corporations; but in this case it is not claimed that Anthony was a managing agent, and the finding of the judge excludes the idea that he received or collected money. It is true that he presented an account to the plaintiffs, and requested payment to himself; but he received no money, and says that he presented the account without authority, and his honor so finds. Clinard v. White, 129 N. C. 250, 39 S. E. 960, is clearly distinguishable from this case. The person upon whom the service was made was clearly a "managing agent." In Bank v. Moore, 92 N. C. 590, the court simply held that an attorney of a foreign corporation was not an agent upon whom process could be served. Jester v. Packet Co., 131 N. C. 54, 42 S. E. 447, held that, when the president of such corporation was in the state, service could be made upon him. See Womack's Pr. Corp. 656. The conclusion which we have reached is in harmony with the decisions in New York, where the statute is substantially as ours, as shown by the cases cited in the brief.

The judgment must be affirmed.

(139 N. C. 567)

STATE v. LUCAS.

(Supreme Court of North Carolina. Oct. 8, 1905.)

1. CRIMINAL LAW—FORMER JEOPARDY — MOTION FOR NEW TRIAL.

The error of the court in holding that there had been no former conviction of the offense charged can be reached by a motion for a new trial, and not by a motion for the discharge of the accused.

2. SAME—JUSTICE OF THE PEACE — HOLDING ACCUSED TO ANSWER—SUBSEQUENT JURISDICTION.

A justice of the peace, who has required one charged with a criminal offense to give his bond for his appearance in the superior court, and who has bound the complainant and witnesses to appear in that court and testify, under Code, §§ 896, 1152, 1156, 1157, has no further jurisdiction of the case, and he cannot reverse his decision, and adjudge the accused guilty of an offense within his jurisdiction, and impose a fine therefor.

Appeal from Superior Court, Sampson County; O H. Allen, Judge.

J. H. Lucas was convicted of simple assault, and he appeals. Affirmed.

Criminal action for assault. Defendant was indicted for assault with serious damage, and pleaded former conviction and not guilty. The evidence upon the former plea was that a warrant was issued by a justice of the peace charging defendant with an assault and battery on D. C. Bullard, resulting in serious injury. At the trial the justice found that there was probable cause, and required defendant to give bond for his appearance at the next term of the superior court. The bond was duly executed and accepted by the justice, and the defendant dis-

charged; all witnesses having been recognized for their appearance at court. No entry of these proceedings having been made on his docket, the justice, on the next day after the trial, concluded that he had made a mistake, reversed his decision, and rendered judgment against defendant for a fine of $1 and costs. No one but the justice was present when this was done. Defendant, being notified of the judgment, appeared and paid the fine and costs, and the justice surrendered to him the appearance bond he had given. No papers were returned to the superior court as required by the statute. The witnesses appeared at court as they were recognized to do, and this bill of indictment was sent to the grand jury and returned "A true bill." The assault with serious damage was sufficiently charged in the indictment. Upon the foregoing facts the court adjudged that the plea had not been sustained, as the judgment of the justice was a nullity. The case was then tried upon the plea of not guilty, and the defendant was convicted of a simple assault. Defendant's counsel moved for his discharge upon the ground that the court erred in holding that there had been no former conviction. Motion denied. Judgment upon the verdict. Defendant excepted and appealed.

F. R. Cooper, for appellant. The Attorney General, for the State.

WALKER, J. (after stating the case). The motion to discharge the defendant should not have been sustained. If the ruling of the court was wrong, the defendant was not entitled to a discharge, but to a new trial. But we will treat the motion as if it had been for a new trial, as, perhaps, it was so intended.

The ruling of the court that the judgment of the justice was void, as he had no jurisdiction of the case after he had bound the defendant to court and taken his recognizance, was manifestly correct. The statute requires that, when the justice has no final jurisdiction of the offense, "he shall desist from any final determination" of the matter, and either commit the accused to prison or require from him a recognizance for his appearance at the next term of the court to answer the charge, and he shall then bind the complainants and witnesses for the state to appear in like manner and testify. He must return the papers, with a statement of his proceedings, to the clerk of the court on or before the first day of the term. Code, §§ 896, 1152, 1156, 1157. This is plain language, and its meaning is unmistakable. It was intended most surely that, when the justice had fully performed the duties required of him, his jurisdiction as to the case should be at an end. If he makes a mistake, it must be corrected elsewhere—not in his court. There is no provision of the statute, nor is there any in the general law, for correction of his errors by himself after he has given his decision, and taken security for the appearance of the accused. To permit a justice, after an investigation and decision by himself, and after the discharge of the defendant and the witnesses, all of whom have been recognized for their appearance at court, to reverse his decision the next day, in the absence of the prosecutor, the witnesses, and the defendant, would be pernicious practice, and tend to great confusion in judicial proceedings, apart from other considerations arising from the express provisions of the statute prescribing the jurisdiction of justices of the peace and impliedly forbidding any such proceeding. It would open the door wide to fraudulent and collusive prosecutions, pervert the course of justice, and defeat the very purpose which the orderly method of procedure provided by the statute was intended to subserve.

We are therefore of the opinion that when the justice had heard the cause, and adjudged that the accused give bond for his appearance, and his bond was executed and accepted by the justice, the latter's power and jurisdiction ceased. The case had then passed beyond his control, and he could not reverse or change his decision, or take any other steps in the cause, except to return the recognizance and the papers, together with a statement of his proceedings, to the clerk of the court in obedience to the statute. There is no authority given to a justice to grant a new trial in a criminal case after he has made a final disposition of it. If he can reverse his judgment the day after it is given, he can do so the next week, month, or year. What the justice did the day after the trial was therefore coram non judice, and his former decision of the case was in no manner avoided or affected thereby. The case then stood as if there had been no subsequent proceedings. The views we have expressed are fully sustained by Steel v. Williams, 13 Ind. 73, a case directly in point, in which the very question herein presented is fully and ably discussed. Indeed, the authorities upon the subject seem to be all one way; the judges and text-writers having spoken with one voice upon the subject. Bishop, in his New Criminal Procedure (4th Ed.) p. 141, § 234, subsec. 4, says: "The magistrate, on determining to send the prisoner to the higher court, commits him and the witnesses, or takes their several recognizances, as the case may require. Then, and in the absence of any special statute, his functions in the case cease." He is in a certain sense functus officio. Having fulfilled the particular function conferred by statute, he is consequently without further official authority in the case. So in Sandrock v. Knop, 34 How. Prac. (N. Y.) 191, a case substantially identical in its facts with this one, the defendant was arrested and tried by the committing magistrate, a police justice, who required him to enter into a recognizance for his appearance. Afterwards the justice proceeded to re-examine the case. He discharged the defendant, and then ordered the

appearance bond to be canceled. It was held that the giving of the recognizance by the accused had the effect to divest the justice of all authority further to examine into the complaint, and that any further proceedings in the investigation of the alleged offense must be had at the general sessions, to which court the defendant had been bound to appear, and before the grand jury. The subsequent proceedings were therefore held to be a nullity. More like our case in all respects than any other we have been able to find is State v. Mousely, 4 Har. (Del.) 553, which was an indictment for assault. The accused was first bound to court by the justice, who afterwards, with the consent of the prosecutor, allowed the matter to be settled on payment of costs. This was held to be beyond his jurisdiction and an unauthorized proceeding, and it was distinctly ruled that, when the committing magistrate holds the accused to bail or commits him for refusal to give bail for his appearance, there is no appeal from the justice and no authority anywhere to review his decision on this question, nor to prevent the case from going before the court after once there has been a judgment that it is a case which ought to be tried there. In State v. Russell, 24 Tex. 505, it was held that, after taking a bail bond and the adjournment of his court, a magistrate has no authority to take further action in the case, as the jurisdiction of it is in the court to which the defendant has been bound for his appearance. The court held, in Nelson v. People, 38 Mich. 618 (opinion by Cooley, J.), that holding an accused person for trial in the circuit court "undoubtedly" gave that court jurisdiction of the case.

It was held in State v. Randolph, 26 Mo. 213, that after the justice had issued his warrant of commitment to the sheriff, he could not recall it and take a recognizance, unless expressly empowered by statute so to do, as his authority was exhausted, and the defendant can be discharged only by habeas corpus. Our statute makes such provision (Code, § 1161), that is, that a justice or judge may take the recognizance. In our case the justice had already taken the bond. The case cited serves to illustrate the principle and to prove its general adoption in all systems of judicial procedure. State v. Young, 56 Me. 219, presented a peculiar application of the rule. It was there held that the recognizance returned to court might be amended so as to speak the truth, being a record, but that as, when amended, it showed the justice had taken it after once committing the defendant, it was void, as he was without authority to act in the matter or to supersede the further execution of the mittimus; his jurisdiction having been fully exercised and ended when the officer received the defendant and departed with him from the court. But for our statute, to which we have referred, this would be the law here. The principle of the decision is still the law with us. In this case, the justice recognized the accused and then his jurisdiction ended. There was nothing more for him to do, or that he could do under the statute, as his jurisdiction in this respect is derived solely from the statute and must be exercised in accordance therewith. State v. Jones, 100 N. C. 438, 6 S. E. 655. We might cite numerous other cases to the same effect as those mentioned above, but it would be useless to do so, as those cited will suffice to show that the general current of authority has always strongly set in one and the same direction. Suppose the justice had originally assumed final jurisdiction, which he possessed, and fined the defendant; could he the next day, or the next week, have set aside the judgment, renounced his final jurisdiction, and recognized the defendant to appear at the next term of the court? Certainly he could not. So plain a proposition does not admit of argument. So it must be, in either case, that, when he has fully exercised his jurisdiction, he has reached the limit beyond which he cannot go, nor can he retrace his steps.

If the justice had taken final jurisdiction when the case was first heard by him, and disposed of it, the plea of former conviction would have been a complete bar to the prosecution in the superior court, as the jury by their verdict found that there was no serious damage done. State v. Albertson, 113 N. C. 633, 18 S. E. 321; State v. Price, 111 N. C. 703, 16 S. E. 414. But as the justice had no jurisdiction to try and convict the defendant after he had bound him to court, and as the indictment alleged that there was serious damage, though the jury convicted of a simple assault merely, the plea was bad, and was properly overruled by the court. As the superior court had jurisdiction of the case by reason of the form of the indictment, it proceeded rightly to pronounce judgment upon the verdict. State v. Ray, 89 N. C. 587; State v. Earnest, 98 N. C. 740, 4 S. E. 495; State v. Fritz, 133 N. C. 725, 45 S. E. 957. There is no direct authority to be found in the decisions of this court upon the question discussed. The general observations made in State v. Moore, 136 N. C. 581, 48 S. E. 573, will be found to have an indirect bearing upon the matter. The second, or, rather, the pretended, trial, did not have the true form of a judicial investigation or inquiry, nor even its semblance. What is said in that case is therefore applicable to this one. We again call the attention of the justices of the peace to the suggestions made in State v. Moore, and to the necessity of carefully observing the directions of the statute, and now, we add, of keeping strictly within the bounds of the jurisdiction thereby conferred. Departures from the beaten path, if permitted, will open a way by which criminals may escape merited punishment with impunity. State v. Jones, supra.

The record discloses no error committed in the trial below.

No error.

(139 N. C. 363)

LOVE v. LOVE et al.

(Supreme Court of North Carolina. Oct. 24, 1905.)

1. ADMINISTRATORS—SALE OF LANDS — ORDER —APPEAL—ABANDONMENT.

Where, in proceedings by an administrator before the clerk to sell land for assets, defendants took an appeal in February, 1897, but the appeal was not docketed until January, 1899, such delay amounted to an abandonment of the appeal.

2. SAME—SALE PENDING APPEAL—VALIDITY.

Where an appeal by defendants, in proceedings before the clerk by an administrator to make assets by a sale of lands, was abandoned by delay in the docketing of the appeal, a sale of the land pending the appeal was not void.

Appeal from Superior Court, Union County; Neal, Judge.

Proceedings by C. C. Love, as administrator of C. C. Love, Sr., for a settlement of his final account, and from a judgment on exceptions filed to his report, he appeals. Reversed.

Redwine & Stack, for appellant. Adams, Jerome & Armfield, for appellee.

BROWN, J. Upon the coming in of the report, several exceptions were filed by plaintiff, all of which were overruled by his honor, except exceptions 5 and 9. As there is no ninth exception, his honor evidently intended to sustain the fifth and eighth exceptions, relating to the taxation of costs and witness fees. After a careful investigation of the record, we affirm the judgment pronounced by the court below, except as to the first and second exceptions to conclusions of law, whereby the sale of the land is set aside and a new sale ordered. It appeared that on January 5, 1897, the plaintiff, as administrator, filed a petition to sell the land of his intestate for assets. The heirs at law answered, and demanded a statement of an account "showing the nature and character of the indebtedness alleged." This account the clerk proceeded to take. On February 27, 1897, the clerk made an order authorizing the administrator to sell the land described in the petition for assets subject to the widow's dower. Upon the clerk's minutes or notes of the evidence and proceedings before him appear these words: "Judgment. Appeal by defendants." The clerk certifies to us upon certiorari that the said cause appears for the first time on the civil issue docket at January term, 1899. Notwithstanding the entry of appeal, the administrator sold the land on April 5, 1897, and a decree of confirmation was entered May 14, 1897. His honor held that the sale was void pending the appeal, and directed a resale. In this there was error. Had the appeal been properly prosecuted, we would agree with his honor and the able referee (Mr. Armfield) who tried this case. We think the appeal was abandoned, whether intentionally or not.

This case differs materially from Lictie v. Chappell, 111 N. C. 347, 16 S. E. 171, upon which the defendants rely. Merely craving an appeal is not taking an appeal. The appellant must look after his case, and see that his appeal is made effectual. If the clerk fail to forward the case to the judge or docket it upon the regular civil issue docket (according to the character of the case), it was the appellant's duty in apt time to apply for the proper order to compel him to do so. This appeal was taken in February, 1897. The appeal was not docketed until January, 1899, nearly two years thereafter. In the meantime the defendants had suffered the land to be sold and a decree of confirmation entered. An appellant, who merely prays an appeal and files his bond, is not relieved of further care in respect to his appeal. He must see that it is brought to a hearing. Wilson v. Seagle, 84 N. C. 110; Blair v. Coakley, 136 N. C. 409, 48 S. E. 804.

The affidavit of Mr. Adams, returned to us along with the clerk's response to the certiorari, cannot be considered by us. Had it been presented to the judge of the superior court in due season, he would doubtless have required the appeal to be docketed.

For these reasons we think the sale to Long should stand, and the administrator be charged with the proceeds. The judgment of the court below in that respect is reversed, and the cause remanded, to the end that a decree may be entered in accordance with this opinion.

Reversed.

(139 N. C. 366)

STACK v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina. Oct. 24, 1905.)

1. WATERS AND WATER COURSES—RAILROADS —CROSSING WATER COURSES — INJURIES TO LAND—LIMITATIONS — ACTIONS — INSTRUCTIONS.

Under Pub. Acts 1895, p. 297, c. 224, limiting actions to recover damages for injuries to land by the construction of a railroad to five years, an instruction, in an action for damages caused by the flowage of plaintiff's land resulting from the construction of a railroad embankment over a water course, that if there was a substantial injury to the land prior to September, 1899, the action having been brought in September, 1904, plaintiff could not recover, and that the question for determination was, "when did the substantial injury begin?" was proper.

2. SAME—EVIDENCE.

Where defendant's roadbed and culvert were constructed across a water course more than 40 years ago, and plaintiff and his witnesses testified that the water was ponded on plaintiff's lot in controversy, in a manner substantially similar to that complained of, as much as 10 or 15 years prior to the action, but that the ponding had increased of late, owing to certain changes in the grading and draining of a certain town, by which the flow of the stream had been accelerated, such evidence justified an instruction that, if there was a substantial injury to plaintiff's land begun by defendant's embankment more than 5 years before suit brought, plaintiff's claim was barred by limitations prescribed by Pub. Acts 1895, p. 297, c. 224.

Appeal from Superior Court, Union County; Neal, Judge.

Action by J. E. Stack against the Seaboard Air Line Railway Company. A judgment was rendered in favor of defendant, and plaintiff appeals. Affirmed.

This was a civil action for wrongfully ponding water on a lot owned by the plaintiff. The plaintiff alleged and offered evidence tending to show that the defendant's roadbed crossed a ravine or branch at a point below a lot which was owned by the plaintiff; that the defendant had constructed a culvert or drain under its roadbed which was insufficient to carry off the water of the branch in times of rain, and by reason of such defective and insufficient culvert the waters of said branch were frequently ponded on the plaintiff's lot, causing great damage to the same; that the culvert and roadbed were built some 40 years ago, but had only caused substantial damage to the plaintiff's lot within the last 4 or 5 years. The defendant denied that the plaintiff owned the lot or that this was an insufficient structure. It also denied the damages, pleaded the statute of limitations, and offered evidence tending to sustain its answer. There were four issues submitted: (1) On the ownership of of the lot; (2) as to the alleged negligence of the defendant; (3) on the damage done; and (4) on the statute. Under the charge of the court, the jury answered the first three issues in favor of the plaintiff, and in response to the fourth issue found that the plaintiff's cause of action was barred by the statute of limitations. There was judgment for the defendant, and the plaintiff excepted and appealed.

Redwine & Stack, for appellant. John D. Shaw and Adams, Jerome & Armfield, for appellee.

HOKE, J. (after stating the case). The only exception presented for our consideration was for alleged error in determination of the fourth issue. On that issue the court charged the jury as follows: "Is the plaintiff's action barred by the statute of limitations? Your inquiry would be this: When did the substantial injury start, if the lot was injured? This action was instituted September 6, 1904. The question now is, when did the substantial injury begin? This action began in 1904, and if this injury began more than five years before that, don't make any difference who resided there, the plaintiff or some one else, and this injury has existed for that length of time; that is, if the substantial injury to this property began prior to September 1, 1899—then you would answer the first issue 'Yes.' If you should find that it was commenced after that time, you would answer 'No'—that it was not barred. When did the substantial injury begin? If prior to September, 1899, you should answer 'Yes;' if since then, you should answer 'No.'" This we think a correct charge, in accordance with the statute law governing cases of this character and the decisions of the court. Pub. Acts 1895, p. 297, c. 224; Beach v. Railroad, 120 N. C. 502, 26 S. E. 703; Lassiter v. Railroad, 126 N. C. 509, 36 S. E. 48.

The plaintiff does not seriously argue that the law was incorrectly stated by the judge below as an abstract proposition, but contends that there was no testimony before the court of any substantial injury done to the land prior to the five years next before the bringing of the suit, and that the judge should have so told the jury. But the case on appeal does not sustain this position. The evidence was to the effect that the roadbed and culvert were built more than 40 years ago, and both the plaintiff and his witness, S. A. Robinson, tendered by the plaintiff and examined by the defendant, testified that the water was ponded on this lot, in a manner substantially similar to that now complained of, as much as 10 or 15 years ago. True, the plaintiff's testimony was to the effect that the ponding had increased of late, owing to certain changes in the grading and drains of the town of Monroe, by which the flow of the surface water into this branch had been accelerated. Under the charge of the court, however, the jury have determined that substantial injury of the kind now complained of was done to the plaintiff's property from this very structure more than five years next before action brought, and has existed continuously since. As we have seen, there was evidence to support the verdict, and on such finding we are clearly of opinion that the plaintiff's cause of action is barred by the statute.

No error.

(139 N. C. 374)

PERRY v. FARMERS' MUT. FIRE INS. ASS'N et al.

(Supreme Court of North Carolina. Oct. 24, 1905.)

INSURANCE—MUTUAL FIRE INSURANCE—LOSS—FAILURE TO PAY—ENFORCEMENT.

A contract of insurance was made with a mutual fire insurance association through a branch. The by-laws of the association made it the duty of the president of any branch to sign policies issued through it and order all assessments. The insured sustained a loss and recovered judgment. Thereafter the officers of the branch attempted to dissolve it, and form a new association, the holders of policies in the branch being permitted to surrender them and take out new policies in the new corporation; and the officers also paid salaries to themselves and a claim which had no preference over insured's judgment. *Held*, that the insured could not hold the officers of the branch personally liable, either on the ground of the making of the payments, as he had no lien thereon, or because of the illegal attempt of the officers to dissolve the branch, but could, by motion in the original cause, obtain an order directing the making of an assessment to pay the judgment as provided by the charter and by-laws.

Appeal from Superior Court, Union County; Ward, Judge.

Action by T. J. Perry against the Farmers' Mutual Fire Insurance Association and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Plaintiff recovered judgment in the superior court of Union county against the Farmers' Mutual Fire Insurance Association upon a policy issued by said corporation, "by and through the Union and Stanley Branch." The judgment was affirmed by this court at the February term, 1903. 132 N. C. 283, 43 S. E. 837. It appearing from the record in that cause that the Union and Stanley Branch had ceased to exist, and that its liabilities had been assumed by the Union Branch, judgment was directed to be entered that the amount to be paid by assessments upon the members of that branch, which was done at the next succeeding term of the court. The judgment not having been paid, plaintiff instituted the present action against the corporation, the Farmers' Mutual Fire Insurance Association, and W. H. Phifer and James McNeely. In the complaint it is alleged, in addition to the foregoing facts, that the defendant Phifer is president and McNeely is secretary and treasurer of said Union County Branch; that by the provisions of the charter of the defendant, the terms of the policy, and the judgment thereon, it was the duty of the president of the Union County Branch of said corporation to levy an assessment upon all the members of said branch sufficient to pay the said judgment; that demand was made therefor and refused; that since the rendition of said judgment the said branch, through its officers, have paid on account of claims against it an amount more than sufficient to pay the same; that more than $100 have been paid to the defendants the president and the secretary and treasurer on account of salaries and commissions, and $223 paid to B. D. Austin on a claim which had no preference over the plaintiff; that since the rendition of said judgment the defendants the president and secretary, with the intent and for the purpose of preventing the plaintiff from collecting his judgment, called a meeting of the members of said corporation living in Union county and composing said Union County Branch, and attempted to dissolve said branch and to form another association, of which the defendant W. H. Phifer is president and James McNeely is secretary and treasurer; that the holders of the policies in the Union County Branch were permitted to surrender their policies therein and take out other policies in the new corporation without the payment of any fee, while new members were required to pay an entrance fee of 50 cents. The plaintiff asks that a mandamus issue commanding the defendant W. H. Phifer to levy an assessment sufficient to pay his judgment, and for a personal judgment against the defendant Phifer and McNeely. The defendant corporation filed no answer. The defendants Phifer and McNeely joined in an answer in which they say that there is a misjoinder of causes of action. They deny that there was ever organized any such branch of the defendant corporation as the Union County Branch; that, if there ever was such a branch, it was not sued by the plaintiff, nor was any judgment ever recovered by plaintiff against such branch, nor was the defendant corporation ever sued on account of any liability of such branch. They deny that any demand was made on the Union County Branch to levy an assessment to pay plaintiff's judgment, for the reason that there was never any such branch upon which to make a demand. They admit the payment of the amounts as alleged, but deny that plaintiff had any claim or lien thereon. They aver that in some litigation pending in the superior court of Union county it was adjudged that the Union and Stanley County Branch had ceased to exist and no such branch as the Union County Branch had been organized; that thereupon a new corporation was chartered and organized under the corporate name of "The Farmers' Mutual Fire Insurance Company of Union County"; that said corporation had no connection with the defendant corporation or any of its branches, and is not successor thereto. They deny that they have ever attempted to defeat the payment of plaintiff's judgment. At the close of the evidence plaintiff withdrew his demand for a mandamus against the Farmers' Mutual Fire Insurance Association of North Carolina. Defendants Phifer and McNeely moved for judgment of nonsuit, which was allowed. Plaintiff excepted and appealed.

Adams, Jerome and Armfield, for appellant. Redwine & Stack, for appellee McNeely.

CONNOR, J. (after stating the case). Several interesting questions in regard to the right of the plaintiff to enforce the payment of his judgment by mandamus directed to the defendant corporation are eliminated by his course in withdrawing any demand therefor. When the appeal in the original action was before us, it appeared that the Union and Stanley County Branch, through which the policy was issued, had separated, and that the Union County Branch had assumed the liabilities of the original branch. We are not sure that we understand what is meant by the allegation in the answer that there was never any Union County Branch of the defendant corporation. We would be unwilling to think that the officers of the defendant corporation would issue to its members a policy of insurance for which no one, either individually or corporately, was liable. If so improbable a thing was done, the persons issuing the policy and receiving plaintiff's money upon assessments would be liable for damages in another form of action. The record shows that while plaintiff's policy was in force, and after the division of the branch, assessments were levied upon and paid by the plaintiff to meet losses sustained "since the division of the Union and Stanley County

Branch." The record contains several notices to plaintiff, issuing from the "Office of W. H. Phifer, President Union County Branch of the Farmers' Mutual Fire Insurance Association of North Carolina," signed by "James McNeely, Secretary and Treasurer," and marked "Paid" by him. We presume that notwithstanding this testimony, which causes us, as it is well calculated to cause others, to suppose that some one was responsible upon contracts made and for money paid pursuant to those notices, there is some legal reason why the Union County Branch was at all times a myth, with capacity to take in, but none to pay out, money. After a second careful examination of the charter of this corporation, we are not sufficiently astute to perceive why some one, either corporate or natural, is not responsible to the plaintiff upon his contract, or for damages for inducing him to enter into it. The loss was adjusted by the duly appointed officers. His money was received, both before and after the fire, and a jury have found every controverted fact in his favor.

While it must be conceded that the organization of the defendant corporation is somewhat peculiar, we have discovered nothing in the record to cause us to change our opinion that the "Union Branch is liable to the plaintiff, and, if the defendant fails or refuses to make the assessment, the plaintiff would be entitled to a mandamus compelling it to do so. The Union Branch is not a corporation, and is not a party to this action. The remedy must be worked out through the defendant corporation." Perry v. Ins. Ass'n, 132 N. C. 283, 43 S. E. 837. The contract of insurance was with the defendant corporation "through the Union and Stanley County Branch." The by-laws put in evidence provide that "it shall be the duty of the president of any branch of this association to sign all policies issued through said branch and order all assessments after they have been properly adjusted." It cannot be that the law will permit persons to hold themselves out as officers of a corporation, make contracts, assume liabilities, receive money, etc., and avoid all responsibility by simply denying the existence of the corporation or the agency through which it professes to act. It is evident that the defendant corporation was organized for the purpose of affording persons residing in the country an opportunity to insure their property at a low rate fixed by actual losses and a small amount for expenses. It was not contemplated that the corporation should have any capital stock or surplus fund. The security of the member was to depend upon the prompt assessment upon and payment by each member of the amount necessary to pay the loss. The business was to be conducted by branches formed in the several counties; each branch being, in respect to its policies and losses, independent. This is all simple and plain, but the success of the plan is necessarily very largely dependent upon the good faith of the members and managers. It is well known that the parties are not experienced in the business of insurance or the management of corporations. The courts have sought to sustain and enforce such contracts by looking to the substance and intention, rather than by adopting a technical or strained construction. Bacon's Benefit Soc. § 178. While it is not perfectly clear how the remedy for failure to levy and collect the assessment is to be worked out, we have no doubt that an order may be formulated which will enforce the discharge of the duty imposed by the charter. Neither officers nor members of corporations can evade their plain duty to those with whom contracts are made by dissolving the organization and leaving creditors unprovided for. To permit this to be done would invite and encourage dishonesty and fraud. If the corporation has property, it is impressed with a trust for the benefit of creditors. If there are unpaid subscriptions to the stock, the courts enforce their collection and appropriation upon the same principle. Foundry Co. v. Killian, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539. We do not doubt that in mutual insurance companies, as to amounts due upon assessments already made or to be made to pay losses accrued, the same principle is applicable. It cannot be that, where all the members have enjoyed the protection which membership affords, they can, after a loss has been sustained, withdraw and refuse to pay their portion of the loss. 21 Am. & Eng. Enc. 277. It is well settled that, when several persons participate in the irregular organization of a corporation, they cannot avoid responsibility to its creditors by showing the invalidity of the organization. Foundry Co. v. Killian, supra.

The plaintiff, however, waives in this action his remedy by mandamus, and seeks to hold the defendants Phifer and McNeely liable personally. This claim is based upon two grounds: First. That they paid to themselves, as commissions and salary, $126, and to B. D. Austin $223. The plaintiff is confronted with the objection that he has no claim upon this fund. It does not clearly appear how or from what source it originated. The right of each policy holder is to have an assessment made to pay his loss. It is from this source alone that he is to be paid. This is apparent from an examination of the by-laws and the notices sent to each member, set out in the record. It therefore follows that the plaintiff had no claim upon or right to the amount paid Austin. If it was improvidently paid, the officers are liable to the corporation. Second. The plaintiff's next claim is that the defendants are liable personally, for that they procured the dissolution of the Union Branch and the formation of a new company. As we have seen, the defendants Phifer and McNeely had no power to so dissolve the Union Branch or withdraw its members from the corporation as to affect their

liability to the plaintiff. They had a right, if they saw fit, to charter and organize a new corporation, and to prescribe the terms upon which members should be admitted or policies issued. This left the legal status of the plaintiff unimpaired. We cannot preceive how any cause of action accrued to plaintiff by the formation of the new company. It does not appear that the new company took over any assets of the Union County Branch, and it expressly refused to assume any liability for plaintiff's judgment. So far as the record shows, the members of the Union Branch of the defendant company have never refused to pay plaintiff's judgment. They have never been called upon to do so by an assessment. We are of the opinion that the judgment of nonsuit was properly ordered. While we can see much practical difficulty in enforcing the payment of an assessment when made, we can see no reason why, by motion in the original cause, the plaintiff may not have an order directed to the defendant corporation to have the assessment made pursuant to its charter and by-laws. If the officers should refuse to discharge their duty, we do not doubt that power resides in the court to enforce its performance, or to appoint a receiver with directions to make and collect the assessment. If this is not so, the maxim that there is no wrong without a remedy is not true.

The judgment must be affirmed.

(139 N. C. 536)

STATE v. PARKER.

(Supreme Court of North Carolina. Oct. 24, 1905.)

1. INTOXICATING LIQUORS—WRONGFUL SALE—STATUTES—IMPLIED REPEAL.

Laws 1903, p. 749, c. 434, § 1, making it unlawful to sell "any spirituous, vinous, malt, or other intoxicating liquors or any drink containing alcohol" in Union county, was not repealed by implication by Laws 1905, p. 495, c. 497, § 13, prohibiting the sale of spirituous, vinous, or malt liquors, or "other intoxicating drinks," and repealing conflicting laws.

2. SAME—EVIDENCE—INSTRUCTIONS.

Where, in a prosecution for selling "drinks containing alcohol" in Union county, prohibited by Laws 1903, p. 749, c. 434, there was evidence that defendant sold cider 14 days old, and another variety called "chemical cider," and that the beverages sold contained alcohol and intoxicated the witnesses, such evidence justified an instruction that, though it would be insufficient to convict that the drinks sold contained a mere trace of alcohol, it was also not required that they contain a sufficient quantity to intoxicate when freely used, but they must contain such an amount as a man of ordinary sense, reason, and judgment would say that they "had alcohol in" them.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 326, 336.]

Appeal from Superior Court, Union County; Ward, Judge.

J. D. Parker was convicted of selling drinks containing alcohol in Union county, and he appeals. Affirmed.

Redwine & Stack, for appellant. The Attorney General and Adams, Jerome & Armfield, for the State.

CLARK, C. J. The defendant was indicted for selling "drinks containing alcohol," contrary to chapter 434, p. 749, Laws 1903, relating to the sale of liquor in Union county. The defendant moved in arrest of judgment on the ground that chapter 497, p. 492, Laws 1905, repeals the statute under which the defendant was convicted. The motion was properly denied. Section 1, c. 434, p. 749, Laws 1903, makes it unlawful to sell "any spirituous, vinous, malt or other intoxicating liquors or any drink containing alcohol by whatever name known or called." Section 13, c. 497, p. 495, Laws 1905, prohibits the sale of spirituous, vinous, or malt liquors, or other intoxicating drinks, and repeals all previous statutes in conflict with it. The defendant was indicted, not for selling intoxicating drinks, but for selling drinks containing alcohol, covered by the act of 1903, which, as far as drinks of this character are concerned, was not repealed by the law of 1905. There is no conflict between the two provisions. They can both stand, for they supplement each other. Not being "irreconcilably inconsistent," the later statute does not repeal the other by implication. State v. Biggers, 108 N. C. 760, 12 S. E. 1024; State v. Massey, 103 N. C. 356, 9 S. E. 632, 4 L. R. A. 308; State v. Witter, 107 N. C. 792, 12 S. E. 328; Winslow v. Morton, 118 N. C. 491, 492, 24 S. E. 417, and cases there cited.

The defendant asked the court to instruct the jury (1) not to consider the evidence in regard to apple cider; (2) that the jury cannot convict, unless satisfied beyond a reasonable doubt that the defendant sold the prosecuting witness intoxicating liquors or whisky drinks, other than apple cider, that would intoxicate. The court refused to so charge, and told the jury that the indictment was under the act of 1903, for selling "any drink containing alcohol by whatever name known or called," and told the jury that the state must satisfy them beyond a reasonable doubt that the defendant sold Whitley a drink containing alcohol; that "one drop, nor two drops, nor three drops, nor a mere trace, would not be sufficient to say that it contained alcohol; nor, on the other hand, would it be necessary for the drink to contain a sufficient quantity to make one drunk when freely used. The latter would be the test if the defendant were indicted for selling intoxicating liquors. That is not the charge in this case. Here he is charged with selling drinks that contained alcohol, under the section read to you; but the drink, when sold under this

section, must contain some appreciable amount of alcohol—such an amount as a man of ordinary sense, reason, and judgment would say that it had alcohol in it." There was evidence that the defendant sold cider 14 days old, and another variety called "chemical cider," and there was evidence that the beverage sold contained alcohol. Indeed, the witness said it made him drunk, and other witnesses said the same beverage intoxicated them. The defendant cannot complain of the charge. "When the liquid, by common knowledge and observation, is intoxicating, the court may so declare; but, if it is doubtful whether or not it be so, then the question of fact is raised for the jury." State v. Scott, 116 N. C. 1015, 21 S. E. 194; State v. Giersch, 98 N. C. 720, 4 S. E. 193. Upon the same reasoning the court here left it to the jury to find whether the "drinks" sold "contained any alcohol." Commonwealth v. Reyburg, 122 Pa. 304, 16 Atl. 351, 2 L. R. A. 415; Topeka v. Zufall, 40 Kan. 47, 19 Pac. 359, 1 L. R. A. 387; State v. Crawley, 75 Miss. 922, 23 South. 625.

No error.

(139 N. C. 427)

CUNNINGHAM & HINSHAW v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Oct. 31, 1905.)

1. INSURANCE—PAYMENT OF LOSS—EVIDENCE.
In action on insurance policy, a finding that the insurance had been paid in full by the insurers *held* warranted by the evidence.

2. SAME—SUBROGATION OF INSURER.
Where an insurer in a fire policy pays the loss, he is subrogated to the rights of the insured against the one responsible for the fire.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1506, 1507.]

3. SAME—ACTION BY INSURED.
Where the insurer in a fire policy pays the loss, so that he becomes subrogated to the rights of the insured as against the one causing the loss, the insurer may sue, and the insured may not maintain an action against, the one responsible for the loss.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1515, 1516.]

Appeal from Superior Court, Wake County; Neal, Judge.

Action by Cunningham & Hinshaw against the Seaboard Air Line Railway. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

This action was instituted by the plaintiffs, residents of Liverpool, Eng., for the recovery of the value of 500 bales of cotton alleged to have been burned by the negligence of the defendant. Two causes of action were set out in the complaint, but at the trial the plaintiffs withdrew all claim by reason of the first cause. The defendant denied that plaintiffs were the owners of the cotton or that the same was burned by its negligence. For a further defense the defendant alleged that the cotton was covered by insurance policies issued by the Standard Marine Insurance Company, Limited, and the Thames & Mersey Marine Insurance Company, and that the insurance companies had paid to the plaintiffs, on account of said policies, the full value of the cotton; that by reason of such payment the companies were subrogated to any and all claim, right, or demand which plaintiffs had against it by reason of the destruction of said cotton; that the insurance companies were the real parties in interest, and were necessary parties to this action. Thereupon the insurance companies by leave of the court came in, made themselves parties plaintiff, and filed their complaint denying that they were subrogated to the rights of the plaintiffs, saying, however, that if the court should be of the contrary opinion they adopted the complaint. Defendant duly answered the complaint of said insurance companies. At the conclusion of the evidence, the insurance companies voluntarily took judgment of nonsuit. His honor submitted to the jury the following issues: "(1) Were the plaintiffs, Cunningham & Hinshaw, the owners of the cotton sued for at the time of the fire? Ans. Yes. (2) Was the cotton covered by policies of insurance, and has such insurance been paid? Ans. Yes. (3) Did such insurance inure to the benefit of the defendant, and, if so, in what sum? Jury need not answer this issue. (4) Was said cotton burned by the negligence of the defendant as alleged in the complaint? Ans. No. (5) What was the value of the cotton at the time and place of the fire?" Judgment was entered upon the verdict, and plaintiffs appealed.

Armistead Jones & Son and J. N. Holding, for appellants. T. B. Womack and Day & Bell, for appellee.

CONNOR, J. (after stating the case). The first issue having been found for the plaintiffs, we are brought to a consideration of the plaintiff's exceptions to his honor's rulings upon questions pertaining to the second issue. The plaintiffs tendered certain issues, which his honor declined to submit, and they excepted. We think that the issues submitted fairly presented to the jury the controverted questions of fact. Criticism is made of the form of the second issue; but, as the jury were practically instructed how to answer it, the form becomes immaterial.

The defendants took the depositions of certain persons, including one of the plaintiffs, in Liverpool. Many objections were made to the questions and answers contained in the depositions, the validity of which are dependent upon the conclusion to which we are brought in regard to the materiality of the testimony. The controversy was directed to the proposition, maintained by the defendant, that the cotton was insured and that the loss had been paid in full before this action was commenced; that by reason of such payment the insurers became subrogated to the right of action, if any, which had accrued to the plaintiffs; and that, under section 177 of

the Code, they were the real parties in interest and could alone maintain the action. The depositions tended to show that C. T. Bowring & Co., Limited, of London, insurance brokers, took out for the plaintiffs policies of insurance covering the cotton in controversy in the Standard Marine and Thames & Mersey Insurance Companies; that upon the destruction of the cotton the companies were duly notified of and adjusted the loss at the full value, plus 10 per cent. for advance in price, as per terms of the policy. There is no serious controversy in respect to these facts. The plaintiffs denied that the loss had been paid, insisting that the amount received by them from the companies was an advance or loan, to be repaid from the amount collected from the carrier.

It appears that C. T. Bowring & Co., the brokers, gave to the plaintiffs a writing "on the inside, but not attached to the policies," in the following words: "Season of 1902–1903. C. T. Bowring & Co., Ltd., London. Sept. 9, 1902. Mess. Cunningham & Hinshaw: In consideration of your acceptance of our policy containing the stipulation, 'This policy does not cover any cotton in the custody or control of any land carrier or other bailee,' we agree that, in event of loss on such cotton, we will advance to you our proportion of the amount of such loss, pending collection from the carrier or other bailee, as a loan without interest, the repayment thereof to be conditional upon, and only to the extent of, the net amount recovered by you from the carrier; and we further agree that we will pay and assume all costs and expenses incurred by you in connection with such recovery." On November 6, 1902, Bowring & Co. notified the insurance companies of the loss. On November 7, 1902, the company sent to Bowring & Co. the following: "Liverpool, 7 Nov., 1902. Messrs. C. T. Bowring & Co., Ltd., London. Cr., with the Standard Marine Insurance Co. Ltd. By advance against 500 bales cotton destroyed by fire at Hamlet, N. C., pending collection of loss from carrier, £2,357.10, cheque herewith." On November 8, 1902, Bowring & Co. delivered to the Standard Fire Insurance Company the following receipt: "London, 8 Nov. 1902. Received from the Standard Marine Insurance Company * * * the sum of two thousand three hundred and fifty-seven pounds, thirteen shillings, and eight pence, being P. C. of mechanician 8 3–8 and claim account, fire at Hamlet N. C., as per credit note No. 29,216–29,218, £2,357.10.8. T. C. Bowring & Co., Ltd." The same transactions were had with the Thames & Mersey Marine Ins. Co. The total amount of the loss, plus 10 per cent. was £4,715. On November 11, 1902, the plaintiffs executed to Bowring & Co. the following receipt: "Liverpool, Nov. 11, 1902. Received from Messrs. C. T. Bowring & Co. * * * the sum of four thousand seven hundred and fifteen pounds, amount of claim five hundred bales cotton burnt at compress. Cunningham & Hinshaw, per Alfred Collins." On the same day the plaintiffs sent Bowring & Co. the following letter: "Dear Sirs: We are in receipt of your credit note and cheque in settlement of our claim for total loss of 500 bales of cotton burnt at Hamlet, N. C., and now enclose our receipt. We much appreciate the promptitude with which the underwriters have settled the claim. We sent the bill of lading by last Saturday's mail to our senior in New Orleans to assist in recovering from the carriers, and we hope the underwriters will be recouped a substantial portion of their loss. Yours faithfully, Cunningham & Hinshaw."

The only parol evidence bearing upon the construction of the writing was that of W. E. Hargraves, one of the members of the firm of Bowring & Co., who described the manner in which the policies were procured and the loss paid. W. A. Williams, who was underwriter to the Standard Fire Insurance Company, testified regarding the issuance of the policy, saying that the entire transaction was with Bowring & Co., and that the money was paid to them as an advance on the loss. S. T. Cross occupied the same relation to the Thames & Mersey Company. Cunningham, one of the plaintiffs, testified that the plaintiffs were suing jointly with the insurance companies and were the real parties in interest; that they had a loan from the insurance companies; that he never saw the policies of insurance or the contract between the insurance companies and Bowring—only the policies between themselves and Bowring. We have examined this testimony with care. His honor instructed the jury that "upon all of the evidence, if the jury shall find it to be true, the cotton was insured, and the plaintiffs had been paid in full therefor, and the jury will answer the second issue 'Yes.'" To this instruction plaintiffs excepted. It will be observed that the plaintiffs' second cause of action, upon which they are demanding judgment, is not against the defendant as a common carrier, but for that, while the cotton was in a cotton compress building belonging to Chas. E. Johnson & Co., at Hamlet, awaiting compression and shipment, it was burned by the negligence of the defendant. Considered from this point of view, the contract in regard to making an advance, which seems to have been made by Bowring & Co., and to which the insurance companies are not parties, has no application. The agreement contained in that writing is to make an advance "pending collection from the carrier or other bailee." Here there is no loss sustained while the property is in the possession of the carrier, nor is the claim for any loss occurring from any default of the bailee, C. E. Johnson & Co., but against the defendant as an independent wrongdoer. The money could not well be said to have been paid pursuant to an agreement having no application to the manner of loss. We do not perceive any

evidence of a loan by the insurance companies to the plaintiffs.

Without discussing the construction of the several writings between Bowring & Co. and the insurance companies, it is sufficient to say that the receipt executed by the plaintiffs to Bowring & Co. on November 11, 1902, for £4,715, "amount of claim of 500 bales cotton burnt at compress," negatives any suggestion that Bowring & Co. were making a loan or advancement. This is further negatived by the terms of the letter of same date from plaintiffs to Bowring & Co., acknowledging receipt of check "in settlement of our claim for total loss of 500 bales of cotton," etc. They also express their appreciation of the "promptitude with which the underwriters have settled the claim," and state that they have sent the bill of lading to their senior in New Orleans to assist in recovering from the carriers, expressing the hope that "the underwriters will be recouped a substantial portion of their loss." After a careful examination of the evidence, we concur with his honor that the plaintiffs were paid in full by the insurers. There are authorities sustaining the claim of the insured to recover of the carrier or wrongdoer for destruction of property when it is insured; the insurer having made a loan pending the litigation. We see no reason why this may not be done. The wrongdoer is primarily liable. In a case much like this, the court held that the transaction constituted a payment. Lancaster Mills v. Merchant, etc. (Tenn.) 14 S. W. 317, 24 Am. St. Rep. 586, in which a strong opinion is written by Lurton, J.

The serious question in the appeal is thus presented: "What were the rights of the insurers upon payment of the loss, and how is it to be worked out?" This court, in Insurance Company v. Railroad, 132 N. C. 75, 43 S. E. 548, held that, when the insurer had paid the loss, it was subrogated to the rights of the insured, and could, under our Code, maintain the action against the wrongdoer. It is said, however, that this decision is based upon section 43, c. 54, p. 163, Laws 1899, by which the standard form of insurance policy is prescribed, and it is provided that the insurer shall, upon the payment of the loss, be subrogated, etc., and that the insured shall make an assignment to the company; that the statute writes into the policy this provision, and that these policies are not in the form prescribed and contain no such provision. We think that the right of the insurer to be subrogated to the rights of the insured is independent of our statute. It has been recognized and enforced by many courts long before the passage of the statute, which was merely declaratory of the law. Mr. Sheldon, in his work on Subrogation (section 230), says: "The insurers against fire of property which has been destroyed by fire communicated from a locomotive engine will, upon payment of the loss, be subrogated to the extent of their payments to the remedies of the insured, or the owners of the property insured and destroyed, against the railroad company for the loss." Chief Justice Shaw, in Hart v. Railroad, 13 Metc. (54 Mass.) 99, 46 Am. Dec. 719, with his usual force and clearness says: "Now, when the owner, who prima facie stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss, for which he had a claim of indemnity; and he can equitably receive but one satisfaction. So that, if the assured first applies to the railroad company and receives the damages provided, it dimishes his loss pro tanto, by a deduction from and growing out of a legal provision attached to and intrinsic in the subject insured. The liability of the railroad company is in legal effect first and principal, and that of the insurer secondary; not in order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases—to the railroad company by his right at law, or to the insurance company in virtue of his contract. But if he first applies to the railroad company, who pay him, he thereby diminishes his loss by the application of a sum arising out of the subject of the insurance, to wit, the building insured, and his claim is for the balance. And it follows as a necessary consequence that, if he first applies to the insurer and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and, if he fails to do so, the cestui que trust may sue in the name of the trustee, and his equitable interest will be protected." To the same effect is Monmouth Ins. Co. v. Hutchinson, 21 N. J. Eq. 107. "The payment of a total loss by the insurer works an equitable assignment to him of the property and all the remedies which the assured had against the carrier for the recovery of its value." Mobile & Mont. Railroad v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527. This right is not dependent upon, nor does it grow out of, any privity of contract. It is a doctrine of equity, by which one who is secondarily liable upon a contract pays the debt or discharges the obligation, and is substituted to all of the rights of the creditor or person holding the claim against the party primarily

liable. It is based upon equitable conceptions of natural justice. It is not dependent upon an actual assignment of the debt or obligation. "The rights acquired by subrogation do not depend upon a written assignment of the claim. Upon payment of the insurer, the insurance company is regarded as an assignee in equity." Clement on Fire Insurance, 368, citing Insurance Co. v. Railroad, supra, and many other cases.

Prior to the adoption of our Code of Procedure, the action to enforce the claim of the insured could be prosecuted in a court of law only in the name of the insured, to the use or for the benefit of the insurer. The insurer has the same right or cause of action which the insured had, and his recovery is limited to the rights of the insured. He could not prosecute an independent cause of action for the wrong done, but only that which accrued to the insured. This right is not based upon any supposed consent of the insured to permit him to sue in his name. It is an absolute right, created and conferred upon the payment of the loss. It is held that if, after knowledge of the payment of the loss by the insurer, the wrongdoer pay the damages sustained by the destruction of the property, such payment will not bar the action of the insurer to recover upon his subrogated right (Fire Ins. Co. v. Hutchinson Co., supra); the chancellor saying: "If the railroad company had not paid H. his damages, or had paid them to him knowing that he had received the amount insured from the complainants, they are liable to the complainants in a suit at law, which they have the right to bring in the name of H., without his consent, to repay them the damage to the amount of the sum paid by them, and that a release by H. would be no defense to such suit." It will be observed that in many of the cases cited the suits are brought in the name of the insured, but it will be noted that they are to the use or for the benefit of the insurer. In Hart v. Railroad, supra, "the insurance company sues in the name of the plaintiff," etc. In U. S. v. Tobacco Co., 166 U. S. 468, 17 Sup. Ct. 619, 41 L. Ed. 1081, suit was brought to the use of the insured. We think the authorities abundantly sustain the proposition that the right of the insured upon payment of the loss is perfect and absolute, and that he is the real party in interest.

It would seem to follow that, under section 177 of our Code, the insured must bring the action. While it is true that section 177 does not authorize the assignment of a thing in action not arising out of contract, it has been held that where a cause of action is assignable, either at law or in equity, the assignee is the real party in interest, and that the equitable owner of any species of property or right of action must prosecute in his own name. In Hart v. Railroad, supra, it is said that the right to sue is in the nature of an equitable assignment, which authorizes the assignee to sue in the name of the assignor for his own benefit, except under the reformed Codes of Procedure, which permit any action to be brought in the name of the real party in interest. Sheldon on Subrogation, § 230; Clement on Fire Insurance, 369. "The right of the insurance company is derived from the insured alone, and can be enforced in his right only. At common law it must be asserted in the name of the insured, or, under the modern Codes of Practice, it may be asserted by the insurance company in its own name when it has paid the full value of the property insured." Id.

We do not think that the right to sue in its own name, as sustained by this court in Insurance Co. v. Railroad, supra, is dependent upon the act of 1899, nor do we think the language of the Chief Justice open to that construction. For some, we presume, good reason, the insurance companies voluntarily retired from this litigation, thereby expressly repudiating the suggestion that it was being prosecuted for their benefit. So far as this record shows, this action is prosecuted by the plaintiffs for the purpose of recovering the value of the cotton burned for their own benefit. It may be that, if they were permitted to recover, the insurers would be entitled to sue them for the amount. However this may be, it is clear that the insurers may also, and notwithstanding the result of this action, sue the defendant upon their subrogated right. It is an elementary truth that a defendant should not be subjected to two actions by different parties for the same wrong. The case of Hammond v. Schiff, 100 N. C. 161, 6 S. E. 753, does not present the question decided in this case, nor is that decision in conflict with what is here decided. The wrongdoer, being primarily liable, cannot reduce the amount of the plaintiff's recovery by showing that he is insured; nor can the insurance company, in an action upon the policy, reduce the recovery by showing that the plaintiff has a cause of action against the wrongdoer. In the last case the insurer must, in discharge of his contract, pay the loss and obtain indemnity by suing, formerly in the name of the insured, now under our Code in his own name, the wrongdoer. As said by Shaw, C. J., if the insured has sued the wrongdoer and recovered the whole or a portion of the loss, such recovery will inure to the benefit of the insurer, who, as between the wrongdoer and himself, is primarily liable. In neither case, and by no method of procedure, will the injured party be allowed to recover double satisfaction. His right as against either is to be compensated for his loss. To one he looks by way of damages for the tort; to the other, by way of indemnity upon his contract.

To the suggestion that, if the plaintiffs are not permitted to recover, the wrongdoer is not required to pay damage sustained by his wrongful act, it is sufficient to say that he is liable to only one party—primarily to

the injured party, and by substitution to the party who has indemnified the injured party. If the insurance companies do not choose to prosecute their right, that is no reason why the plaintiffs shall be permitted to recover double satisfaction or to maintain a cause of action which, by receipt of the money from the insurance company, passed out of them into the company. For reasons based upon the distribution of remedial powers between two jurisdictions, the cause of action which vested in the insurer was formerly prosecuted in the name of the insured. Now, when all such distinctions are abolished, and all rights are enforced and wrongs redressed in one form of action by the real party in interest, the insurer alone may sue, or, to cite the language of the Chief Justice in Insurance Co. v. Railroad, supra: "Whether the insured made an actual assignment or not is immaterial, as the subrogation was complete upon the payment, and the sole right of recovery passed to the company." As showing the opinion prevailing in the profession, we note that other suits, based upon payment of loss by an insurance company for property burned, are brought in the name of the company. Insurance Co. v. Railroad, 138 N. C. 42, 50 S. E. 452.

Being of the opinion that the plaintiffs, not being the real parties in interest, cannot maintain the action, we do not deem it necessary to discuss the exceptions to his honor's rulings pertaining to the fourth issue. The judgment must be affirmed.

Affirmed.

MEMORANDUM DECISIONS.

ALEXANDER v. RAILROAD CO. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Alexander against the Railroad Company. Burwell & Cansler, for defendant.

PER CURIAM. Affirmed.

BOST v. COTTON MILLS. (Supreme Court of North Carolina. February Term. 1905.) Action by one Bost against the Cotton Mills. Self & Whitener, for plaintiff. Feimester & Cabell, for defendant.

PER CURIAM. Affirmed.

BOURNE v. ATLANTIC COAST LINE R. CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Bourne against the Atlantic Coast Line Railroad Company. Mr. Gilliam, for plaintiff. Mr. Bridgers, for defendant.

PER CURIAM. The court being evenly divided (CONNOR, J., not sitting), the judgment is affirmed.

BRANCH v. MARYLAND CASUALTY CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Branch against the Maryland Casualty Company. Mr. Harris, for plaintiff. Mr. Womack, for defendant.

PER CURIAM. Affirmed.

BRICKELL v. CAMP MFG. CO. (two cases). (Supreme Court of North Carolina. February Term, 1905.) Action by one Brickell against the Camp Manufacturing Company. Daniel & Green and Mr. Shepherd, for appellee. Dismissed under rule 17 (39 S. E. vi).

BRIDGES v. SEABOARD AIR LINE RY. CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Bridges against the Seaboard Air Line Railway Company. Morrow & McRorie, for appellant. Shaw, Rayburn & Shepherd, for appellee.

PER CURIAM. Affirmed.

BROOKS MFG. CO. v. CITY OF GREENSBORO. (Supreme Court of North Carolina. February Term, 1905.) Action by the Brooks Manufacturing Company against the city of Greensboro. Scott & Barringer, for plaintiff. Scales, Taylor & Scales, for defendant.

PER CURIAM. Affirmed.

HOKE, J., dissents.

BROWN v. ATLANTIC COAST LINE R. CO. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Brown against the Atlantic Coast Line Railroad Company. Peebles & Harris, for plaintiff. Day & Bell, for defendant.

PER CURIAM. Affirmed.

CASE MFG. CO. v. MOORE. (Supreme Court of North Carolina. February Term, 1905.) Action by the Case Manufacturing Company against one Moore. Mr. Bower, for plaintiff. Mr. Wakefield, for defendant.

PER CURIAM. Affirmed.

CLARKE v. RANKIN. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Clarke against one Rankin. Locke Craig, for plaintiff. F. A. Sondley, for defendant.

PER CURIAM. Affirmed.

CLEGG v. SOUTHERN RY. CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Clegg against the Southern Railway Company. Armfield & Turner, for plaintiff. Mr. Caldwell, for defendant.

PER CURIAM. Affirmed.

CLICK v. LOCOMOBILE CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Click against the Locomobile Company. Manly & Swink, for plaintiff. Dismissed under rule 17 (39 S. E. vi).

COBLE v. HUFFINES. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Coble against one Huffines. A. M. Scales, for plaintiff. A. L. Brooks, for defendant.

PER CURIAM. Defendant's appeal dismissed for failure to file brief.

COOPER v. LUMBER CO. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Cooper against the Lumber Company. Russell & Gore, for plaintiff. E. K. Bryan, for defendant.

PER CURIAM. Affirmed.

COWAN v. ROBERTS. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Cowan against one Roberts. J. C. Martin, for plaintiff. W. W. Zachary, for defendant.

PER CURIAM. Affirmed.

CROWELL v. INSURANCE CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Crowell against the Insurance Company. Mr. Stewart, for plaintiff. Clarkson & Duls, for defendant.

PER CURIAM. Affirmed.

CURTIS v. ASHEVILLE ELECTRIC CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Curtis against the Asheville Electric Company. Mr. Merrimon, for plaintiff. Sondley & Martin, for defendant.

PER CURIAM. Affirmed.

CURTIS v. SOUTHERN RY. CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Curtis against the Southern Railway Company. Mr. Franklin, for plaintiff. Mr. Moore, for defendant.

PER CURIAM. Affirmed.

DOSS v. HUTSON. (Supreme Court of North Carolina. February Term, 1905.) Action by one Doss against one Hutson. Mr. Carter, for plaintiff. Mr. Holcombe, for defendant.

PER CURIAM. Affirmed.

DREWRY v. HARRISON. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Drewry against one Harrison. Day & Bell, for plaintiff. W. E. Daniel, for defendant.

PER CURIAM. Affirmed.

In re DREWRY'S ENTRIES. (Supreme Court of North Carolina. Spring Term, 1905.) In the matter of entries of one Drewry. J. T. Perkins, for appellant. A. C. Avery, for appellee.

PER CURIAM. Petition to rehear dismissed. See 40 S. E. 208; 48 S. E. 543.

EDLEY v. SOUTHERN RY. CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Edley against the Southern Railway Company. Mr. Ewbank, for plaintiff. Moore & Rollins, for defendant.

PER CURIAM. Affirmed.

EDWARDS v. PIPER. (Supreme Court of North Carolina. February Term, 1905.) Action by one Edwards against one Piper. F. A. Woodard, for plaintiff. Connor & Connor, for defendant.

PER CURIAM. The court being evenly divided (CONNOR, J., not sitting), the judgment is affirmed.

EZZELL v. ROBINSON. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Ezzell against one Robinson. Adams & Jerome, for plaintiff. Redwine & Stack, for defendant.

PER CURIAM. Affirmed.

In re FOWLER. (Supreme Court of North Carolina. Spring Term, 1905.) In the matter of one Fowler. U. L. Spence, for petitioner. Murchison & Johnson, for defendant.

PER CURIAM. Affirmed.

FOX v. SOUTHERN BELL TELEPHONE CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Fox against the Southern Bell Telephone Company. Mr. Raper, for plaintiff. Mr. Robbins, for defendant.

PER CURIAM. Affirmed.

HOKE, J., dissents.

GERALD v. RAILROAD CO. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Gerald against the Railroad Company. Rodman & Rodman, for plaintiff. Small & McLean, for defendant.

PER CURIAM. Affirmed.

GINNINGS v. WILKESBORO HOTEL CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Ginnings against Wilkesboro Hotel Co. Mr. Barber, for defendant. Dismissed for failure to file brief.

GREENVILLE v. FLEMING. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Greenville against one Fleming. The Attorney General, for the State.

PER CURIAM. Dismissed.

GRIFFIN v. SEABOARD AIR LINE RY. CO. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Griffin against the Seaboard Air Line Railway Company. Robinson & Caudle, for plaintiff. J. D. Shaw, for defendant.

PER CURIAM. Affirmed.

MONTGOMERY, J., dissents.

HALL v. STANTON TANNING CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Hall against the Stanton Tanning Company. Mr. Finley, for plaintiff. Mr. Barber, for defendant.

PER CURIAM. Affirmed.

HILTON v. COTTON MILLS. (Supreme Court of North Carolina. February Term, 1905.) Action by one Hilton against the Cotton Mills. Self & Whitener, for plaintiff. Appeal dismissed by consent.

HOSIERY CO. v. RAILROAD CO. (Supreme Court of North Carolina. Spring Term, 1905.) Action by the Hosiery Company against the Railroad Company. Battle & Mordecai, for plaintiff. Day & Bell, for defendant.

PER CURIAM. Affirmed.

IDDINGS v. TELEGRAPH CO. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Iddings against the Telegraph Company. L. C. Caldwell, for plaintiff. Armfield & Turner, for defendant.

PER CURIAM. Affirmed.

CONNOR, J., dissenting.

JACKSON v. ATLANTIC COAST LINE R. CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Jackson against the Atlantic Coast Line Railroad Company. McIntyre & Lawrence, for appellee. Dismissed under rule 17 (39 S. E. vi).

KENNEDY v. SEABOARD AIR LINE RY. CO. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Kennedy against the Seaboard Air Line Railway Company. Redwine & Stack, for plaintiff. J. D. Shaw, for defendant.

PER CURIAM. Affirmed.

KERNER v. SOUTHERN EXPRESS CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Kerner against the Southern Express Company, Mr. Patterson, for plaintiff. Mr. Watson, for defendant.

PER CURIAM. Affirmed.

KING v. KERNER. (Supreme Court of North Carolina. February Term, 1905.) Action by one King against one Kerner. Manly & Eller, for plaintiff.

PER CURIAM. Dismissed under rule 17 (39 S. E. vi).

LAMB v. YOUNG. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Lamb against one Young. Busbee & Busbee, for plaintiff. J. C. Clifford, for defendant.

PER CURIAM. Defendant's appeal dismissed for failure to print record.

LASSITER v. NORFOLK & C. R. CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Lassiter against the Norfolk & Carolina Railroad Company. Mason, Daniel, Peebles & Harris, for plaintiff. Elliott, Day, Bell & Allen, for defendant. For former opinion, see 48 S. E. 642.

PER CURIAM. Petition to rehear dismissed.

LEACH v. WESTERN UNION TELEGRAPH CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Leach against the Western Union Telegraph Company. Dillard & Bell, for plaintiff. Mr. Whitson and F. H. Busbee & Son, for defendant.

PER CURIAM. Affirmed.

LEMMOND v. McCAIN. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Lemmond against one McCain. Adams, Jerome & Armfield, for plaintiff. Redwine & Stack, for defendant.

PER CURIAM. Affirmed.

McBRAYER v. WITHROW. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one McBrayer against one Withrow. S. Gallert, for plaintiff. McBrayer & Justice, for defendant.

PER CURIAM. Affirmed.

McGINN v. BANKERS' UNION. (Supreme Court of North Carolina. February Term, 1905.) Action by one McGinn against the Bankers' Union. Mr. Mangum, for plaintiff. Mr. Mason, for defendant.

PER CURIAM. Affirmed.

McGIRT v. SOUTHERN RY. CO (Supreme Court of North Carolina. Spring Term, 1905.) Action by one McGirt against the Southern Railway Company. R. C. Strudwick, for plaintiff. King & Kimball, for defendant.

PER CURIAM. Affirmed.

McLEAN v. BULLARD. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one McLean against one Bullard. H. H. McLendon, for plaintiff. J. A. Lockhart, for defendant.

PER CURIAM. Affirmed.

MARSHALL v. CORBETT. (Supreme Court of North Carolina. February Term, 1905.) Action by one Marshall against one Corbett. Mr. Stevens, for plaintiff. Dismissed for failure to print record.

MORROW v. RAILROAD CO. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Morrow against the Railroad Company. A. G. Mangum, for plaintiff. G. F. Bason, for defendant.

PER CURIAM. Affirmed.

DOUGLAS, J., dissents.

NORTON v. SOUTHERN RY. CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Norton against the Southern Railway Company. Mr. Avery, for plaintiff. Mr. Ervin, for defendant.

PER CURIAM. Affirmed.

PEARSALL v. WOOTEN. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Pearsall against one Wooten. Avery & Ervin, for plaintiff. Avery & Avery, for defendant.

PER CURIAM. Affirmed.

PENLAND v. INGLE. (Supreme Court of North Carolina. February Term, 1905.) Action by one Penland against one Ingle. Davidson, Bourne & Parker, for plaintiff. Mr. Carter, for defendant.

PER CURIAM. Appeal dismissed. See opinion in defendant's appeal. 50 S. E. 850.

PINCHBACK v. BESSEMER CITY MIN. CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Pinchback against the Bessemer City Mining Company. Osborne, Maxwell & Keerans, for plaintiff. Mason, Burwell & Cansler, for defendant. Petition dismissed.

PORTER v. ARMSTRONG. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Porter against one Armstrong. J. D. Bellamy, for plaintiff. E. K. Bryan, for defendant.

PER CURIAM. Petition to rehear dismissed.

WALKER, J., dissenting.

RAYNOR v. LIDDELL CO. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Raynor against the Liddell Company. A. B. Justice, for plaintiff. C. W. Tillett, for defendant.

PER CURIAM. Affirmed.

REES v. CAROLINA SPOKE CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Rees against the Carolina Spoke Company. Mr. Strudwick, for plaintiff. Mr. Stedman, for defendant.

PER CURIAM. Affirmed.

RICHARDSON v. AMERICAN LINSEED OIL CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Richardson against the American Linseed Oil Company. Mr. Rodman, for plaintiff. Small & McLean, for defendant.

PER CURIAM. Affirmed.

ROBERTS v. ROBERTS. (Supreme Court of North Carolina. February Term, 1905.) Action by one Roberts against one Roberts. Mr. Bower, for plaintiff. Mr. Newland, for defendant.

PER CURIAM. Affirmed.

ROBERTSON v. THOMAS. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Robertson against one Thomas. Douglass & Simms, for plaintiff.

PER CURIAM. Motion to docket and dismiss defendant's appeal under rule 17 (39 S. E. vi) allowed.

ROGERS v. WINTON DISPENSARY. (Supreme Court of North Carolina. February Term, 1905.) Action by one Rogers against the Winton Dispensary. Cowper & Winborne, for plaintiff. Mr. Shepherd, for defendant.

PER CURIAM. Affirmed.

HOKE, J., did not sit.

SCHAFER v. OAK HILL HOTEL CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Schafer against the Oak Hill Hotel Company. Shepherd & Sparger for plaintiff. Mr. Carter, for defendant. Appeal dismissed, as being premature.

SHITLE v. SOUTHERN RY. CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Shitle against the Southern Railway Company. Mr. Martin, for plaintiff. Mr. Moore, for defendant.

PER CURIAM. Affirmed.

SIGMON v. FOY (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Sigmon against one Foy. E. B. Cline, for plaintiff. T. M. Hufham, for defendant.

PER CURIAM. Affirmed.

SOLES v. ATLANTIC COAST LINE R. CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Soles against the Atlantic Coast Line Railroad Company. Mr. Lyon, for plaintiff. Mr. Davis, for defendant.

PER CURIAM. The court being evenly divided (BROWN, J., not sitting), the judgment is affirmed.

SOUTHERLAND v. SCHOOL COMMITTEE. (Supreme Court of North Carolina. February Term, 1905.) Action by one Southerland against the School Committee. Mr. Parker, for plaintiff. Mr. Grady, for defendant.

PER CURIAM. Affirmed.

STALLINGS v. TELEGRAPH CO. (Supreme Court of North Carolina, Spring Term, 1905.) Action by one Stallings against the Telegraph Company. A. O. Gaylord, for plaintiff. H. W. Stubbs and F. H. Busbee & Son, for defendant.

PER CURIAM. Affirmed.

STATE v. ALSOBROOKS. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Alsobrooks. The Attorney General, for the State. Redwine & Stack, for defendant.

PER CURIAM. No error.

STATE v. BILLINGS. (Supreme Court of North Carolina. Spring Term, 1905.) Proceeding by the state against one Billings. The Attorney General, for the State. Adams & Maness, for defendant.

PER CURIAM. No error.

STATE v. COOK. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Cook. The Attorney General, for the State. Lusk & Jones, for defendant.

PER CURIAM. No error.

STATE v. DILLINGHAM. (Supreme Court of North Carolina. Spring Term, 1905.) Proceeding by the state against one Dillingham. The Attorney General, for the State. Locke Craig, for defendant.

PER CURIAM. Affirmed.

STATE v. DARGAN. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Dargan. The Attorney General, for the State. Williams & Lemmond, for defendant.

PER CURIAM. No error.

STATE v. EDMUNDSON. (Supreme Court of North Carolina. February Term. 1905.) Proceeding by the state against one Edmundson. The Attorney General, for the State. Mr. Rouse, for defendant.

PER CURIAM. No error.

STATE v. GENTRY. (Supreme Court of North Carolina. Spring Term, 1905.) Proceeding by the state against one Gentry. The Attorney General, for the State. Ben Posey, for defendant.

PER CURIAM. No error.

STATE v. HOCKADAY. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Hockaday. The Attorney General, for the State. Dismissed for failure to obtain proper order to appeal in forma pauperis.

STATE v. JONES. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Jones. The Attorney General, for the State. Caudle & Bennett, for defendant.

PER CURIAM. No error.

STATE v. LEE. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Lee. The Attorney General, for the State. Mr. Staples, for defendant.

PER CURIAM. No error.

STATE v. LITTLE. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Little. The Attorney General, for the State. Mr. McLendon, for defendant.

PER CURIAM. No error.

STATE v. LYTLE. (Supreme Court of North Carolina, February Term, 1905.) Proceeding by the state against Sarah J. Lytle. The Attorney General, for the State. Mr. Carter, for defendant.

PER CURIAM. No error.

STATE v. McLEAN. (Supreme Court of North Carolina. Spring Term, 1905.) Proceeding by the state against one McLean. The Attorney General, for the State. H. E. Norris, for defendant.

PER CURIAM. No error.

STATE v. McNEILL. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one McNeill. The Attorney General, for the State. Appeal dismissed under Rule 17 (38 S. E. vi).

STATE v. MEACHUM. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Meachum. The Attorney General, for the State. Mr. McLendon, for defendant.

PER CURIAM. The ruling below is sustained, on authority of Carr v. Commissioners, 136 N. C. 125, 48 S. E. 597, and State v. Sheppard (at this term) 50 S. E. 231.

STATE v. MEACHUM. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Meachum. The Attorney General, for the State. Mr. Coxe, for defendant.

PER CURIAM. No error.

STATE v. MILLER. (Supreme Court of North Carolina. Oct. 24, 1905.) Appeal from Superior Court, Union County; Neal, Judge. James Miller was convicted of crime, and he appeals. Reversed. Williams & Lemmond, for appellant. The Attorney General, for the State.

PER CURIAM. Upon examination of the record, we find no sufficient evidence against the defendant, James Miller, and we therefore award a new trial. New trial.

STATE v. MORRIS. (Supreme Court of North Carolina. Spring Term, 1905.) Proceeding by the state against one Morris. The Attorney General, for the State.

PER CURIAM. No error.

STATE v. SEABOARD AIR LINE RY. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against the Seaboard Air Line Railway. The Attorney General, for the State. Day & Bell, for defendant.

PER CURIAM. Affirmed.

STATE v. SHADE. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Shade. The Attorney General, for the State. Avery & Ervin, for defendant.

PER CURIAM. No error.

STATE v. SMITH. (Supreme Court of North Carolina. Spring Term, 1905.) Proceeding by the state against one Smith. The Attorney General, for the State. H. H. McLendon, for defendant.

PER CURIAM. No error.

STATE v. SOUTHERLAND. (Supreme Court of North Carolina. Spring Term, 1905.) Proceeding by the state against one Southerland. The Attorney General, for the State.

PER CURIAM. No error, on authority of State v. Pigford, 117 N. C. 748, 23 S. E. 182.

STATE v. SPIVEY. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Spivey. The Attorney General, for the State. Mr. Hopgood, for defendant.

PER CURIAM. No error.

STATE v. SPRUILL. (Supreme Court of North Carolina. Spring Term, 1905.) Proceeding by the state against one Spruill. The Attorney General, for the State.

PER CURIAM. No error.

STATE v. STURDIVANT. (Supreme Court of North Carolina. February Term, 1905.) Proceeding by the state against one Sturdivant. The Attorney General, for the State. Mr. McLendon, for defendant.

PER CURIAM. No error.

SUTTON v. EDWARDS. (Supreme Court of North Carolina. February Term, 1905.) Action by one Sutton against one Edwards. Mr. Morrill, for plaintiff. Mr. Lindsay, for defendant.

PER CURIAM. Affirmed.

TAYLOR v. McKINNON. (Supreme Court of North Carolina. February Term, 1905.) Action by one Taylor against one McKinnon. Mr. Meares, for plaintiff. Mr. McLean, for defendant. Dismissed for failure to file brief.

THOMAS v. MacKNIGHT. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Thomas against one MacKnight. Murchison & Johnson, for plaintiff. H. F. Seawell, for defendant.

PER CURIAM. Affirmed.

THOMASON v. SEABOARD AIR LINE RY. (Supreme Court of North Carolina. February Term, 1905.) Action by one Thomason against the Seaboard Air Line Railway. Mr. Pittman, for plaintiff. Mr. Bridgers, for defendant.

PER CURIAM. Affirmed, and defendant allowed to answer over.

THOMPSON v. WESTERN UNION TELEGRAPH COMPANY. MATTHEWS v. SAME. (Supreme Court of North Carolina. February Term, 1905.) Actions by one Thompson and one Matthews against the Western Union Telegraph Company. Appeals dismissed by consent of appellant.

TRIPP v. NOBLES. (Supreme Court of North Carolina. February Term, 1905.) Action by one Tripp against one Nobles. Mr. Jarvis, for plaintiff. Mr. Skinner, for defendant.

PER CURIAM. Petition to rehear dismissed. See 48 S. E. 675.

WALKER, J., dissents.

TURNER v. ANDREWS. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Turner against one Andrews. C. D. Turner, for plaintiff. J. W. Graham, for defendant. Dismissed for failure to file brief.

WESTFELDT v. ADAMS. (Supreme Court of North Carolina. February Term, 1905.) Action by one Westfeldt against one Adams. Sondley & Martin, for petitioner. Shepherd, Moore, Hooker & Merrimon, opposed.

PER CURIAM. The court being evenly divided (HOKE, J., not sitting), the petition to rehear is dismissed. See 47 S. E. 816.

WHITFIELD v. GOODSON. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Whitfield against one Goodson. Stevens, for plaintiff. Rountree & Carr, for defendant.

PER CURIAM. Defendant's appeal dismissed for failure to prosecute.

WILLIAMS v. DILLON. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Williams against one Dillon. Redwine & Stack, for Rogers' Heirs. R. W. Lemmond, for Belk's Heirs.

PER CURIAM. Affirmed on both appeals.

WILLIAMS v. INTERSTATE TELEPHONE CO. (Supreme Court of North Carolina. February Term, 1905.) Action by one Williams against the Interstate Telephone Company. Mr. Russell, for plaintiff. Rountree & Carr, for defendant. Dismissed, under rule 15 (39 S. E. vi), for failure to prosecute appeal.

WILSON v. BRYSON. (Supreme Court of North Carolina. February Term, 1905.) Action by one Wilson against one Bryson. Shepherd, Axley & Moore, for plaintiff. Mr. Ray, for defendant.

PER CURIAM. Affirmed.

WINDER v. RAILROAD CO. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Winder against the Railroad Company. E. F. Aydlett, for plaintiff. Pruden & Pruden, for defendant.

PER CURIAM. Affirmed.

WOOLARD v. McGOWAN. (Supreme Court of North Carolina. February Term, 1905.) Action by one Woolard against one McGowan. Mr. Sugg, for plaintiff. Mr. Skinner, for defendant.

PER CURIAM. Affirmed.

WORSLEY v. CREECH. (Supreme Court of North Carolina. Spring Term, 1905.) Action by one Worsley against one Creech. W. O. Howard, for plaintiff. G. M. T. Fountain, for defendant.

PER CURIAM. Affirmed.

WORTH v. EAGAN. (Supreme Court of North Carolina. February Term, 1905.) Action by one Worth against one Eagan. Scott, Bynum & Barringer, for plaintiff. Stedman & Morehead, for defendant.

PER CURIAM. Affirmed.

END OF CASES IN VOL. 51.